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CALCUTTA HIGH COURT

1936

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CALCUTTA HIGH COURT

*** A. I. R. 1936 Calcutta 1**

AMEER ALI, J.

Haridas Chatterjee and others—Plaintiffs.

v.

Manmatha Nath Mullick and others—Defendants.

Suit No. 245 of 1932, Decided on 7th August 1935.

(a) Hindu Law—Adoption — Dayabhaga—Brother's daughter's son cannot be adopted.

In Bengal, the Niyoga rule is part of the law of the land and the adoption is notionally limited to boys engendered under Niyoga by the adoptive father. Hence the adoption of a son of brother's daughter is prohibited: *Case law reviewed.* [P 6 C 2]

*** (b) Hindu Law—Adoption prohibited by Niyoga rule is no adoption—Adoptee is not extracted from original family.**

Adoption of a child (brother's daughter's son) whose adoption is prohibited by Niyoga rule is no adoption, and there is no extraction of the child from the original family. When adoption is attempted and failed, it is not right to consider sonship annulled because the father might have exercised his patria potestas to destroy the child or resorted to other methods of annulling sonship. [P 9 C 2]

(c) Hindu Law — Adoption — Dayabhaga Law—There cannot be adoption without giving and taking.

Though as a general proposition under Dayabhaga law, acceptance is not necessary to constitute a valid gift, adoption is a very special form of gift and there cannot be an adoption without giving and taking. [P 9 C 2]

(d) Evidence Act (1872), S. 114—Scope.
Section 114 includes but is not limited to the presumption of 'regularity'. [P 10 C 1]

(e) Evidence Act (1872), S. 32 (5)—Relationship created by adoption—Evidence of incidents bearing on adoption is admissible subject to careful scrutiny.

Where the relationship created by adoption is of such importance and specifically included in the act, evidence of incidents bearing more or less directly on the fact or otherwise of an adop-

tion and its validity would be allowed subject of course to careful scrutiny as to value.

[P 10 C 2]

*A. K. Roy, H. D. Bose and B. Bose—*for Plaintiffs.

*S. N. Banerjee, S. M. Bose, K. C. Mukerjee, P. N. Sen, J. C. Sett, S. N. Bose, S. R. Das Gupta, H. K. Bose and S. P. Choudhury—*for Defendants.

Judgment.—Having received so much assistance from counsel on both sides in this case, from Mr. H. D. Bose, the most experienced Hindu lawyer at the Bar, for the plaintiffs, and counsel, both senior and junior for the various defendants I would have liked to consider my judgment. I do not do so because in the circumstances of this case, it is desirable that parties should have my decision before my impending departure. I state the facts only so far as may be necessary to explain the points of law which have been discussed before me. This case and the two cases which follow in the list turn on the effect of an adoption made somewhere about 1850. There was a man called Ramgopal who died in 1860 leaving a very valuable estate. He had a brother Shib Kisen married to a lady Annapurna. Ramgopal had only daughters. One daughter married Shib Nath Chatterjee, and they had a son Noni Mohan. Shib Kristo and Annapurna had no male child. They therefore adopted or purported to adopt Noni Mohan. In the course of the arguments and discussing the points of law involved I used the following symbols. Shib Kristo Banerjee the adopting father is A. His wife Annapurna, the adopting mother X. Shib Nath Chatterjee, the natural father, B, and his wife Y. Noni Mohan is Z, and as adopted son ZI. Ramgopal left a widow Jaikali.

The widow's interest lasted for a long period of time, that is until 1920. During that period there were very extensive alienations, alienations by the widow either of her widow's interest or of absolute interest on the ground of necessity, which alienations were in point of fact to *X* (Annapurna). There were also extensive alienations by *X* (Annapurna) as transferee in respect of the transactions I have mentioned, and by *ZI* (Noni Mohan qua adopted son) and his successors in interest.

The defendants are such alienees, and the plaintiffs seek to dispossess them as reversioners to the estate of Ramgopal on the death of Jaikali. In this case the position is somewhat peculiar, because Noni Mohan would be the heir to Ramgopal's estate, firstly as *Z*, i. e., in his capacity of natural son of *B* (Shib Nath Chatterjee), and alternatively as *ZI* (adopted son of *A* Shib Kristo) to the exclusion of any other person. The persons therefore claiming to be reversioners, i. e., the plaintiffs and certain of the defendants in this suit, and the plaintiffs in the other two suits, can establish no right in respect of the estate of Ramgopal unless it can be shown that Noni Mohan was neither the natural son of Shib Nath nor the adopted son of Shib Kristo. Now this is the essential point. I considered that it should be determined first. The point made is quite shortly as follows:

The plaintiffs seek to get rid of *Z* and *ZI* by: (1) setting up an adoption; (2) asserting that the adoption was bad; (3) denying that the adoption was too bad, i. e., had the effect of cutting him off from his own family without introducing him to the new family. I am purposely using non-legal language. In point of fact, as we shall see, that what they actually seek to do is to get him quite out of his own family and half into the new family. These contentions are the subject matter of the first three issues which were raised and which I have tried. The plaintiffs are entitled to give further evidence on the other issues of which there are two classes, issues which are essential to establish that the plaintiffs would be, if the point of law succeeds, the reversioners, a matter depending upon pedigree and dates of death; and another class of issues appropriate to the various defen-

dants in connection with their respective transfers. Neither of those matters have been dealt with. I only purport to deal with the point of law.

I. Adoption.—The defendants as they were quite entitled to do did not admit the adoption. I speak of the fact. The result was that some evidence had to be given. A good deal of evidence was objected to and in some cases the objections were upheld. I may yet have to explain the extent to which that evidence has been admitted. I do not propose to do so at the moment. There was also an attempt to give expert evidence as to Hindu law. I ruled against its admissibility. For the purpose of discussing the point of law I will only say at the moment that from the documents which have been tendered, and from the oral evidence to the limited extent to which it is admitted I think this Court should infer that there was an adoption, —I am using that word at this stage in a perfectly neutral sense. I have not forgotten that reliance was placed upon one particular document, the pedigree in a book produced on behalf of the plaintiff in which Noni Mohan is described as "palan putra". This point was taken and was elaborated by Mr. Mukherjee for one of the defendants, who has shown me certain authorities, which indicate that "palan putra" is a more ungrammatical form of "palak putra" (itself ungrammatical), the primary sense of which is a son brought up or maintained in the house without being the legally adopted son. The common word used for legally adopted son in Bengal is *Poshya Putra*. But I do not think this fact of itself outweighs the evidence in the aggregate to be drawn from the other documents and the surrounding circumstances. In my view (and upon this basis is the judgment I propose to give), this Court should infer that an adoption took place. I conclude further (although how far I consider this matter to have been satisfactorily established by evidence I may have to state later) that Noni Mohan was adopted at an early age and that the ceremonies appropriate such as *Upanayana* ceremony and others were performed in the house of Shib Kristo. Noni Mohan was married there as a Banerjee and his daughter was married there as a Banerjee and I

think it is legitimate to infer, whatever the effect may be, that Noni Mohan performed the ceremonies of his adoptive father and gave Pinda to his soul and the souls of his adoptive father's ancestors.

2. *Adoption bad.*—The plaintiffs having established that an adoption in fact took place have now to establish that the adoption was bad in law. The actual pleading is as follows: The issues follow the pleading using the words "valid" and "invalid." The pleading is not as I shall show quite appropriate to the case finally made. The points of law therefore are: (a) Is the adoption unexceptionable? I use this word intentionally in order to avoid the difficulties of "perfect" and "imperfect," "valid" and "invalid." (b) If not unexceptionable, what is the effect of the adoption? It has become apparent during the course of the argument that in order to decide the ultimate question involved in this suit it is not enough merely to say "valid" or "invalid," "perfect" or "imperfect." It is not suggested (a) that there is any inherent incapacity to adopt in A (Shib Kristo Banerjee). Nor any (b) inherent incapacity to give in adoption in B. (c). The obstacle set up in this case is the alleged prohibition against adopting the son of a brother's daughter.

The materials put before me in respect of this prohibition can be classified as follows: (1) Original texts; (2) the deductions, argument, or as it has been called "gloss" of recognised original commentators, such as the authors of the Dattaka Chandrika and Dattaka Mimamsha; (3) "gloss" of later translators and commentators; (such as Sutherland) on the text, or the gloss of original commentators; (4) decided cases; (5) text books and opinion of modern authors. In dealing with this material, of whatever class, it should be borne in mind that there are two questions to be considered (a) whether a prohibition exists; (b) if so whether it is mandatory or recommendatory.

1. *Original text.*—There is no express prohibition against adopting a brother's daughter's son in the original text. The texts of both Shaunaka and Shakala contain a prohibition against adoption in three specific cases, daughter's son, sister's son and mother's sister's son.

I will refer hereafter to this prohibition as the "three specific cases." Both these texts also in describing the actual adoption refer to the adoptee as "this shadow of a son." (2) The author of the Dattaka Chandrika attaches to the phrase just quoted the following gloss, "that is to say, the capacity to be begotten by Nioga and so forth." The author of the Dattaka Mimamsha in chapter 5 expands this idea of "capacity to be begotten by Nioga" in a manner which I may have to state in greater detail. Speaking generally he connects the "three specific cases" with the "shadow" and "Niyoga" of the earlier commentator and builds on this foundation a theory of "incongruous relationships" and the rule that no one can adopt a child union with whose mother under Nioga would have involved the penalties of incest. ("The Niyoga rule") (3) Sutherland translated "incongruous relationship" as "prohibited degrees", in this manner automatically expanded the idea from "Nyoga" to marriage. Hence the rule that no one can adopt one with whose mother he could not have contracted a valid marriage. ("The marriage rule.")

For the purpose of this case it is not necessary to go into the question whether Sutherland was justified in interpreting Nanda Pundit's view as above stated because the adoption in this case would be hit by the Niyoga law whether, there being no actual text of the original rishis, the view of the authors of these two commentaries is to be accepted or not? That is the whole question and on that question, it seems to me, I have to consider the following points. (1) Is this Court bound by the direct authority as to the Niyoga bar? (2) If not, are there authorities in its support which I should nevertheless follow; (3) if not, whether there are opinions expressed either in cases or in text books which I should follow; and (4) what is my own opinion with regard to the Nyoga law.

As the matter has been fully discussed before me I think it desirable that I should first state my own view and then see how far I am bound by or should follow authority. Apart from authorities there are two questions to be considered: (a) what is the sense of the analogy on which it is based; (b) how

far were the commentators justified in applying it having regard to the text on which they were commenting. I understand Niyoga to be this: A husband who for some reason or other cannot himself fertilize his wife is allowed by law to produce a son by appointment or as we should probably say by attorney: the persons to be appointed are to be chosen from a very limited class. As is quite natural i. e., upon elementary principles of physiology or exigamy it was understood that the person to be appointed to fertilize should not be closely related by blood to the prospective mother. Speaking for myself (except for one explanation given to me by the Advocate-General to which I shall refer again) I have been unable to appreciate how the two things, adoption and Niyoga, are in any way similar except that 'there is a son in both'. To me the so-called analogy is utterly incongruous. The reasons why it appears to be incongruous are as follows: I quite appreciate that in primitive no less than modern society fictions have to be maintained, but there is a sense even in fantasy. I can well appreciate any amount of fiction in a case of adoption directed to create the impression that the adopted son is a son born of the adoptive parents.

I could understand for instance if (using the symbols above indicated) *B* were notionally appointed under Niyoga to produce a son by *X* for *A*. That would be congruous with *Z* being the real son of *A* and *X*. On the other hand if the fiction is the idea of *A* being appointed under Niyoga to *Y*, wife of *B*, it is congruous to the idea of *Z* being a son born of *A* and *X*. If *A* has fertilized *Y* under Niyoga it means that *Z* has been born, the natural son of *B* and *Y* not of *A* and *X*. Hence I am unable to follow the explanation of Mayne at p. 133, Edn. 9.

The explanation is probably to be found in the growth of Brahmanical influence, and the consequent prominence given to the religious principle. If the primary object of adoption was to gratify the manes of the ancestors by annual offerings it was necessary to delude the manes, as it were, into the idea that the offerer really was the descendant. He was to look as much like a real son as possible, and certainly not to be one who could never have been a son. Hence arose that body of rules which were evolved out of the phrase of Saunaka, that he must be 'the reflection of a son.'

I do not intend to make capital out of the language which is no doubt illustrative. My point is that the suggestion that *A* has produced a son by Niyoga to *B* and *Y* is not going to "delude" the manes of the ancestors of *A*. I should have thought on the contrary that it would alarm them. The only point on which the manes might be deluded is the physical competence of *A*.

Again the relevant passage in the judgment of Banerjee, J., 17 All 294 (1), at p. 322, is in these words:

I am of opinion that the meaning put on the text by Nanda Pandita is its true meaning. It has been fully shown in the judgment of the Full Bench of the Madras High Court in *Minakshi v. Ramananda* (2), that the rule of exclusion deduced by Nanda Pandita, founded on propinquity and incongruous relationship, is not an inconsistent rule, and all I need say is that I concur in that judgment and in the reasons given in it for the conclusion at which the learned Judges arrived. The object of marriage among Hindus is to procreate a son able to confer spiritual benefit, and this cannot be done by the issue of an incestuous marriage. Hence the rules for marriage within prohibited degrees. The same being the object of the procreation of a son through the now obsolete practice of Niyoga, rules of prohibited relationship in Niyoga were also provided. As adoption is resorted to for a similar object, similar rules of exclusion founded on the analogy of Niyoga are the necessary consequence of the requirement of Saunaka that the son to be adopted should 'bear the reflection of a son' that is of a son born in wedlock: otherwise the efficacy of adoption would fail, as in "that case the son to be adopted would bear the resemblance of the 'issue of an incestuous connection.'"

In the case cited by Banerjee, J. 11 Mad 49 (2) at p. 52, the following is said:

There is this justification for the analogy, viz. that the object in permitting niyoga to the extent to which it was recognised by the ancient law, was to provide a substitute for the son of the body and thereby to prevent the extinction of that spiritual benefit which was believed to arise from the performance by a son of funeral and annual obseques.

I do not see that the analogy is "justified," nor do I consider it accurate to describe Niyoga as providing a "substitute for the son of the body." The Niyoga son is an actual son—the adopted son is a substitute or shadow son. The only intelligible explanation of the application of the idea of Niyoga to the idea of adoption is that suggested by the Advocate-General. According to his theory the adoptee is regarded as being actually the issue of *A* and *Y* by Niyoga.

1. *Bhagwan Singh v. Bhagwan Singh*, (1895) 17 All 294=1895 A W N 167 (F B).

2. (1888) 11 Mad 49 (F B).

In other words the adoption is notionally limited to boys engendered under Niyoga by the adoptive father. That I agree does get over the primary incongruity of Niyoga and adoption. On the other hand this explanation does seem to go far beyond the textual foundation. It is not the explanation either of Mr. Mayne or Banerjee, J., nor I think of other text-writer. Therefore, if the matter were open I would say that I cannot understand why Niyoga is at all appropriate. In fact the Niyoga analogy seems to me incongruous to the idea of adoption. I should further have said that its introduction, viz., the phrase in the original text "bearing the reflection of a son" is unwarranted. There has been considerable discussion in this case as in many others as to the meaning of this phrase "bearing the reflection of a son." Should this phrase "bearing the reflection of a son" bring in any analogy at all? Now, again, if that was open before me, I should feel emboldened to say, as was suggested, I don't know when first, but certainly in 6 Cal 41 (3) towards the end of the judgment, that this is no more than description. That is the view taken by the German translators Buhler and Joly and also by Mandlik. I was told and it was agreed that the phrase should be translated "son" bearing reflection of a "son," rather than "boy bearing reflection of a son." This favours the reading of Buhler, Joly and Sir John Edge in 17 All 294 (1). Certainly therefore I should have held both from text and context that the phrase amounts to nothing more than a description of an "ideal" son created by the prescribed means in the place of a born son. . . . "This son; This image son. . ."

I now have to consider the authorities which have or have not established the Niyoga rule as a prohibition in adoption. (1) How far is the matter covered by the authority which is binding on me? So far as the Privy Council is concerned, there are three cases which have to be referred to 12 M I A 397 (4), especially at p. 441; 26 I A 153 (5),

3. Haran Chander v. Hurro Mohun, (1881) 6 Cal 41=6 C L R 393.

4. Collector of Madura v. Muthu Ramalinga Sathupathi, (1867-69) 12 M I A 397=1 Beng L R 1=2 Sar 361 (P C).

5. Bhagwan Singh v. Bhagwan Singh, (1899) 21 All 412=26 I A 153=7 Sar 474 (P O).

both cases and 42 I A 155 (6), especially at 161. Neither of these decisions directly covers the point at issue, nor directly established or otherwise the Niyoga rule.

I therefore have to consider whether they have done so by implication. Counsel Mr. Bose contends that they impliedly approved it. Some of the modern authorities contend that they have impliedly rejected it. Before coming to a conclusion on this point it is advisable to consider the direct authorities. (2) In Madras there are direct authorities in favour of the rule, 11 Mad 49 (2) (which I have already quoted); a later case 43 Mad 876 (7) which accepted as a general rule, the marriage or Niyoga test, and on this basis, in the absence of special custom held that the adoption of a brother's daughter's son is invalid. Bengal: 6 Cal 41 (3), the difficulty about this case is that while in the concluding portion of the judgment the learned Judges say that the shadow of a son appears "to have been purely descriptive" in the body of the judgment, they refer to the marriage or Niyoga rule as a generally accepted rule of Hindu Law. Allahabad: 17 All 294 (1). In 17 All 294 (1) [the second case dealt with by the Privy Council in 26 I A 153 (5)] Sir John Edge and the majority of the Court disapproved the Niyoga rule. Banerjee, J., in an elaborate judgment, as I have already indicated supported it. Upon the main point at issue (the three specific cases) the dissenting judgment of Banerjee, J., was upheld. The Board was not called upon to express an opinion on the Niyoga rule. 32 Bom 619 (8): Bombay has been really the only dissenting voice. In 32 Bombay, while expressing no very great approval of Nanda Pandit's Niyoga rule, the Court proceeded upon the basis that it was not necessary to attack it because the adoption there was valid unless it came under the extension of the Niyoga rule for which Sutherland is considered responsible. It therefore rejected Sutherland's gloss on Nanda Pandit. It was not necessary for it to attack Nanda Pandit's gloss. In the later cases, 36 Bom

6. Pattu Lal v. Mt. Parbate Kunwar, 1915 P C 15=29 I C 617=42 I A 155=87 All 359 (P C).

7. Ranganayakamma v. Somasundara Rao, 1920 Mad 451=59 I C 609=43 Mad 876.

8. Ramchandra v. Gopal (1908) 32 Bom 619=10 Bom L R 948.

533 (9) at 536, the Courts confined the marriage or Niyoga rule to "the three specific cases" established as to the subject of mandatory prohibition by the Privy Council in 26 I A 153 (5). They did not take the unnecessary risk of attacking the rule itself. In 39 Bom 410 (10) the Court took the view that Nanda Pandit's rule of exclusion should only be regarded as mandatory where it coincided with the "three specific instances" given in the text. That brings us back to the rulings of the Board. Mr. Bose contends that this Niyoga or marriage rule having been brought to its attention both in 26 I A 153 (5) and in 42 I A 155 (6) and no adverse comment having been made that it has been inferentially accepted by the Board. The case in 42 I A 155 (6) was one in which the adoption was attacked on Nanda Pandit's application by analogy or Niyoga rules to adoption by females, and the passage reads as follows :

It was pointed out by Banerji, J., in *Jai Singh Pal Singh v. Bijai Pal Singh* (11), on this question as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, that Nanda Pandita in the Dattaka Mimamsa extended to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not the base upon the authority of any of the Smritis or institutes of sages.

The Board negatived that particular extension; it rejected one 'gloss' of Nanda Pandit. It had already rejected others, e. g., by holding in 26 I A 113 (12) that the rule against the adoption of an only son is only monitory. It has in other cases negatived the extensions or rules by analogy of Nanda Pandit, when it considered them not to be warranted by the original text. The question is whether in this case, 42 I A 155 (6), while it has negatived the one extension, the Board must be taken to have adopted or approved the main rule. My own view is that no inference can be drawn either way and that the Board upon this particular argument of Nanda Pandit has not committed itself to an option. It appears to me that in the

second case in 26 I A 153 (5) the Board were very careful to avoid entering upon that subject. With regard to the views of the Board on Nanda Pandit that generally I gather from the passage in 12 M I A 397 (4) and again in 26 I A 153 (5) (the first case) and the passage in 42 I A 155 (6), which I have just quoted, that while it is not open to any Court to discuss the reasonableness or the validity of any of the original texts, it is open, other things being equal, to consider whether the special argument of the commentator is to be accepted. On the other hand (i. e., disregarding the rulings of the Board) there is still left a considerable body of cases where the Niyoga rule has been accepted. Notwithstanding, the observations at the end of the judgment, it must, I think, be taken to be accepted in 6 Cal 41 (3). It has been accepted throughout in Madras. Subject to what I have said above, it is accepted in Allahabad. It has not been expressly negatived by the Bombay cases, although it may be said to have been negatived by implication having been limited into "three specific cases".

The question is, should I be justified in disregarding this volume of authority? I am guided in this matter by the course taken by the Judicial Committee itself in 26 I A 153 (5), where, whatever its own opinions may have been, the Board appears to have attached great weight to the fact that the Courts in India had proceeded for a considerable time upon one basis. In addition to the decided cases there is the opinion of authorities, such as Mr. Sutherland himself, Mr. Mayne, of the Hindu Judges, Mr. Banerjee in 17 All 294 (1), and the Hindu Judges who were parties to the decision in 11 Mad 49 (2). There are Mr. Strange, M. W. Siromoni, and of moderns, Sir Dinshaw Mulla, all accepting the Niyoga or marriage rule. I feel bound therefore to disregard my own opinion and to proceed upon the basis, that for this Court the Niyoga rule is part of the law of the land.

3. *Adoption not too bad.*—Assuming the Niyoga rule or law to have been contravened, what is the effect? This aspect of the case has been ably argued both by Mr. Bose on behalf of the plaintiffs, and by Mr. Sanyal from somewhat different points of view. For that

9. *Yamnava v. Laxman Bhimrao* (1912) 36 Bom 533=16 I C 180.

10. *Gajanan v. Kashinath* 1915 Bom 99=28 I C 978=17 Bom L R 372=39 Bom 410.

11. (1905) 27 All 417=(1905) A W N 20=2 A L J 36.

12. *Sri Balusu Gurulingaswami v. Sri Balusu Rama Lakshamma*, (1899) 21 All 460=26 I A 113=22 Mad 398=7 Sar 830 (P C).

reason I make my own analysis of the plaintiff's case. It seems to me that the results of a questionable adoption can be discussed under three heads. (1) What is the effect of questionable adoption qua adoption? (2) What is the effect of the father's power or rights over the son apart from the effect of the adoption itself, a point emphasised by Mr. Sanyal? (3) What is the effect of ceremonial, a point to which Mr. Bose originally attributed great importance?

(1) *Effect of questionable adoption, qua adoption.*—Having regard to the lines on which this aspect of the case was developed by Mr. Bose, it does not seem to me that the plaintiff's case in its final aspect is covered by the allegation in the plaint, that the adoption is void or illegal, and that the son cannot regain his place in his old family. In the plaint it is specifically alleged that the adoption "did not confer upon him the status of a son." In order to succeed, the plaintiffs have got to get him out of his old family and into the new family, but only half in, i. e., the best part of him sticking out into nothingness. In other words the plaintiffs seek to establish that there are three and not two positions: (1) unexceptionable adoption, (2) void adoption, and (3) an intermediate stage of quasi adoption. To describe these positions I shall use the phrases (1) adoption, (2) no adoption, and (3) quasi adoption.

(1) *Adoption.*—Adoption results where there is no defect or prohibition of any kind and also exists where there is a prohibition, but not a mandatory prohibition, as in the case (now) of the adoption of an only son.

(2) *No adoption* according to the authorities, takes place where the person has no capacity to adopt. The principal example of this class is a widow without the authority of her husband. It appeared to me that if the Niyoga bar is a mandatory prohibition it would in effect cause want of capacity, and therefore there would be no adoption. The plaintiffs do not want that because if no-adoption, X remains in his own family; he does not get into the new family at all.

(3) *Quasi-adoption.*—That brings me to "quasi-adoption," that is, an adoption but with the adoptee having only limited or qualified rights, i. e., a status

inferior to that of an ordinary adopted son. This idea of quasi-adoption is difficult to one as unfamiliar with Hindu law as myself. It appears that Mr. Sanyal and Mr. Bose are right in their suggestion that there are certain cases of quasi-adoption, e. g., a Vaishya or Brahmin adopting one of the other twice-born castes. According to the texts and commentaries such a one is not entitled to inherit in his new family, nor is he entitled or liable to perform the shraddh of his adoptive parents or ancestors. He gets, or may get, certain rights of maintenance. At the same time he is regarded from the point of view of marriage and relationship as belonging to the adoptor's family. That is one case. The other case is where everything else is in order, caste, no prohibition, no other hindrance, but the forms of adoption are not properly gone through. There is a text in the Dattaka Mimansha to the following effect (v. 45).

He who adopts a son, without observing the rules ordained, should make him a participator of the rites of marriage, not a sharer of the wealth.

One question is whether that is only a recommendation, I might have so considered it, but that is not the point which I am dealing with at the moment. A question which rather intrigued me is whether such a person that is a person otherwise fit and proper to be adopted, but in respect of whom the proper ceremonies were not gone through, could perform a shraddh and offer pinda. Looking through some of the texts yesterday I obtained the impression that if merely the forms were not observed the adopted son would be capable of offering pinda. That would mean "adoption." However, unless the defendant's counsel wishes to show me anything on this point I shall assume that Mr. Bose is right in saying that the adoptee cannot do so. I have my misgivings. I shall assume therefore that these are two instances of quasi-adoption of persons becoming, according to Mr. Bose, "sons" but without the rights or ordinary status of sons. He points to the case of a blind natural son. The question in this case is whether a child, the adoption of which is prohibited by the Niyoga rule, constitutes another example

of quasi adoption. Treating as I do the Niyoga bar upon the same basis as the "three specific instances", I am bound since the decision in 26 I A 153 (5) to treat the prohibition as mandatory. Mr. H. D. Bose contends, nevertheless, that is, notwithstanding the prohibition that the adoptee becomes the son of the adoptive father. That, as indicated, is not the position originally pleaded, but it is a point of law, and the case has been argued upon that basis.

On this point, i. e., "quasi-adoption" or "no adoption" Mr. H. D. Bose is met by certain body of authority. He distinguishes it upon this ground that the cases for the most part are instances of adoption by widows without their husband's authority. The case in 1 M H C R 363 (13) at p. 367 was certainly a case of a widow adopting without authority. 12 B H C R 364 (14), at p. 365, is a little more difficult. It was a case of a widow who was assumed to have the general power to give in adoption, but who had purported to give in adoption the eldest son, see pp. 393 and 397. It was laid down as a general proposition that if an adoption fails "upon any ground," this ground in particular, the status quo is restored, or as I should rather put it, the child never getting into the new family never gets out of the old. There is 39 Bom 528 (15) at p. 533 apparently again a question of invalidity by reason of want of authority, where the general proposition was reiterated. In 58 Cal 745 (16) at p. 749, where, so far as I can see, the objection was not inherent incapacity to adopt, but incapacity by reason of age, etc., of the adoptee, it is accepted as the general rule that an improper adoption does not extract a child from his own family. There is also the opinion of Mr. Sutherland which is referred to in a footnote and adopted by Mr. Strange at p. 83 of his Hindu Law. On the other hand the manner in which Sir Dinshaw Mulla formulates the rule, and its exceptions supports the contention of Mr.

Bose. Excep. (b) embodies the first species of quasi adoption that of a boy belonging to another caste. The author cites, however, 1 M H C R 363 (13), but as I read it, it is not an unequivocal authority for the proposition in support of which it is used. Excep. (a) of Mr. Mulla is based on the case in 1 Bullnois 137. I will deal with that under another heading.

The question therefore is whether adoption contrary to Niyoga prohibition and adoption by a widow without authority can be logically distinguished. I will deal with the question of gift, but it seems to me that the fact that the incapacity was not a general incapacity to take, but a particular incapacity to take the person whose adoption is challenged, is not logically distinguishable. If the prohibition is mandatory and in the one case there is no adoption, I cannot see why the same consequences do not ensue in the other. There is also the fact that all the cases are not of widows without authority and that it has been assumed that the principle is general. So far therefore as the adoption itself is concerned, my opinion, what it is worth, is on this breach of mandatory prohibition no-adoption, i. e., no extraction from the original family. I have not forgotten the passage upon which Mr. H. D. Bose placed so much reliance, the passage in Dattaka Chandrika, containing the phrase "through the extinction of his filial relation by gift alone", II, 19. I do not read "gift alone" to mean gift other than a gift in adoption. The chapter in the Dattaka Mimansa (Ch. 4) makes this perfectly clear, but I think that the author of the Dattaka Chandrika "by gift alone" did not intend invalid gift or gift prohibited but gift itself, i. e., without appropriate ceremonial. (2) I next come to the effect of the father's power in excess of the actual power to give in adoption.

The contention before me is something like this. The adoption may be bad, qua adoption, i. e., in the case of want of capacity to receive. There is no incapacity to give in adoption. Moreover there is in the father, obstacle-capacity to "give, sell or abandon his son" (Vasistha). Therefore whatever the effect may be, qua adoption, qua patria protestas, or qua powers of the father plus adoption this son can be

13. Bawani Shankara Pandit v. Ambaby Ammal, (1863) 1 M H C R 363.

14. Lakshmappa v. Ramava (1875) 12 Bom H C 364.

15. Dalpatsingji v. Raisingji Narharsingji, 1915 Bom 93=29 I C 943=17 Bom L R 566=39 Bom 528.

16. Sajani Sundari Dasi v. Jogendrachandra Sen, 1931 Cal 591=133 I C 325=58 Cal 745.

excluded from his own family, notwithstanding that he is not included in the new family. For the purpose of the discussion I accept Mr. Sanyal and Mr. Bose's view of the text and the authorities. I assume that a father can do all this. I assume also that the son is a chattel. There is nothing remarkable about that. The point made was that being, e. g., an orange, the father can give, discard or destroy the orange. He can expel his son from his own family. (Incidentally it should be noted that in the translation of this text given in Mulla the word "disown" is used. It should be "abandon").

What struck me at the time and it is the view to which I still adhere, is this: that the child may be an orange, but he is an orange with a status. Mr. Bose has contended throughout that he has no status. That the child may have certain rights, e. g., under the Mitakshara system of law. I consider the human Hindu child to be both a physical object and also an ideal object, i. e., a son. The father can no doubt destroy in any manner he pleases the physical object. He can also destroy the ideal status (assuming such a thing to exist), but I think only by methods recognized or conceived. I shall assume that he can destroy or annul the status of a son by gift or sale. The view which appeals to me is this. If the father purports to annul the status by one recognized method, e. g., gift in adoption and fails it is not legitimate to say that he could have sold or could have killed the child, i. e., that he could have annulled the status by some other means or could have in any event destroyed the object itself. I think it wrong to import the absolute power to destroy the physical object or right to annul status by an alternative method in order to aid in establishing an exclusion of the child from his own family.

My view of course depends on whether there is such a thing as the status of a son. So far as I understand Hindu ideas, whatever the patria potestas, a male child is far from being a mere human cub. He is a son and a grandson and a great-grandson. His birth is not regarded as a purely physical or physiological phenomenon but is a spiritual and physical re-birth of the father and the father's ancestors. If that is the

underlying idea, the child's status as a son is a matter of prime importance to the family, to the caste, and to everyone. A mechanical figure of speech is probably inadequate, but it suffices for my purpose to describe him as a cog in a certain machine. It appears to me that the effect of adoption is to take this cog out of one machine and to introduce it in its proper place in another machine.

Those are my views on the second point, the point whether by reason of the inherent powers a father can render, what would otherwise be no-adoption, a quasi-adoption. I was dealing yesterday when I broke off with the second ground upon which the plaintiffs base their contention that notwithstanding the mandatory prohibition against adoption, the child nevertheless is cut off from his natural family, i. e., the inherent right of the father to do what he likes with his own child, I expressed the view that there are two separate things, patria potestas and property in the son on the one hand, and status of a son on the other. I have to some extent given reasons for that view. The father can no doubt in the exercise of patria potestas destroy his child, the physical object; he can also by certain methods annul the status of son. I did not think that when adoption is attempted and failed, it is right to consider sonship annulled because the father might have exercised his patria potestas to destroy the child or resorted to other methods of annulling sonship.

There is one matter to be dealt with before I leave this point. It may be suggested that, after all, it is not necessary to resort either to theory of destruction of physical objects or to alternative methods of annulling sonship, because although the adoptor may not have been capable of receiving, the natural father was capable of giving, and therefore as adoption is gift there was in law a gift. That is based upon the proposition that under Dayabhaga law, acceptance is not necessary to constitute a valid gift. I accept that as a general proposition. In my view however, adoption is a very special form of gift and I am not prepared to accept the view that there can be an adoption without giving and taking. Whether it should be regarded as one form of on-

erous gift, or as a gift in a category of its own it is not necessary for me to determine. I have not forgotten that particular passage relied upon by Mr. Bose "by gift alone." I have already given my view of it.

(3) The last ground upon which the plaintiffs contend that there can be, and is in this case, a quasi-adoption, is the ceremonies. It is on this point that certain questions of the law of evidence arise. It is said in the first place that there can be no presumption that the ceremonies appropriate to a Brahmin were gone through after the so-called adoption, because in this case the fact sought to be inferred are intended to be used to nullify or invalidate the adoption. That point was taken both by the standing counsel and Mr. Mukherjee. It occurred to me at the time and at first sight it seemed attractive. S. 114 of our Evidence Act includes but is not limited to the presumption of "regularity." Moreover, I do not think that because the fact sought to be presumed will or may affect the validity in law of a certain transaction that is necessarily repugnant to the principle. I do not think that one need do more than consider whether in the normal course of things certain consequences are likely to happen. If they are, it is not material to consider whether they will validate or invalidate a transaction. In this particular case assuming the transaction to be invalid, you may infer that the parties knew it to be invalid, and therefore you may again infer that they would not go through the ceremonies appropriate to a valid adoption. That I think, having considered the matter, is the highest it can be put. I do not think you can say that if all the circumstances indicate that these ceremonies are likely to have been gone through, that you must reject that inference, because some argument will be adduced that by reason of those ceremonies, the antecedent adoption was bad in law.

The second point so far as the law of evidence is concerned was that the evidence of hearsay on the question of relationship which is taken from the English law and incorporated in S. 32, sub-S. 5, does not extend to evidence by hearsay of particular ceremonies or incidents and that so and so was present

at such and such an occasion. I think this is a somewhat difficult matter and largely a question of fact and degree. The English rule is rather wide. I forget the precise expression, but I think it wide enough to include any incident relative to the fact of relationship. It is difficult to draw the line. I think that under the Indian law where the relationship created by adoption is of such importance and specifically included in the Act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed subject of course to careful scrutiny as to value. At any rate that is the basis upon which I propose to decide this point and I assume therefore that the Upanayana ceremony and marriage were performed on Noni Mohan after his alleged adoption or purported adoption in the house of the adoptive father. Mr. Bose from the first attached considerable importance to this aspect of his case. It is certainly borne out in the passage in Mulla's Hindu Law, S. 510, sub-S. (a), already referred to.

With regard to authorities there is only this one case in 1. Boulnois. It is obvious that the material portion of this judgment is upon another point and that the opinion quoted did not form any part of the decision. It is merely an opinion of "a very learned person." As it is a matter which affects seriously the rights of an individual, unless it was supported by texts or direct authority, or reason, I do not feel inclined to follow it. So far as reason goes in support of the view expressed in S. 510 (a) of Mulla's Hindu Law the point made is this: that being a Brahmin, investing with the sacred thread constitutes a notional new birth. It must be a new birth in the adoptive family. Therefore, it is said, he is attached to the gotra of the adoptive family, and disconnected from the gotra of his own family. This is said to be so notwithstanding that the adoption is no-adoption. It occurs to one that the new birth must be a new birth as a son and a son to somebody. If it is a birth as a son in the gotra of his adoptive parents, one should logically arrive at the position of a son, and the retrospective removal of any blot on, or defect in the original adoption. That is one view.

On the other hand if there can be no adoption it can be argued that these ceremonies of re-birth were ineffective and therefore there was no re-birth at all. In such a case not having been reborn in the new family, the child would remain a son to his natural father. The plaintiffs have to steer clear of both those positions. In doing so Mr. Bose comes back to his position of quasi-sonship, of part affiliation. Unless there is clear authority in support I do not propose to take that view. In point of fact the authorities support the opposite view, namely that if the adoption is no-adoption, the ceremonies performed in the new family are of no effect. Cf. 1 M H C R 363 (13) and 43 Mad 876 (7) at 891 and 893. To summarise: Left to myself, I would (1) reject the Dattaka Chandrikas's Niyoga explanation, (2) reject the expansion or development, of this represented "Virudha Sambhandha" of Nanda Pundit, (3) a fortiori, I would have rejected the expansion of that "Virudha Sambhandha" into the "prohibited degrees" of Sutherland, (4) I would in any event have treated the Niyoga rule as recommendatory except in the "three specified cases," (5) I should have taken the view that if on the other hand a mandatory prohibition, adoption is no-adoption, and not quasi-adoption.

Having regard to the authority referred to I feel bound: (1) To accept the Niyoga or marriage rule as part of the law and as wider than and including the "three specified cases". Those three specified cases having been treated by the Privy Council as mandatory I must treat the whole rule as mandatory. (2) On the other hand the authorities allow me to take the view that assuming the Niyoga rule to operate, the result of its transgression will be no-adoption. In other words I reject, so far as this class of person (brother's daughter's son) is concerned, the quasi-adoption theory. (3) With regard to the result of no adoption I follow both my own inclination and the authorities in deciding that there being no adoption the child will remain affiliated to its own natural father. That is the result.

I ought to mention one argument put before me by Mr. H. K. Bose that in the particular circumstances of this case the result would be not the child Z

is filius nullius, but that the child is Dyamushan, the son of both A and B. The specific argument addressed to me is this: that the plaintiffs have given evidence of certain ceremonies performed after adoption. They have not alleged nor suggested that the tonsure ceremonies were performed in the adoptive family. Therefore, it is said I should infer that it was performed in the natural family, and in those circumstances some authority has been shown to me to show that the child might become attached to both. It is an ingenious point, but having regard to my other views, I do not propose to offer an opinion of my own upon it. I am not clear that the state of the evidence would allow me to find that any particular ceremony was performed in the natural family so as to found a double affiliation. I should also say that estoppel in any form does not form one of the issues before me, and has not been argued. After expressing the above conclusions on the point of law involved in the first three issues I have ascertained from the Advocate-General, who appears with Mr. Bose for the plaintiff, that he desires rather than go on and complete his evidence on the other issues including the issues as to title, as to whether his clients are reversioners in the event of my decision being wrong he would prefer to have the case adjourned and appeal on the point of law. I am perfectly agreeable to this course, and in this case, speaking for myself, I consider it desirable. Counsel for all parties also agree to that course as the most convenient. In those circumstances I will dismiss the suit with costs now on the preliminary points, and should the plaintiffs succeed on the appeal I shall always be ready to put the case back on my list for trial and to hear further evidence on the other issues. I am taking this course at the request of counsel for all parties.

I have heard the Advocate-General on the question of costs. He submits that having won on certain of the issues or on a portion of the case, his clients should not have to pay the entire costs, and he reminded me that there are a large number of defendants, who are separately represented. As regards the last point, I certainly regret that the plaintiffs should have to pay those costs, but in such a case as this the defen-

dants are bound to be represented here and entitled to be separately represented. With regard to the first point, although the case has been split up for the purpose of analysis, the point sought to be established in order to destroy the title of the defendants is really one, and I feel I should not be justified in making any other order. There is a special argument addressed to me with regard to the costs of the Receiver, Mr. Khaitan, for whom Mr. Chowdhuri appears. At an early stage of the case counsel for the receiver asked to be dismissed from the action on the ground that no notice under S. 80 had been served upon him. I did not perhaps treat the matter with the seriousness which it deserved, but I do remember that counsel for the plaintiff was not prepared to have the suit against the receiver dismissed upon that ground and did not suggest that he was not a necessary party and should be dismissed. In those circumstances I should think personally whether he was or was not a necessary party; the plaintiffs having made him a party should pay the costs. But without having considered the matter in any detail I assume the plaintiffs were justified in making him a party since this is an ejectment and title suit in which they claim possession of land in the hands of the receiver. It is pointed out to me that in the written statement filed by the receiver the title of the plaintiffs was not specifically denied, but the position appears to me this: the plaintiffs have to prove their title, and on the views which, however wrongly I have given them, they failed to do so.

K.S.

Suit dismissed.

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DERBYSHIRE, C. J. AND COSTELLO, J.

Barisal Loan Office Ltd., Barisal—
Defendant 1—Appellant.

v.

Satish Chandra Das—Plaintiff—
Respondent.

Appeal No. 171 of 1934, Decided on 9th May 1935, from appellate order of Addl. Dist. Judge, First Court, Backargunge, D/- 30th November 1933.

* Transfer of Property Act (1882), Section 55 (1) (f)—Sale of properties—Vendor not in a position to give possession of some of them and vendee not getting possession—Suit for compensation—Held clause in sale

deed did not exclude statutory obligation of vendor under S. 55 (1) (f).

A sale in respect of several properties was executed by the defendant to the plaintiff. Plaintiff was not put in possession of some of the properties and he sued for compensation. The sale deed provided that if any defect in title was found by the vendee subsequently, the vendor will not be liable, and that if the vendee did not give possession he should himself take steps to do so and that the vendor would help him. But it was found that at the time of sale itself, the vendor did not have possession of the properties in question and he had lost all right to obtain possession of same:

Held: that the above clauses did not exonerate the defendant from the statutory liability under S. 55 (1) (f). [P 13 C 1, P 14 C 2]

*Atul Chandra Gupta and Bankim Chandra Banerji—*for Appellant.

*Nirmal Chandra Chakravarty and Charu Chandra Chakravarty—*for Respondent.

Costello, J.—The suit out of which this second appeal arises was brought by one Satish Chandra Das against the Barisal Loan Office Limited to recover compensation in respect of certain properties purchased by him from the defendants. The plaintiff had purchased a large number of properties from the Barisal Loan Office Limited by a registered Kobala dated the 2nd Aswin 1335 corresponding to 18th September 1928, for a sum of Rs. 21,900. The Barisal Loan Office Limited had purchased these properties at a sale which took place in certain execution proceedings arising out of a decree in a mortgage suit which the defendants themselves had instituted in order to enforce the mortgage on the properties in question. The Barisal Loan Office Limited was, therefore, in the position of being not only the judgment-creditors, but also the purchasers at the auction which took place in execution proceedings.

The plaintiff was claiming in the suit compensation in respect of six of the properties comprised in the Kobala on the ground that he could not get possession of those properties from the defendants who were the vendors. The position was that the Barisal Loan Office Limited, the purchasers at the auction held by the Court, had never taken delivery of possession of these six properties and that long before the date of sale of these properties to the plaintiff the defendants' right to take possession through Court had become extinguished by virtue of the provisions of Art. 181, Limitation

Act. The plaintiff made the case that as he could not get possession of these six properties and as the Barisal Loan Office Limited was not in a position to put him in possession of those properties he was entitled to have back so much of the purchase price as represented the value of the six properties in question. The defence set up in the suit, briefly stated, was that the defendants had given no guarantee of title and, on the other hand, it had been expressly stipulated in the kobala itself that the defendants as the vendors should not be made liable for any defect of title concerning the properties which they purported to sell to the plaintiff. The learned Subordinate Judge who tried the case accepted the view put forward on behalf of the defendants and he dismissed the suit. The plaintiff thereupon appealed from the decision of the Subordinate Judge of Barisal to the Additional District Judge, 1st Court, Bakargunj and it is against the judgment of that Court that this appeal comes to us. The learned Additional District Judge has summed up the matter in these words :

In my opinion there is nothing in the Kobala which stands in the way of the plaintiff claiming his common law right to get back his money which he paid for property of which he cannot get possession and which the vendor was at the date of the sale legally precluded from putting him in possession.

He accordingly finds that the plaintiff was entitled to compensation and he has made an order that the case should go back to the trial Court for assessment of the compensation. Mr. Gupta appearing on behalf of the defendants appellants has argued that there is sufficient provision in the kobala itself to exclude the operation of the provisions of S. 55, sub-S. 1 (f), T. P. Act. That subsection when taken in conjunction with the operative part of the section is to the following effect :

In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights mentioned in the rules next following or such of them as are applicable to the property sold. The seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.

It is not disputed in this case that the plaintiff, the purchaser of the properties set forth in the schedule to the Kobala, has not been put in possession of the six

properties or parcels of land which are the subject-matter of the present suit. Moreover it is admitted that at the time of the conveyance the vendors themselves had never been in possession of these properties and had lost all rights to get possession of the properties by legal process. The position therefore was that on 18th September 1928, the vendors were unable to comply with the provisions of S. 55 (1) (f), T. P. Act. It is argued, however, on behalf of the appellants that their obligation to comply with the provisions of that section does not and did not exist at the time of the Kobala by reason of certain provisions contained in the document and in this connexion Mr. Gupta has relied upon two passages contained in the Kobala. The first of those passages appears at p. 5 of the copy of the translation which has been supplied to us and is in these words:

No objection or excuse thereto by anybody will be accepted. Or if it transpires that no possession has been taken according to law in any of the properties then you may, if you think necessary take at your own cost possession therein according to legal procedure; and if necessary, I shall render you help in taking such possession, at your cost and Tadbir.

Mr. Gupta has argued that that passage indicates that it was common knowledge between the parties to this conveyance that there were certain properties of which the vendors had not acquired possession and this provision was inserted in the Kobala to cover that position and to provide that the plaintiff as purchaser should himself take such steps as were necessary to get possession of those particular properties with such assistance as the defendants—the vendors—were able to render to him. In my opinion that passage is of no assistance whatever to the defendants in this case because it now appears—and indeed Mr. Gupta has admitted on behalf of the clients—that the properties which are the subject-matter of the suit are comprised in the list set forth in Sch. Ka of the Kobala. That appears from a passage in the earlier part of the document which is in these words:

Barisal Loan Office Limited Company on 22nd June 1917 in Execution Case 74 of 1916 arising out of Mortgage Suit No. 845 of 1907 of the 2nd Sub-Judge's Court of Barisal and on 14th December 1920 in Execution Case arising therefrom under S. 90, numbered as Execution Case No. 58 of 1920 and on 20th January 1909 in Execution Case No. 91 of 1908 arising out of

Mortgage Suit No. 2 of 1897 of the 1st Sub-Judge's Court, Barisal, purchased at Court sales the shares described of properties Nos. 1-38 of Sch. (ka) below within District Backergunge, and after the confirmation of the said sales by the Courts concerned, the said Company on taking out sale certificates and executing writs for delivery of possession took possession in the said purchased properties through Court, and has been in ownership and possession thereof by receipt of the rent from the tenants of the said Mahals in exercise of the right and possession arising by virtue of the said auction-purchasers, and so far as the khas lands are concerned, by receipt of rent and crops &c, in khas.

There is a definite statement that the whole of the 38 properties with which we are concerned in the present appeal had been taken into possession by the defendants as auction-purchasers and that therefore they were in a position to give possession of those 38 properties to the plaintiff as purchaser under the kobala. In those circumstances it seems to me that the passage at p. 5 which I have read has no application and certainly can be of no assistance to the present appellants. There is however another passage in the kobala which at first sight seems to afford some basis for the contention put forward on behalf of the defendants at the trial. That passage appears at p. 6 of the copy of the translation of the Kobala and it is in these words :

As regards the hastabad (gross collection) which is shown as *stith* you have got the same checked by reference to the settlement papers and the company's collection papers. If for any reason in future a lesser amount than the same be found as hastabad, or if any defect in title be found with respect to any property, then the company will not be liable therefor. You are purchasing this property being all along cognizant of the full particulars of the mahal and after making a prayer for purchasing the property without any investigation, and in these circumstances the loan office will not be liable to you for any such reason as aforesaid.

The actual words which have been stressed by Mr. Gupta and upon which he mainly relies are these :

If any defect in title be found with respect to any property then the company will not be liable therefor.

Mr. Gupta in his argument has contended that this saving clause exonerating the defendants from all liability for any defect in title must be taken as covering the position where there is not only a defect in title but a complete want of title. Mr. Gupta, has invited us to come to the conclusion that the position in the present case in effect is this : that with regard to the six properties in question the plaintiff

has discovered that there was total want of title in the vendors and therefore, says Mr. Gupta, by virtue of the provisions in the passage in the kobala the defendants are not liable to pay compensation to the plaintiff. It seems to me that the fallacy of the argument lies in this, because the passage in question begins with the words "If for any reason in future" we ought to take it that this clause can only come into operation on the supposition that the plaintiff had been put into possession of all the 38 properties and had subsequently discovered that as regards one or more or even all of them there was a defect in the vendors' title. In my opinion the language of this clause by no means excludes the statutory obligation that lay on the defendants to comply with the provisions of Section 55 (1) (f), T. P. Act. The learned Additional District Judge refers to a case, 8 I C 91 (1), and on the authority of that case he says "the contract must be clear and unequivocal". Then he quotes a passage from an English case :

When a vendor sells property under stipulations which are against common law right and places the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness, if he uses expressions reasonably capable of misconstruction; if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself.

The English case which is referred to must be the case of (1906) 1 Ch 316 (2). On the strength of those two authorities the learned Additional District Judge says this :

The question is whether this statutory right of the buyer and the corresponding statutory obligation of the seller was in the present case taken away by any contract between the buyer and the seller.

In my judgment neither of the passages which I have recited nor any other provisions in the kobala of 18th September 1928 are sufficiently explicit and sufficiently free from ambiguity to justify in holding that the defendants are exonerated from their obligation to comply with S. 55, T. P. Act. It has to be borne in mind that owing to the defendants' failure to take the proceedings prescribed by the provisions of O. 21, R. 95, Civil P. C., for the

1. Digamber v. Nishabala, (1910) 8 I C 91.

2. G. W. Ry. Co. v. Fisher, (1905) 1 Ch 316=74 L J Ch 241=92 L T 104=53 W R 279.

purpose of obtaining possession of all the properties which they had purchased at the auction sale they at the time of the kobala had not obtained possession of the six properties now in dispute and they had for all time lost the right to obtain possession of those properties by any reasonable means and therefore they could not give to the plaintiff possession of those properties and at no time either when the kobala was executed or subsequently were they or could they be in a position to assist the plaintiff to obtain possession of those properties. For those reasons I am of opinion that this appeal must be dismissed with costs, hearing fee five gold mohurs.

Derbyshire, C. J.—I agree.

K.S.

Appeal dismissed.

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D. N. MITTER AND PATTERSON, JJ.

Nanda Lal Ganguly—Appellant.

v.

Dasarathi Mukherjee—Respondent.

Appeal No. 3 of 1932, Decided on 23rd January 1935, from original decree of Sub-Judge, 2nd Court, 24-Parganas, D/- 19th September 1930.

Evidence Act (1872), S. 111—Applicability.

Section 111 applies to the case of a will and burden of proving the good faith of the transaction lies on the propounder. [P 16 O 1]

Hira Lal Chakravarty — for Appellant.

Amarendra Nath Bose, Abinash Chandra Ghose and Krishna Kishore Basak—for Respondent.

D. N. Mitter, J. — This is an appeal from a decision of the Subordinate Judge of 24 Parganas, dated 19th September 1930, by which he granted probate in respect of a will of a lady of the name of Nitya Kali Debi. The will is said to have been executed on 25th May 1918 and was subsequently registered. The lady lived for nearly 11 years after the execution of the will, and died on 15th December 1929. The will is attested by a number of witnesses. Two of them were pleaders of Alipur Court and one of them was Dr. Satyendra Nath Roy a well-known physician of the city. The will is to be found printed at p. 50, part 2, of the paper book, and its provisions are to the effect that a small provision for maintenance should be left

with regard to some members of the family of testatrix and the residue of the estate should go to the two daughters of her deceased brother, Sm. Malina Bala Debi and Sm. Latika Bala Debi. There is also a further provision for her son-in-law Dasarathi Mukherjee who is one of the executors to the Will. It appears that the husband of Nitya Kali Debi, Pashupati Ganguly died in 1890. He was practising as a Mukhtar in the Court of Alipur and amassed considerable fortune. After the death of Pashupati a dispute arose between Pashupati's surviving brother Mohendra Chandra Ganguly who was also a pleader of Alipur and Nitya Kali with regard to the joint estate and a suit for partition of the estate was instituted in 1909, and the partition suit resulted in a compromise.

It was arranged by that compromise that certain properties would belong absolutely to her and that she would be holding them as her stridhan. By her will she has made disposition with regard to her stridhan properties. The attestation and execution of the will have not been challenged before us in appeal. The only question which has been argued before us by Mr. Chakravarty is that the will was induced by undue influence by Dasarathi, who according to the recitals in the will was the person who was looking after her properties to a large extent and had benefited her in various ways. On this recital it was urged that Dasarathi was in a position of active confidence with respect to this lady and therefore the burden lay on the propounder of establishing the good faith of the transaction. In this connection reliance is placed on S. 111, Evidence Act, to support this contention. We have examined the evidence given on behalf of the propounder including the evidence of Dasarathi which show that no sort of influence was exercised by him over this lady in order to induce her to make the provision giving 1/3rd of the property she possessed in favour of Dasarathi. As a matter of fact the appeal has now been confined to those properties bequeathed to Dasarathi and it is said that probate should be refused with respect to the 1/3rd of her properties in respect of which there is a bequest in favour of Dasarathi. Our attention has been

drawn also to the decision of their Lordships of the Judicial Committee of the Privy Council in support of the position that it is for the propounder who has taken the benefit of the provision of the will to remove any suspicion with reference to the execution of the will, and with reference to the due understanding of the will by the testatrix. It is said that the burden in the present case is more heavy because the testatrix is a lady advanced in years, weak in health and easily liable to be influenced by a person who was looking after her affairs.

It is rather unfortunate for the appellant that what has been elucidated in the evidence by the cross-examination of Dasarathi does not disclose any circumstance which would show that he actively participated in the matter of the execution of the will or in giving instruction in connection with the contents of the will. It is not suggested, as it was in the case before the Privy Council, viz., the case of *Sarat Kumari Debi v. Sakhi Chand* (1), that a particular provision in favour of Dasarathi did not exist in the draft of the will. It appears from the judgment of the Subordinate Judge that a faint suggestion was made before him to the effect that the probate should be refused at least with regard to this portion of the will. The Subordinate Judge in his judgment rightly says this:

It has neither been made out that any part of the will need be deleted by reason of its being vitiated by fraud, coercion, undue influence or concealment of facts.

The question as to whether S. 111, Evidence Act, would apply to a case of will may be considered and possibly having regard to the general language of the statute the burden of proving the good faith of the transaction would lie on the propounder. In England there is a conflict of opinion on the point. See the remarks of Sir John Woodroffe in his commentary on S. 111, Evidence Act, in particular the last paragraph. But the language of the Indian Statute is general and we think S. 111 applies to the case of wills. We have examined the evidence, and having regard to the evidence in the case it is difficult to say that that burden has not been discharged.

1. 1929 P. C. 113 I. C. 471=56 I. A. 62=8 Pat 382 (P. C.).

In this case we asked the defendant-appellant to show any evidence on his side which has been tendered in this case and which might show that any undue influence was exercised on the testatrix. No such positive evidence is either forthcoming. In these circumstances we have to accept the testimony of Dasarathi. Besides, the learned Judge of the Court below had an additional advantage of watching the demeanour of the witnesses and of seeing Dasarathi himself. In the absence of any evidence to the contrary we do not think that we should be justified in holding that the will is vitiated by undue influence. The result is that this appeal fails and is dismissed with costs—hearing fee 5 gold mohurs.

Patterson, J.—I agree.

R.M./R.K. *Appeal dismissed.*

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LORT-WILLIAMS AND JACK, JJ.

Hiranmoy Bhowmik—Accused.

v.

Emperor—Oposite Party.

Criminal Ref. No. 213 of 1934, Decided on 3rd April 1935.

Bengal Criminal Law Amendment Act (1930), S. 2 (1)—Unless order is reviewed by Government within one year, it cannot be in force after one year and no prosecution can be launched for its disobedience.

An order was made on 7th January 1933 and was amended on 31st March 1933. There was a further order on 14th June 1934. There was no review of the orders dated 7th January 1933 and 31st May 1933 within the time required by law but accused was charged with disobeying the order on 2nd July 1934:

Held: that the order was no longer in force at the time when the accused was alleged to have disobeyed it on 2nd July 1934. [P 17 C 1]

Hemendra Kumar Das and Nani Gopal Das—for Accused.

A. K. Roy and Anil Chandra Choudhury—for the Crown.

Lort-Williams, J.—This is a reference under S. 438, Criminal P. C. The learned Advocate-General on behalf of the Crown does not oppose it. The accused in this case was charged and convicted of an offence under S. 6, Bengal Criminal Law Amendment Act, 1930; that is to say, he was a person in respect of whom an order had been made under Sub.S. (1), S. 2 who had wilfully disobeyed the order. He pleaded guilty to this offence and appealed to the Sessions

Judge on the question of sentence only. The Judge came to the conclusion that the conviction could not be supported; but in view of the accused's plea of guilty, he has made this reference. Now, S. 2 of the Act provides that the local Government may make certain orders as to notification of residence and such other matters with regard to a person about whom there are reasonable grounds for the local Government to believe that he has acted in contravention of the provisions of the Arms Act or has offended in certain other ways. It is provided in that section that such orders shall be received by the local Government at the end of one year from the date of the making of the order, and shall not remain in force for more than one year unless upon such review the local Government directs their continuance. The order in this case was made on 7th January 1933 and was amended on 31st May 1933. There was a further order on 14th June 1934. Since there was no review of the orders dated 7th January 1933 and 31st May 1933 within the time required by law, the order was no longer in force at the time when the accused was alleged to have disobeyed it on 2nd July 1934.

The result is that the conviction and sentence cannot stand. We accordingly accept the reference, set aside the conviction and sentence and direct that the accused be set at liberty forthwith.

Jack, J.—I agree.

K.S. *Reference accepted.*

A. I. R. 1936 Calcutta 17

MUKERJI AND R. C. MITTER, JJ.

Naresh Chandra Dutta — Plaintiff—Appellant.

v.

Girish Chandra Das and another—Respondents.

Letters Patent Appeal No. 6 of 1934, Decided on 22nd February 1935, against judgment of Henderson, J., D/- 25th May 1934.

(a) Mahomedan Law—Pre-emption—Performance of talab—Deed of transfer compulsorily registrable—Date of sale for purposes of making talab is date on which deed can be said to be registered deed.

In case of a deed compulsorily registrable so far as third parties are concerned the point of time at which the transfer is to be effective, is when the deed of transfer can be said to be a registered deed. It is the date on which the document can be said to be registered, the necessary

formalities being performed, that is material for purposes of making a talab by a person claiming pre-emption under Mohomedan Law : 24 M L J 664, *Foll.*; 1933 Cal 212 and 1927 P C 42, *Ref.* [P 17 C 2; P 18 C 1]

(b) Pre-emption — Finding on question of promptness in shafiat ceremonies for pre-emption under Mohomedan Law is one of fact.

A finding on the question of promptness in making a talab in the shafiat ceremonies, shown by a pre-emptor claiming pre-emption under Mahomedan law, is essentially a finding of fact and cannot be interfered with in second appeal. [P 18 C 2]

Birendra Kumar De—for Appellant.

Sarat Chandra Basak and Priyanath Dutt—for Respondents.

Mukerji, J.—This is an appeal by the plaintiff in a suit for pre-emption. It is not disputed that the Mahomedan law of pre-emption applies to the case though the parties themselves are Hindus. The following are the facts: The sale in connection with which the plaintiff is seeking to enforce his right to pre-empt is evidenced by a deed which was presented for registration at the registration office on the 30th day of August. Before that date the vendor, on receipt of Rs. 50 out of the total amount of consideration which was fixed at Rs. 500, had put the vendee in possession. On the date abovementioned the vendor admitted execution and thereupon the Sub-Registrar made the usual endorsements on the deed. The necessary entries and copies were thereafter made and the final endorsement that the deed had been registered was made on the 3rd day of September. The Munsif decreed the suit. On appeal by the defendants the Subordinate Judge reversed that decision and dismissed the suit, and his decree has been affirmed by Henderson, J. It has been found that the first talab or demand was performed on the 4th day of September, and the suit has been dismissed on the ground that there was delay in such performance. On that, two questions at once arise: 1st when did the sale take place? 2nd, when did the plaintiff come to know of the sale?

So far as the first question is concerned there may be three points of time at one or other of which the sale can possibly be taken to have been effected: the first is the point of time at which a part of the consideration money having been paid the vendor put the vendee in possession; the second, when the transfer became operative under S. 54, T. P. Act, and the third, any other point of time at

which the parties may have intended the sale to be effective. Of the third of these contingencies there was no indication in the pleadings. And therefore upon the view most favourable to the plaintiff it is second point of time aforesaid that should be regarded. This gives rise to the question, when was the deed 'registered' within the meaning of S. 3, T. P. Act. On the question whether the executant of a deed compulsorily registrable has any locus paenitentiae to resile, by reason of the fact that the title under it is incomplete for want of registration, it has been held and that proposition appears to have been affirmed by the Judicial Committee that incompleteness due to want of registration is not a thing of which the executant can take any advantage, and that if the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the transfer and to make it effective, because registration does not depend upon the executant's consent but is the act of the officer appointed by the purpose, 59 Cal 1176 (1); 54 I A 89 (2). But as regards third parties the point of time at which the transfer is to be effective is when the deed of transfer can be said to be a registered deed. The question has been considered in 24 Mad LJ 664 (3), in which after referring to the relevant sections of the Registration Act the learned Judges observed:

Briefly then, registration includes the getting made and the making of certain endorsements, making the certification of registration and the copying of the documents in the register book and the filing of the map or plan, if any, in Book 1. The substantial portion is apparently complete with the making of the certificate of registration. It is these that S. 49 prescribes should have taken place with reference to the document before it can affect any immoveable property to which it relates or be received in evidence.

We agree in the view thus expressed and on that view we must hold that the sale took place on the 3rd September. As regards the second question it may be stated at once that the case which the defendants made has failed. But it is with the plaintiff's case on the point

with which we are more concerned. His case, by which he sought to establish the element of promptness in the shariat ceremonies, was that he first heard of the sale on the 4th September and that as soon as he heard of it he made the talab first at the Bar Library and then in the house of the defendant. That case, shortly stated, is that the plaintiff's officer Nagendra came to Sylhet on the 3rd September and on going to the registration office on the 4th to inquire whether the kobala had been executed and registered he was told by a deed-writer that it had been, and that he promptly went to the Bar Library and saw the plaintiff who immediately made the talab. The Subordinate Judge has shown the utter falsity of this story and has found that the plaintiff must have come to know of the registration before the time alleged and that the talab at the Bar Library was stage-managed. The element of promptness having been found against the plaintiff, his suit has been dismissed, and on that finding, which is essentially a finding of fact, it has been rightly dismissed. The appeal fails and must be dismissed. There will be no order as to costs of this appeal.

R. C. Mitter, J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 18

LORT WILLIAMS AND CUNLIFFE, JJ.

Chamuddin Sardar and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 557 of 1935, Decided on 14th November 1935.

Criminal Trial—Trial by jury—Misdirection—Trial of offence under S. 366, I. P. C.—Judge should warn jury as to danger of convicting accused in sexual offences on uncorroborated testimony of the girl—Failure to do so amounts to non-direction and vitiates trial—Judge should also direct jury as to whether there is independent evidence corroborating girl's statement.

In a trial for an offence under S. 366, I. P. C., the Judge should point out to the jury that they are entitled, if they please, to convict the accused upon the uncorroborated testimony of the girl, but that it is dangerous to do so in cases dealing with sexual offences such as rape, abduction and similar cases, etc., and that only in exceptional cases they should convict the accused upon the uncorroborated testimony of the girl. Failure to warn the jury about the danger of convicting the accused on the girl's evidence only amounts to a non-direction, which vitiates the trial. So also where the

1. Nabadweep Chandra Das v. Lokenath Roy, 1933 Cal 212=142 I C 452=59 Cal 1176=36 C W N 733.
2. Kalyanasundram Pillai v. Karuppa Mooppanar, 1927 P C 42=150 I C 105=54 I A 89=50 Mad 193 (PC).
3. Veerappa Chetty v. Kadireson Chetty, (1913) 24 M L J 664=20 I C 385.

Judge fails to direct the jury as to whether there is any evidence corroborating the girl's statement of the kind required by law, i. e., evidence independent of her own statements, the trial is vitiated : 1934 Cal 7, Rel. on.

[P 19 C 2; P 20 C 1]

Sudansu Sekhar Mukherjee—for Petitioners.

Anil Chandra Rai Choudhuri—for the Crown.

Lort Williams, J.—In this case, a rule was issued to show cause why the convictions and sentences passed upon the petitioners under S. 366, I. P. C., should not be set aside. The learned Sessions Judge was asked to submit his explanation of a statement made by him in para. 3 of his judgment to this effect : "It has not been contended that there was any misdirection or non-direction on points of law" and with special reference to para. 2 of the petition in revision in which a number of points were specified, which had been pressed upon the attention of the learned Judge on behalf of the accused. The first of these points was that the Assistant Sessions Judge, when charging the jury, had failed to direct them on the question of necessity of corroboration of the girl's evidence; further, that the Assistant Sessions Judge had failed to direct the attention of the jury to certain evidence given by the girl to the effect that she had not objected to going with the two accused, which was obviously very material upon the question of abduction. There were other points referred to in the petition with which it is not necessary to me to deal. The learned Sessions Judge seems to have misunderstood the direction given by this Court, because in his explanation he says that :

As there is ample corroboration (for what it is worth) of the girl's evidence, the question of the corroboration of the girl's evidence does not arise as a point of law.

Then he refers to certain evidence which, in our opinion, does not amount to the kind of corroboration required by law. The point to which we desired to draw the learned Judge's attention was that if the Assistant Sessions Judge had failed to direct the jury on the question of the necessity of corroboration and had failed to warn them about the danger of convicting the accused on the girl's evidence alone, in sexual cases such as this, that was a non-direction which vitiated the trial. It seems clear, therefore, taking into consideration the evidence of

the girl to which our attention has been drawn and the charge to the jury, that the statement in para. 3 of the learned Sessions Judge's judgment was erroneous, because it had been clearly contended before him that there was misdirection and non-direction on points of law, namely, the failure of the learned Judge to give the jury the necessary caution which has been referred to by this Court on many occasions and is specifically stated in 38 C W N 108 (1). The head-note of that case states that it is extremely dangerous and permissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The rule must be properly emphasised in the charge to the jury. It is unnecessary to repeat all that was said on that occasion, except to say that the Judge should point out to the jury that they are entitled, if they please, to convict the accused upon the uncorroborated testimony of the girl, but that it is dangerous to do so in cases dealing with sexual offences such as rape, abduction and similar cases, and that only in exceptional cases should they convict upon the uncorroborated testimony of the girl.

Now, in the present case, the girl said in her evidence that she had been beaten by her husband, because she had not said her prayers, and had gone out of the house to a tank, where she met the two petitioners. They told her that her husband would beat her again, and so they would take her to her Nani's bari if she would come away with them. After they had repeated this statement, she agreed to go and they took her away from that place. Eventually she was handed over to three other persons who kept her confined and raped her. But no charge of rape was made against them. The present accused were charged under Ss. 363 and 366, I. P. C., and the jury brought in a majority verdict of guilty under S. 366, the majority being one of three to two. In cross-examination the girl said that she had left her husband once or twice before and had gone to her father's house. She was further asked whether she got frightened and told the accused to take her to her Nani's bari and she said "Yes". She also said that she could not stand being beaten any more and that she did

1. Nur Ahmed v. Emperor, 1934 Cal 7=1934 Cr C 23=155 I C 584=38 C W N 108.

not object to going with them, that she went of her own accord and that neither of the two petitioners ever made any immoral proposal before. Before this occurrence she had never been in her husband's house for more than 15 or 16 days at a time. The learned Assistant Sessions Judge failed altogether to give any warning to the jury upon the question of corroboration. Apparently, he forgot all about the necessity of giving this direction: Nor did he direct them as to whether there was evidence corroborating her statement, of the kind required by law, that is to say, evidence independent of her own statements. So far as the learned Assistant Sessions Judge gave any direction at all, it appears to have been misleading, because the evidence of Meher, Marfat and Samir might have been thought by the jury to be corroborative evidence upon the question of abduction. This evidence consisted of statements made by the girl to them and, therefore, was not the kind of corroboration required by law.

These being the circumstances of this, it is obvious that the convictions cannot be allowed to stand. In view of the fact that the Magistrate originally considered the complaint of the girl to be suspicious, and in view of the evidence of the girl to which I have referred, about her going away willingly and, further, in view of the fact that it was a majority verdict of 3 to 2, we do not think it necessary to send this case back for a retrial. The convictions and sentences are set aside and the accused acquitted. The accused, who are on bail, will be discharged from the bail bonds.

Cunliffe, J.—I agree.

R.M./R.K. *Convictions set aside.*

A. I. R. 1936 Calcutta 20

GUHA AND BARTLEY, JJ.

Corporation of Calcutta—Complainant—Petitioner.

v.

Ganesh Chandra Dhar and another—Defendant—Opposite Parties.

Criminal Revn. No. 687 of 1935, Decided on 20th November 1935.

Calcutta Municipal Act (3 of 1923), Ss. 488, 534—Provisions of S. 534 indicate necessity of prompt action—Delay in starting proceedings—Corporation must establish that they are within prescribed period.

The provisions of S. 534 indicate the necessity for prompt action and delay in prosecuting an

offence under the Act is as little to the interest of the Corporation as to that of the rate-payers. [P 20 C 2]

Where therefore Corporation seeks to prosecute certain persons under S. 488 of the Act and there is no evidence whatever on the record to show when the offence was first brought to its notice, it is the duty of the Corporation to establish that the pleadings although begun at a late stage are still within the period prescribed by the law. [P 20 C 2]

Pashupati Ghose—for Petitioner.

S. C. Basak, S. C. Taluqdar and Prem-ranjan Roy Choudhury—for Opposite Parties.

Bartley, J.—This rule was issued on the Municipal Magistrate of Calcutta, calling on him to show cause why his order dated 20th May 1935 striking off proceedings against the other opposite parties to the rule, on the ground that they were barred by limitation, should not be set aside. The material facts are that on 5th September 1933, the Magistrate, on an application by the Calcutta Corporation, passed orders under S. 363, Calcutta Municipal Act, directing demolition of certain structures erected by the opposite parties, within three months. These orders were not complied with, and on 12th March 1935, about 18 months later, an application was made on behalf of the Corporation to prosecute the offenders under S. 488 of the Act. This was refused, on the ground that further proceedings were barred by limitation.

Now under S. 534 of the Act, no person is liable to punishment for an offence unless the complaint is made within three months of its commission, or, in the case of a continuing offence, of the date on which the offence was first brought to the notice of the Executive Officer or of the Corporation. In the present case, there is no evidence whatever on record to show when the offence was first brought to notice, and in view of their delay in taking action, it was obviously the duty of the Corporation to establish in the first place, that proceedings begun at such a late stage were still within the period of limitation prescribed by law. The provisions of S. 534 indicate the necessity of prompt action, and delays such as we have noted in the present case is as little to the interest of the Corporation as to that of the rate-payers. This rule must accordingly be discharged, and we direct accordingly.

Guha, J.—I agree.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Calcutta 21

GUHA AND BARTLEY, JJ.

Banur-ud-din Biswas—Petitioner.
v.*Gani Mia Sawdagar and another*—Opposite Parties.

Criminal Revn. No. 947 of 1935, Decided on 25th November 1935

Criminal P. C. (1898), Ss. 517, 520—Words 'Court of appeal' are not limited to Court before which appeal from order of acquittal can lie—Court of appeal has jurisdiction to deal with order of disposal of property under S. 517 irrespective of question in what Court appeal from acquittal lies.

The words 'Court of appeal' as used in S. 520 of Criminal P. C., are not limited to a Court in which appeal from an order of acquittal whereby also order under S. 517 is passed could lie. The jurisdiction of the Court of appeal to deal with an order under S. 517, Criminal P. C., for disposal of property found to be in the possession of accused charged under S. 411, of Penal Code is not dependent upon the question in what Court an appeal from an order of acquittal might have been brought, and which in point of fact has not been brought: 3 Cal 379; 1929 Rang 97 and 1932 Bom 534, *Foll.* [P 22 C 1]

S. C. Taluqdar and Syamapada Mukerji—for Petitioner.*Chatterji and Provash Chandra Basu*—for Opposite Parties.

Order.—This rule was issued by this Court on the District Magistrate of Nadia as also on the opposite party to show cause why an order passed by the learned Sessions Judge of Nadia on 8th July 1935, setting aside, on appeal, the order of a Magistrate directing an amount of money to be returned to the opposite party should not be set aside.

It would appear that in the trial before the Magistrate, the accused persons placed on their trial were acquitted of the charge under S. 411, I. P. C.; under S. 258, Criminal P. C., and the Magistrate directed that the money found with the accused in the course of a search was to be paid to the petitioner Banuruddin Biswas. There was an appeal to the Sessions Judge against the aforesaid order passed by the Magistrate under S. 517, Criminal P. C., relating to disposal of the money, and on appeal the order of the Magistrate was set aside. The Sessions Judge in allowing the appeal, directed that the money found with the appellants before him must be returned to them. The merits of the case in which the order of the Sessions Judge was passed are not in question before us in the rule.

It was urged in support of the rule issued by this Court that there was no provision in law for appeal from the order of the Magistrate, the Sessions Judge acted illegally and without jurisdiction in reversing the order of the Magistrate passed under S. 517, Criminal P. C.

The decision of the question whether the Sessions Judge had jurisdiction to entertain and hear the appeal from the order for disposal of property, although there was and there could be no appeal to the Judge from an order of acquittal passed by the Magistrate, passing the order for disposal of property, depends upon the interpretation of the words "any Court of appeal" as used in S. 520, Criminal P. C. These words are not limited to a Court to which an appeal against the conviction or acquittal is or may be pending; orders made under S. 517, Criminal P. C., were independent of the question of conviction or acquittal in a case before a Criminal Court. It was held by this Court so far back as the year 1878, in the cases of 3 Cal 379 (1), that the words "Court of appeal" in S. 419, Criminal P. C., 1872, which has now been replaced by S. 520, of the Code of 1898, that the words "Court of appeal" were not limited to a Court before which an appeal from a conviction was pending; it might very often happen, that the question of the propriety of an order for disposal of property produced before the Court might in no way concern the convicted person; and it was thought unreasonable to put such a construction on the provision relating to appeals from orders relating to disposal of property as could make the power of the Judge to modify, alter or annul a Magistrate's order affecting property contingent on the accident whether another person has or has not chosen to appeal. The reason for the decision referred to above, with which we are in entire agreement, was adopted by a Full Bench of the High Court at Rangoon, in 7 Rang 345 (2). The rule underlying the decision of this Court in *Joggeswar's case* (1), mentioned above, has also been recently recognised by the High Court at Bombay to be sound, in 56 Bom 369 (3), in which case a Full Bench of

1. *Empress v. Joggeswar Mochi*, (1877) 3 Cal 379.
2. *U Po Hla v. Ko Po Shein*, 1929 Rang 97=115 I O 901=30 Cr L J 540=7 Rang 345 (F B).
3. *Walchand Jasraj v. Hari Anant*, 1932 Bom 534=1932 Cr C 789=139 I C 433=33 Cr L J 807=56 Bom 369 (F B).

that Court overruled a previous decision laying down that the words "Court of appeal" implied the Court to which an appeal lay in the particular case, and not the Court to which appeals would ordinarily lie from the case deciding the particular case. The case before the High Court of Bombay was a case of acquittal by the Magistrate.

As indicated above, in consonance with the decision of this Court in 3 Cal 379 (1), we hold that the words "Court of appeal" as used in S. 520, Criminal P. C., are not limited to a Court before which an appeal from an order of acquittal could lie, and the jurisdiction of the Court of appeal to deal with an order for disposal of property in the case before us, was not dependent upon the question in what Court an appeal from an order of acquittal might have been brought, which, in point of fact, had not been brought. The rule is discharged; the order of the Sessions Judge, directing return of money passed on appeal is affirmed.

R.M./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 22

GUHA AND BARTLEY, JJ.

Shamsuddin Ahammed and others—
Defendants—Appellants.

v.

Suresh Chandra Dey and others—
Plaintiffs and *others—*Respondents.

Appeal No. 1582 of 1932, Decided on 19th February 1935, from appellate decree of Addl. Dist. Judge, Noakhali, D/- 30th January 1932.

(a) Burden of proof—Onus immaterial—On whom initial onus lies is of no importance when parties have opportunity of placing all evidence in support of their cases.

The question on which party the initial onus lies is of no importance, after the parties have full opportunity of placing all evidence in support of their respective cases. [P 23 C 1]

(b) Second Appeal—Conclusions on evidence partly documentary are binding on Court in second appeal.

The conclusions on evidence, partly documentary are as much binding on the Court hearing second appeal as conclusions on oral evidence. [P 23 C 1]

(c) Bengal Patni Regulation (8 of 1879), S. 11 (3)—Under S. 11 (3) read with S. 195 Ben. Ten. Act, before its amendment in 1928, purchaser of patni in auction is entitled to eject raiyats having only occupancy rights in holding by suit instituted before amendment.

Under S. 11 (3), Patni Regulation, 1879, read with S. 195, Ben. Ten. Act, before its amend-

ment in 1928, raiyats having rights of occupancy only in a holding are liable to be ejected by a suit, before the amendment in S. 195 was applicable, at the instance of purchasers of a patni claiming khas possession at a sale for arrears of rent, if they were not Khud-kast raiyats that is resident and hereditary cultivators of the lands in regard to which khas possession is claimed by the auction-purchasers: 3 C W N 13, *Foll.*; 1933 Cal 490, *Disting.*

[P 23 C 2]

(d) Mesne profits—Assessment of—Assessment of mesne profits with reference to kabuliats filed by parties and rents recorded in settlement khatian—Principle is correct.

Where the Courts below determine the mesne profits with reference to the kabuliats filed by the plaintiffs and the contesting defendants, and the rents recorded in the settlement Khatians, they cannot be said to follow any wrong principle in assessing the mesne profits allowed to the plaintiffs. [P 24 C 1]

*Nurul Huq, Hamidul Huq Choudhury—*for Appellants.

*Jitendra Kumar Sen Gupta—*for Respondents.

Judgment.—The suit in which this appeal has arisen, was instituted by the plaintiffs, as the purchasers of a Patni Taluk, for establishment of their title to the lands in suit, for khas possession of the same, as also for realisation of mesne profits. The entry in the finally published record of rights was against the plaintiffs, inasmuch as it showed defendants 1 and 2 had a nishkar, called an upajibika carved out of the patni, purchased by the plaintiffs, and that the defendants were in possession in that nishkar right. The case of the plaintiffs was that the lands never appertained to any upajibika or nishkar, and even if defendants 1 and 2 possessed the lands on assertion of a nishkar right, that possession could not affect the plaintiffs' right to get possession of the lands appertaining to the patni purchased by him, free from all incumbrances.

On the pleadings of the parties, the issues raised in the suit relevant for the purpose of this appeal, were these: Are the lands in suit covered by nishkar upajibika as alleged by the defendant? Can the plaintiff get khas possession of the suit lands? Can the plaintiff get any mesne profits?

The Courts below decided the case against the contesting defendants in the suit, and directed khas possession to be delivered to the plaintiff with the exception of lands in the possession of defendants 11 to 15.

In exhaustive judgments dealing with the evidence in the case, both documentary and oral, the Court of first instance, as also the Court of appeal below, came to the conclusion that the lands in suit were not covered by the nishkar upajibika set up by the defendants. On this part of the case, the question raised before us related to this, that the onus of proof was wrongly placed on the contesting defendants in the suit, so far as the existence of the nishkar right was concerned. We are wholly unable to give effect to the contention urged in this behalf and we agree in the view expressed by the lower appellate Court, that the question on whom the initial onus lay was of no importance, after the parties had full opportunity of placing all evidence in support of their respective cases. Strong comments were made, in support of this appeal, on certain documents which negatived the right claimed by the contesting defendants and the existence of the nishkar set up by them; and it was said that the Court of Appeal was not right in holding that the khatian in favour of the defendants could not be deemed to be correct inasmuch as the sanad and the Hukumnama on which the defendants mainly based their title could not be treated as valid and genuine documents creating a lakheraj. It was contended that there was other evidence, which supported the case for the defendants. It was not possible for us to appreciate the arguments advanced before us in this part of the case, as the Courts below have concurrently arrived at the conclusion on all the evidence in the case, that the nishkar interest set up by the contesting defendants had not been established and that the entry in the settlement record upon which the defendants relied could not therefore be held to be correct. Arguments based on some of the documents used as evidence in the case were advanced in support of the appeal; but there can be no question that the conclusions on evidence, partly documentary, are as much binding on us on in second appeal, as conclusions on oral evidence. On the findings arrived at by the Courts below, on full consideration of all the evidence in the case, the plaintiffs in the suit had established their case before the Court, that the lands in suit appertained to the Patni taluk purchased by them, and that there was no nishkar

interest in regard to the same by virtue of which defendants 1 and 2 could be held entitled to resist the possession of the plaintiffs as claimed by them in the suit.

It would appear that some of the tenant defendants resisted the plaintiffs' claim for khas possession claiming protection from eviction under S. 11, Cl. (3), of the Patni Regn. (8 of 1819). It has been concurrently held by the Courts below that none of the tenants defendants besides defendants 11 to 15 had proved that he was a khudkast or resident cultivating raiyat of the village in which the lands of the Patni are situate; and the Court of Appeal below has held that inasmuch as protection from eviction extended only to khudkast or resident cultivating raiyats, before S. 195, Bengal Tenancy Act, was amended in the year 1928, the tenants defendants other than defendants 11 to 15, although raiyats with rights of occupancy, could not resist the claim for khas possession as made by the plaintiffs. The suit in which this appeal has arisen was instituted on 21st December 1927 and the amendment made in S. 195, Bengal Tenancy Act, had no application. The decision of this Court in 3 C W N 13 (1) has a direct bearing on the case before us, so far as the application of S. 11, Cl. (3) of the Patni Regn. (8 of 1819) is concerned, and we give effect to the same. In our judgment, raiyats having rights of occupancy only in holdings were liable to be rejected at the instance of the auction-purchasers in the position of the plaintiffs in the case before us, if they were not khudkast raiyats that is resident and hereditary cultivators of the lands in regard to which khas possession was claimed by the purchasers of a Patni at a sale for arrears of rent. This is the only view that could be taken under the law as it stood before the amendment of S. 195, Bengal Tenancy Act, in the year 1928; and the decision of this Court 37 C W N 4 (2) on which reliance was placed on behalf of the defendants respondents seeking to resist the plaintiffs' claim for khas possession, entirely loses sight of the legal position of parties, so far as this part of the case before us is concerned.

1. Jogeshwar Mazumdar v. Abed Mahomed Sarkar, (1899) 3 C W N 13.

2. Janaki Nath Nandi v. Amarendra Nath Biswas, 1933 Cal 490 = 145 I C 243 = 37 C W N 4

The only other question that was raised in support of the appeal, was the one relating to the principle of assessment of mesne profits in the case. In view of the position appearing from the judgments of the Courts below, that mesne profits were determined with reference to the kabuliats filed by the plaintiffs and the contesting defendants, and the rents recorded in the settlement khatians, we are unable to hold that in assessing mesne profits allowed to the plaintiffs, any wrong principle has been followed by the Courts below. The result of the decision arrived at by us on questions raised in this appeal, is that the appeal fails, and it is dismissed. The plaintiffs respondents are entitled to their costs in the appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 24

GUHA AND BARTLEY, JJ.

Firm, Banwarilal Jagannath—Plaintiff—Appellant.

v.

B. B. & C. I. Ry. Co., Ltd.—Defendant—Respondent.

Appeal No. 1687 of 1932, Decided on 5th February 1935, from appellate decree of Special Sub-Judge, Assam Valley, Dist. Dibrugarh, D/- 14th March 1932.

Railways Act (1890), S. 72—Suit against Railway Company for short delivery of tins of ghee from consignment—Contract embodied in risk note *H*—Consignment a through consignment—Closed tins kept and wagon sealed and rivetted—Pilferage occurring in intermediate station—Company's servants held not guilty of any misconduct—Evidence as to condition of wagon at intermediate station by company held not necessary.

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence, and is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be.

[P 25 C 1, 2]

A sued *B*, a Railway Company, for recovery of a certain sum on account of short delivery of certain number of tins of ghee from the consignment booked on his address. The contract between the parties was embodied in the risk note *H* which exonerated the company from all loss or damages to the consignment except on proof that such loss or damage arose from misconduct on the part of the servants of the Railway Company; it was further provided that in case of non-delivery of the whole of one or more packages forming part of the consignment such non-delivery not being due to accident to a train or to fire, the company shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in pos-

session or control of the company, and if necessary, to give evidence thereof before the consignor was called upon to prove misconduct but, if misconduct could not fairly be inferred from such evidence, the burden of proving such misconduct was to lie on the consignor. It was found by the Court that the tins were placed in a wagon which was sealed and rivetted and that nothing more was required to ensure the safety of the consignment which was a through consignment. It was discovered on an intermediate station that the seal had been removed and some of the tins had been pilfered:

Held: that no misconduct on the part of the Railway servants could fairly be inferred from the established facts: [P 24 C 2; P 25 C 1, 2]

Held further: that there was disclosure by the company of the manner in which consignment was dealt with while under their control, within the meaning of the contract. [P 25 C 2]

Held also: that it was not necessary in the case of through consignment, for the company to give evidence as to the condition of the wagon at any intermediate stage of the journey, which might be the case if question of transshipment was involved: 1933 Cal 742, *Ref.*

[P 25 C 2]

A. C. Chatterjee and Bankim Chandra Ray—for Appellant.

Ambikapada Chaudhury and Bhabesh Narayan Bose—for Respondent.

Bartley, J.—This is an appeal by the plaintiffs against the dismissal, by the Court below of their claim for damages. The suit was against the Bombay, Baroda and Central India Railway to recover Rs. 899-14-0, on the allegation of short delivery of 25 tins of ghee out of a consignment of 63 tins booked to the plaintiffs at Tinsukia from Malakhera station. The company denied liability, and the main issues for trial were whether the defendants were exempted from liability under the risk notes, *A* and *H* covering the consignment and whether the plaintiffs were entitled to sue. The Munsiff decided both points in favour of the plaintiffs, and decreed the suit. The Court of appeal below reversed these findings and dismissed the suit. Plaintiffs have appealed to this Court. The contract between the parties is embodied in risk note *H*. It is a contract of carriage at a special reduced rate, in consideration of which the Company is exonerated from all liability for loss or damage to a consignment, except on proof that such loss or damage arose from the misconduct of the servants of the Company. There is a proviso that in case of non-delivery of the whole of one or more packages forming part of the consignment such non-delivery not being due to accident, to a

train or to fire, the company shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in possession or control of the Company, and if necessary, to give evidence thereof before the consignor is called upon to prove misconduct but, if misconduct cannot fairly be inferred from such evidence, the burden of proving such misconduct shall lie on the consignor.

Both Courts below have directed themselves properly in regard to the evidence adduced before them, but they differ in the conclusion derived from consideration of that evidence. The Munsiff's finding was that the defendants had not shown in what condition the wagon was at Kapasamohanta, (one of 22 stations between Gorakhpur where the consignment was intact and Chapra where the loss was detected) and had therefore failed to disclose how they dealt with the consignment throughout the time, and were not protected under the risk note. The Court of appeal below held that no such evidence of examination of the wagons at intermediate stations was necessary that the loss was due to pilferage; that no misconduct on the part of the Railway servants could fairly be inferred from the evidence showing how the consignment was dealt with; that the onus of proof of misconduct therefore lay on the plaintiff and that it was not discharged. The suit was therefore dismissed.

On appeal before us, the substantial contentions have been that the Court below should have inferred, from the evidence given on both sides that there was misconduct on the part of the Company's servants, and that there was no disclosure, on the part of the Company, of the manner in which the consignment was dealt with such as would, under the terms of the contract throw the onus of proving misconduct on the present appellants. In view of these contentions, reference was made before us to a number of reported cases, in which the question of misconduct was directly or incidentally considered. Only one of these cases however is exactly in point 60 Cal 996 (1). In that case it was laid down, after an exhaustive review of the authorities on the point that

Misconduct is not necessarily established by proving even culpable negligence. It is some-

thing opposed to accident or negligence, and is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be.

I concur in that view, and would adopt the definition given in that case. In the light of that definition, it certainly cannot be held on the findings of fact arrived at by the Court of appeal below, on the evidence that a fair inference of misconduct on the part of the company's servants can be made in the present case. It was found by that Court that the closed tins were placed in a wagon which was sealed and rivetted, and that nothing more was required to ensure the safety of the consignment, which was a through consignment. The wagon was intact at Gorakhpur. At Chapra, the offside of the wagon was open, the seal removed, and some of the contents missing. The rivets and seal had been cut and pilferage had taken place between Gorakhpur and Chapra. I see no reason whatever to dissent from the conclusion arrived at by the Court of appeal below, namely, that no misconduct on the part of the Railway servants can fairly be inferred from the established facts. It remains to consider the further contention raised on behalf of the appellants, that there was no disclosure by the Company of how the consignment was dealt with while under their control.

There is in my view, no substance whatever in that contention. The duty cast on the Company was to show what was done by them in fulfilling their part of the contract—the carriage of the goods from Malakhera to Tinsukhia. They proved that the goods were placed in a sealed and rivetted through wagon consigned to Tinsukhia. It has been definitely found that no additional precautions are necessary in the case of through consignments. I cannot assent to the proposition that disclosure connotes that the Company must, in the case of a through consignment, be prepared to give evidence as to the condition of the wagon at any intermediate stage of the journey. The position might possibly be different if a question of transshipment were involved, but on the facts found in the present case it must be held that there was disclosure by the Company within the meaning of the contract. In the result this appeal fails and is dismissed with costs.

Guha, J.—I agree.

R.M./R.K.

Appeal dismissed.

1. M. and S. M. Ry. Co. v. Sundarjee Kalidas, 1933 Cal 742=147 I C 752=60 Cal 996.

A. I. R. 1936 Calcutta 26

R. C. MITTER, J.

Baidya Nath Pandey and another—
Petitioners.

v.

Hemlata Dasi and others — Opposite
Parties.Civil Rule No. 512 of 1935, Decided on
10th December 1935, from order of Dist.
Judge, Murshidabad, D/- 28th January
1935.**Bengal Tenancy Act (8 of 1885), S. 174 (1)—**
Application under S. 174 (1) for setting aside
sale—Applicant obtaining attachment before
judgment of property put to sale at rent
sale but not obtaining decree, has no locus
standi to make application.The words of S. 174 (1) are *pari materia* with
the provisions of O. 21, R. 90. [P 26 C 2]The words "whose interests are affected by
the sale" are not limited to persons whose pro-
prietary or possessory interests are affected.
They also include persons whose pecuniary
interests are affected by the sale. [P 27 C 1]A person who has obtained an attachment
before judgment of property subsequently put to
sale at a rent sale, but has not obtained decree
in his suit before his application under S. 174,
Cl. (1), for setting aside the rent sale, is not a
person whose pecuniary interests are affected
by the sale and he has therefore no locus
standi to make and maintain the application
under S. 174 (1): 15 I C 668 and 1925 Cal 1103,
Foll.; 1924 Cal 786 and 1934 Cal 477, *Disting.*

[P 27 C 1, 2 P 26 C 1]

*Birendra Kumar De—*for Petitioners.
*Gopendra Nath Das—*for Opposite
Parties.**Order.**—The question raised in this
rule is whether the petitioners had the
right to apply under S. 174, Cl. (1), Ben.
Ten. Act, for setting aside a rent sale.
The facts are not disputed and the ques-
tion raised before me is a pure question
of law and on that the question of juris-
diction of the lower Courts depends.
Both the lower Courts have held that
the petitioners have no locus standi to
make and maintain the said application.The petitioners before me obtained a
mortgage decree against opposite parties
Nos. 8 to 10. The preliminary decree
was passed on 5th January 1933 and the
final decree was passed thereafter. On
6th January 1933 the petitioners made
an application for attachment before
judgment of some properties belonging to
opposite parties Nos. 8 to 10 other than
properties included in the mortgage and
covered by the preliminary mortgage-
decree. The statement in that applica-
tion was that they obtained a preli-minary mortgage decree a day previously
and there was no chance of the whole
amount decreed being recovered by sale of
the mortgage properties. They accord-
ingly wanted an attachment of properties
other than properties included in the
mortgage, in order that they might be
secured so far as their personal decree
was concerned, a decree which they ex-
pected to get.The notice was issued upon the oppo-
site parties Nos. 8 to 10 to show cause
why the said properties should not be
attached before judgment. On 20th Feb-
ruary 1934 the final order attaching the
said properties before judgment was made.
One of the properties so attached is the
subject-matter of the present rule. Oppo-
site parties Nos. 1 to 7, viz., the Baner-
jees and Roy Choudhuris who were the
landlords of opposite parties Nos. 8 to
10 the Mitters, instituted a suit to re-
cover rent and obtained a decree. They
put up the rent decree into execution
and a sale was held under the provisions
of Chap. 14, Ben. Ten. Act, on 19th June
1934 and the opposite party No. 11 Bala-
ram purchased the defaulting tenure. He
only appears in this Rule and opposes it.
On 17th July 1934 the petitioners ap-
plied under S. 174 (1) to set aside the
rent sale by making the necessary depo-
sit. On 11th September 1934 they made
an application in their mortgage suit for
a personal decree under the provisions of
O. 34, R. 6, Civil P. C., but the proceed-
ing started in that application was stayed
by an order dated 13th November 1934.
It is admitted that no personal decree
has yet been passed against opposite
parties Nos. 8 to 10 and in favour of the
petitioners.Section 174 (1) gives to two classes of
persons, the right to make the applica-
tion, viz., (1) the judgment-debtor in the
rent suit and (2) any person whose in-
terests are affected by the rent sale. The
words of S. 174 (1) are *pari materia* with
the provisions of O. 21, R. 90, Civil
P. C., because besides the judgment-
debtors and persons entitled to share in
the rateable distribution of assests, per-
sons whose interests are affected by the
sale, are given the right to apply under
O. 21, R. 90 of the Code. The question
therefore, is whether the persons who
have attached before judgment the pro-
perty put up to sale in execution of a rent
decree, have the right to apply under

S. 174, Ben. Ten. Act. I agree with the decisions of this Court which have laid down that the words "whose interests are affected by the sale" are not limited to persons whose proprietary or possessory interests are affected. They include also persons whose pecuniary interests are affected by the sale. The question therefore, reduces itself to this, viz., whether a person who has obtained an attachment before judgment but has not got a decree in his suit, is a person whose pecuniary interests are affected by the rent sale. There cannot be any doubt on the authorities that a person who attaches the property put up at a rent sale, for the purpose of enforcing his decree, is a person whose pecuniary interests are affected by the sale and he will have the undoubted right to make the application under S. 174.

I am also of opinion that a person who has attached before judgment the property subsequently put up at a rent sale, and who before his application under S. 174, has obtained a decree in his suit is also a person whose pecuniary interests are affected by the rent sale. My reason is this that in accordance with the provisions of O. 38, R. 11, such a person has not to apply for re-attachment of the property which has already been attached before judgment. As soon as he gets a decree in the suit the attachment before judgment has the effect in the eye of law of an attachment in execution of the decree. The cases of 51 Cal 495 (1) and 38 C W N 172 (2) are of the latter type. The facts as reported in the judgments appear to be that the person who made an application under O. 21, R. 90, was a person who had obtained attachment before judgment in his suit but had before the application, obtained a decree. Those cases are, therefore, distinguishable. The case before me is governed by the judgment pronounced by a Division Bench of this Court in the case of 17 C W N 80 (3) and a decision of a single Judge in the case of 42 C L J 37 (4). In both these cases the person

who applied to set aside the sale under O. 21, R. 90, was a person who had simply attached before judgment the property, the sale of which was sought to be set aside, but had not on the date of the application obtained a decree in his suits. In the first mentioned case Mookerjee, J., points out the distinction between an attachment before judgment and an attachment in execution of a decree, and this distinction is founded on the provisions of the statute itself. At p. 81 of the report he makes this observation :

As was pointed out by Woodroffe, J., in the case of 33 Cal 639 (5) the object of an attachment before judgment is simply to safeguard the property, so as to enable the plaintiff to realize the amount of his decree if he should get one substantially, the same view was taken in the case of 38 Cal 448 (6) where the distinction between the two kinds, of attachments, namely of attachment before judgment and attachment in execution, was explained, and it was pointed out that the objects for which the two kinds of attachments are made are entirely different. An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step taken merely for the purpose of preventing the debtor from denying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after decree, on the other hand, is an attachment made for the immediate purpose of carrying the decree into execution, and it presupposes an application on the part of the decree-holder to have his decree executed. The position of a person who has obtained an attachment before judgment and has not yet obtained a judgment, is that he has a chance of obtaining a judgment for the satisfaction whereof he is entitled to proceed against the property given to the Court by way of security. He has undoubtedly no present interest which is affected by the sale.

As I read this judgment I find that the principle is this : When an attachment is effected in execution of a decree, that attachment is effected with the immediate object of getting satisfaction, that is to say, the attaching creditor is a person pecuniarily interested in the attached property which is to be the means for getting the money which the decree directed the judgment-debtor to pay. Whereas in a case of attachment before judgment he has not got any existing pecuniary interest, the object of that attachment being merely to prevent the judgment-debtor from harassing him further if, and only if, he obtains a decree. On this principle I hold, apart from the

1. Dhirendra Nath Roy v. Kamini Kumar Pal, 1924 Cal 786=84 I C 119=51 Cal 495.

2. Gopinath Harishchandra v. Kukari Protap Chandra Saha, 1934 Cal 477=152 I C 219=38 C W N 172.

3. Jogendra Nath Chatterji v. Monmatha Nath Ghose, (1913) 15 I C 658=17 C W N 80.

4. Badian Rahaman v. Saroda Kanta Dutt, 1925 Cal 1108=89 I C 688=42 C L J 37.

5. Sewdut Roy v. Sree Canto Maity, (1906) 33 Cal 639=10 C W N 634.

6. Basiram Malo v. Kattyani Debi, (1911) 38 Cal 448=10 I C 305=15 C W N 795.

question that the decision in the case of 17 C W N 80 (3) is binding on me, that a correct view has been taken of the legal position of the petitioners before me, by the Courts below. I therefore, discharge this Rule, but in the circumstances, I make no order for costs.

R.M./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 28

GUHA AND BARTLEY, JJ.

Jagadiswari Debi and others—Defendants—Appellants.

v.

Tinkari Bibi and others—Respondents.

Appeal No. 1667 of 1932, Decided on 22nd January 1935, against Appellate decree of Addl. Dist. Judge, Dinajpur, D/- 25th April 1932.

Civil P. C. (1908), S. 149, O. 33, R. 2—Application for leave to sue as pauper containing all particulars required in plaint is plaint—Refusal by Court to grant permission to sue as pauper does not amount to rejection of plaint—Court can under S. 149, extend time for payment of court-fees on plaint.

A document mentioned as an application for permission to sue as pauper in O. 33, R. 2, which contains all the particulars that the law requires to be given in a plaint and in addition a prayer that the plaintiff might be allowed to sue as a pauper is a plaint required to be filed in a suit and the refusal by the Court to grant the prayer of the plaintiff to sue as a pauper and the termination of the proceeding in the matter of granting or refusing leave to sue as a pauper, does not amount to rejection of plaint. The plaint still continues to be before the Court and it is a document on which proper court-fees had not been made by virtue of the refusal of the prayer of the plaintiff to sue as a pauper, and the Court can under S. 149 extend time for the payment of court-fees on the plaint: 6 I A 126 and 9 Pat 439, Foll.; 24 Cal 889; 20 Bom 508; 9 Bom L R 204; 18 I C 518 and 1933 Nag 237, not Foll. [P 29 C 1]

Krishna Kamal Moitra—for Appellant.

Girija Prasanna Sanyal, Sourindra Narayan Ghose and Bankim Chandra Ray—for Respondents.

Judgment.—This is an appeal by some of the defendants in a suit brought by the plaintiffs for recovery of joint possession to the extent of a seven-annas share in the lands described in the plaint, on declaration of their title. The suit as instituted was necessitated by an order passed against the plaintiffs under O. 21, R. 100, Civil P. C. It appears that there was an application made by the plaintiffs to the Court for permission to sue as paupers, the application was

made on 7th June 1926, within the period of limitation prescribed for the institution of a suit of the description contemplated by Art. 11-A, Sch. 1, of the Indian Limitation; it contained all the materials necessary for a plaint, and the application was in accordance with the rules prescribed for presentation of an application for leave to sue as a pauper. The application for leave to sue as pauper was refused on 30th January 1928, and on 8th February 1928, time was allowed by the Court for payment of court-fees payable on the plaint which was considered by the Court to have been filed on 7th June 1926. The plaint was subsequently registered by order of the Court, on payment of court-fees as directed on 4th April 1928.

The suit as registered on payment of court-fees was resisted by the contesting defendants, the appellants in this Court, on the ground of limitation; it was pleaded in defence that the suit was barred by one year's limitation from the date of disposal of the claim made by the plaintiffs under O. 21, R. 100, Civil P. C. There was another ground on which the suit was contested by the defendants; it was on this ground that the plaintiffs had no title to the lands in suit inasmuch as the same had been completely extinguished by a sale in execution of a decree for rent in respect of a tenancy which was fully represented by the defendants in the suit for rent. The Courts below negatived both the defences raised by the contesting defendants and agreed in passing a decree in favour of the plaintiffs as prayed by them in the suit.

The question whether the title of the plaintiffs had passed by the sale in execution of the rent decree, is concluded by the findings concurrently arrived at by the Courts below and cannot be allowed to be agitated in this appeal. The plaintiffs on the findings on evidence come to by the lower Courts were entitled to a decree as claimed by them in the suit if their claim was not barred by limitation.

The decision of the Courts below on the question of limitation was challenged in this appeal on the ground that the plaintiffs' suit should be regarded as having been instituted on the date on which court-fees were paid, and not on the date on which the application to sue as pauper was filed; it was argued that

the application for leave to sue as a pauper having been rejected on 30th January 1928, and the proceedings in that connection having terminated on that date, there was no case pending before the Court and the Court had no power under S. 149, Civil P. C., to grant any time or extend the time for payment of court-fees on the plaint.

In our judgment, the position must be recognized as settled by the pronouncement of their Lordships of the Judicial Committee of the Privy Council in the case of 6 I A 126 (1), that the document mentioned as an application for permission to sue as a pauper in O. 33, R. 2, Civil P. C., which contains all the particulars that the law requires to be given in a plaint and in addition a prayer that the plaintiff might be allowed to sue as a pauper, is a plaint required to be filed in a suit, and the refusal by the Court to grant the prayer of the plaintiff to sue as a pauper, and termination of the proceedings in the matter of granting or refusing leave to sue as a pauper, does not amount to rejection of plaint, so far as the plaintiff was concerned. If the position under the law is as it must be held to be the case that the plaint was before the Court, and it was a document on which proper court-fees had not been made by virtue of a refusal of the prayer of the plaintiff to sue as a pauper, the provisions of S. 149, Civil P. C., could come to the assistance of the plaintiff. The view taken by the Patna High Court in the case of 9 Pat 439 (2), which follows closely upon, and gives effect to the pronouncement of the Judicial Committee in 6 I A 126 (1), referred to above, is in our judgment, the correct view of the law, applicable to the facts of the case before us, so far as the question of limitation involved in it goes; and we have no hesitation in agreeing with the same.

In the course of argument reference was made to decisions in cases mentioned below in support of the appeal: 24 Cal 889 (3); 20 Bom 508 (4); 9 Bom L R

204 (5); 18 I C 518 (6); 1933 Nag 237 (7). Some of these decisions, it would appear, were given before the provisions contained in S. 149, Civil P. C., were enacted; in others, not only the provisions of S. 149 of the Code, but also the pronouncement of the Judicial Committee in 6 I A 126 (1), case referred to above, which has a direct bearing on the question of limitation raised in the case before us, were not kept in view.

In the result, the appeal is dismissed with costs. The decision and decrees of the Courts below are affirmed.

R.M./R K.

Appeal dismissed.

5. Keshavlal Hiralal v. Mayabhai Prem Chand, (1907) 9 Bom L R 204.

6. Mg Wa Tha v. Abdul Gani Osman, (1913) 18 I C 518.

7. Protap Chand v. Atmaram, 1933 Nag 237=147 I C 732.

A. I. R. 1936 Calcutta 29

R. C. MITTER, J.

Ram Charan Chakraborty—Plaintiff—Appellant.

v.

Raj Kumar Chakraborty — Defendant—Respondent.

Appeal No. 1886 of 1932, Decided on 6th February 1935, from appellate decree of Sub-Judge, Khulna, D/- 30th April 1932.

Landlord and tenant — Rent — Suit for—Kabuliyat executed by tenant providing that tenant is to deliver certain quantity of paddy every year—In case of default landlord is entitled to realize amicably or by suit 'ticca' sum of Rs. 20 per year with interest—Default by tenant—Landlord is entitled to Rs. 20 per year with interest and not to value of paddy at market rate at date of suit.

Where a kabuliyat executed by a tenant states that it is a kabuliyat for land let out at a produce rent and provides that the tenant will have to deliver certain quantity of paddy every year and that in case of failure to deliver the paddy, the landlord would be entitled to realize amicably or by suit the 'ticca' sum of Rs. 20 with interest, and there is no provision for what is termed 'Bari', the landlord is only entitled to payment in default of delivery of paddy to Rs. 20 per year with interest as stipulated for in the kabuliyat and not to the value of the quantity of paddy fixed, calculated at the market rate at the date of the suit. The word 'ticca' means 'fixed in perpetuity'. [P 30 C 1]

R. N. Ray and Nagendra Kumar Dutt—for Appellant.

Srish Chandra Dutt—for Respondent.

Judgment.—This appeal is on behalf of the plaintiff and arises out of a suit for recovery of rent. The question between the parties is whether the plaintiff is en-

1. *Stuart Skinner v. William Orde*, (1878) 2 All 241=6 I A 126 (PC).

2. *Bank of Behar v. Sri Thakur Ram Chanderji*, (1929) Pat 637=118 I O 329=9 Pat 439=11 P L T 55.

3. *Auhoya Churn Dey Ray v. Bisseswari*, (1897) 24 Cal 889.

4. *Keshab Ramchandra v. Krishnarao Venkatesh*, (1896) 20 Bom 508.

titled to recover at the present market rate the value of 6 bishes of paddy or at the rate of Rs. 20 per year. The present market value of 6 bishes is Rs. 70. The Court of first instance decreed the suit at the amount claimed by the plaintiff giving the defendant a credit to the extent of Rs. 20 on account of payment. The learned Subordinate Judge on appeal has held that the plaintiff is entitled to claim only at the rate of Rs. 20 per year. The rights of the parties are governed by the terms of a registered kabuliyat dated 4th Baisakh 1295. The kabuliyat begins and ends by saying that it is a kabuliyat for lands let out at a produce rent. After stating that the tenant will have to deliver 6 bishes of paddy every year, it proceeds on to state that if the tenant fails to deliver the paddy, the landlord would be entitled to realize amicably or by suit the ticca sum of Rs. 20 with interest at the rate of Re. 1 per month. The use of the word 'ticca' gave rise to controversy between the parties. The learned Subordinate Judge relying apparently on one of the meanings given to that word by Wilson in his Glossary came to the conclusion that 'ticca' means 'fixed in perpetuity'. In this respect, he is certainly supported by Wilson and I cannot say that the interpretation of the word 'ticca' given by the learned Subordinate Judge is a wrong interpretation.

I do not however wish to rest my judgment on that point alone. According to the terms of the kabuliyat which I have quoted above, the parties themselves provided for the case where the tenant would fail to deliver the paddy. It is stated that the landlord would be entitled to realise the sum of Rs. 20 with interest at the rate of Re. 1 per month. The parties therefore contemplated that in case of non-delivery of the paddy, the landlord would be entitled to claim only the money mentioned in the kabuliyat and that with a certain rate of interest. It is significant that on non-delivery of paddy, there is no stipulation of interest being calculated in terms not of kind, that is, there is no provision for what is termed 'Bari'. In my view therefore on a fair reading of the kabuliyat the landlord is entitled to payment, in default of delivery of paddy of Rs. 20 per year with interest as stipulated for in the kabuliyat. The result is that this appeal is dismissed with costs.

R.M./R.K.

Appeal dismissed.**A. I. R. 1936 Calcutta 30**

R. C. MITTER, J.

Sasi Kanta Acharjee Bahadur and others—Defendants—Appellants.

v.

Lechoo Sheikh—Plaintiff and others—Respondents.

Appeal No. 157 of 1933, Decided on 26th March 1935, from Appellate decree of Sub-Judge, 4th Court, Mymensingh, D/- 13th September 1932.

Bengal Tenancy Act (8 of 1885), S. 146-A (3)—Rent suit—Defendants fulfilling requirements of any of four clauses in sub-S. 3, shall be taken to represent entire body of cosharers.

If the defendants in a rent suit fulfil the requirements of any of the four sub-Clauses in the Sub-S. 3 of S. 146-A they should be taken to be representing the entire body of co-sharer tenants in the tenure or the holding.

[P 31 C 1]

Jogesh Chandra Roy and Sachindra Kumur Roy—for Appellants.

Judgment.—This appeal is on behalf of defendants 1, 2 and 3 in a suit instituted by the plaintiff for a declaration that his interest is not affected by the sale in execution of a decree for rent obtained by defendants 1, 2 and 3 against one Abdul. At the said sale, defendants 1 to 3 purchased the property. It is admitted that one Sadhu Khan held a jote at a rental of Rs. 13 a year under one Krishna Sundar Bhowmik. This jote has been recorded in khatian No. 64. Defendants 1 to 3 have purchased the interest of Krishno Sundar Bhowmik. On the death of Sadhu, the jote was inherited by his widow Sowa Bibi and four sons Abdul, Ebrahim, Nasar and the plaintiff Lachoo Sheikh. In the year 1921, two kabuliats were executed in favour of the landlords one by Nasar, one of the sons of Sadhu Khan and the other by Abdul. In the kabuliat Abdul stated that he was executing the kabuliat on behalf of himself, his mother Sowa Bibi and his brothers, the plaintiff and Ebrahim. In the year 1930, defendants 1 to 3 sued for rent. They made Abdul a defendant but the plaintiff was not made a defendant. Defendants 1 to 3 obtained a decree and in execution of that decree have purchased the property. The plaintiff comes to Court on the allegation that that was not a rent decree at all inasmuch as he had not been made a party defendant. The answer of defendants 1 to 3 is of a two-fold char-

acter. Firstly, they stated that Abdul did in fact represent the tenancy with them inasmuch as he represented his other co-sharers in executing the kabuliati in the year 1921. Secondly, they say that in any event, the suit was a properly constituted suit and the decree obtained therein by them was a rent decree having regard to the provisions of S. 146-A, Ben. Ten. Act. So far as the first point is concerned, the Court of appeal below has recorded a finding that in executing the kabuliati in the year 1921, Abdul did not represent his other co-sharers.

On the second ground, namely, as to whether the suit of the year 1930 had been framed in accordance with the provisions of S. 146 A, Ben. Ten. Act, the learned Subordinate Judge construes the section and holds that the four clauses of sub-S. 3 of S. 146-A must be taken together and they cannot be taken in a disjunctive way. For the purpose of supporting his conclusion, he noticed the word 'and' before Cl. 4, of the said sub-section. Sub-S. 2 of S. 146-A provides that notwithstanding anything contained elsewhere either in the Bengal Tenancy Act or in any other law, a decree for arrears of rent of a tenure or holding and a sale in execution of such decree shall be valid against all co-tenants whether they have been made parties defendants to the suit or not and against the holding in the manner provided in Ch. 14 if the defendants to the suit represented the entire body of co-sharer tenants in the tenure or holding for the rent for which the suit is brought. Then sub-S. 3 enumerates the circumstances under which the entire body of co-sharer tenants may be deemed to be represented by the defendants in a suit for recovery of rent. Four circumstances are noticed in the sub-section each being the subject-matter of a separate clause. A reading of the clauses would show that if the defendants in a rent suit fulfil the requirements of any of these four sub-clauses they would be taken to be representing the entire body of co-sharer tenants in the tenure or holding. This is the construction which I put upon this sub-section but inasmuch as the learned Subordinate Judge had put a different construction upon the said sub-section he did not record necessary findings. But as my construction of the section does not agree with the construction put by the learned

Subordinate Judge, I am of opinion that the case cannot be disposed of without recording proper findings on the materials on the record. If the learned Subordinate Judge finds that Abdul came within any of the clauses of sub-S. 3, he would hold that the holding had passed to defendants 1 to 3 in execution of the decree for arrears of rent and would dismiss the plaintiff's suit. If he finds on the materials on the record that Abdul did not fulfil any of the conditions stated in any of these four clauses, he would give the necessary declarations in favour of the plaintiff. But in making the declarations he would specify the interest which the plaintiff has in the tenure.

The result is that this appeal is allowed. The decree of the learned Subordinate Judge is set aside and the case is remanded to the lower appellate Court for being dealt with in accordance with the directions given above. Costs will abide the result.

R.M./R.K.

Case remanded.

A. I. R. 1936 Calcutta 31

DERBYSHIRE, C. J. AND MUKERJI, J.

Amina Bibi—Defendant — Appellant.
v.

Akshoy Kumar Sen—Plaintiff—Respondent.

Appeal No. 130 of 1930, Decided on 18th January 1935, against original decree of Sub-Judge, 2nd Court, 24-Parganas, D/- 26th April 1930.

(a) Civil P. C. (1908), O. 41, R. 27—Appellate Court under R. 27 must require additional evidence to be produced—R. 27, does not enable it to receive additional evidence.

O. 41, R. 27, merely enjoins that the appellate would require the additional evidence to be produced to enable it to pronounce judgment.

[P 32 C 1]

Where an appellant applies for reception of certain document at the stage of appeal, O. 41, R. 27, does not enable the appellate Court to receive the document as additional evidence even though it finds that notwithstanding the exercise of due diligence on his part, the documents were not within the appellant's knowledge: 31 Bom 381 (P C) and 1931 P C 143, Rel. on.

[P 32 C 1]

(b) Adverse Possession—Acquisition of title—Clear and definite evidence as to different points of time is necessary.

Where a question of acquisition of title by adverse possession has to be determined a clear, full and definite evidence relating to the different points of time should be required.

[P 32 C 2]

Sarat Chandra Bose, Apurba Charan Mukherji and Durga Charan Roy Chowdhury—for Appellant.

Bijan Kumar Mukherji and Manilal Bhattacharji—for Respondent.

Mukerji, J.—In this appeal which has been pressed only as regards item 1 of property namely plot No. 1 of the schedule to the plaint the substantial question in controversy, such as it was before the Court below, was whether that property was originally acquired by one Ijjatannessa Bibi or had belonged previously to her father Nasirulla. By reason of some documents which the appellant has discovered during the pendency of the appeal the question has been placed before us for our consideration in a somewhat altered form namely whether it had not belonged to Ijjatannessa Bibi's mother who is said to have been one Mariam Bibi. The appellant has applied for the reception of the said documents as evidence at this stage. O. 41, R. 27, of the Code as explained by the decisions of the Judicial Committee in the cases of 34 I A 115 (1) and 58 I A 254 (2) would not enable us to receive these documents as additional evidence, even though we may find that notwithstanding the exercise of due diligence on her part the documents were not within her knowledge, which is the only ground on which the appellant takes her stand for her application—such a condition legitimately forming a ground for an application for review. The rule so far as it is pertinent here, enjoins that the appellate Court would require such evidence to be produced to enable it to pronounce judgment. The application such as it is, namely, an application by the appellant for receiving additional evidence must accordingly be rejected.

We have heard the appeal on the materials that are on the record. The earliest document relating to the property that we have before us is the kabuliati of Ijjatannessa dated 1852 (Ex. 1). That document according to plaint was the foundation of her title. We find however that when on a false allegation that Ijjatannessa had died, her son Fazlur Rahman applied for a Redemption Certificate in 1889, a patta dated 4th February 1873,

in favour of Ijjatannessa, in connexion with this very property was filed by him. There was then a proceeding as the result of which upon a compromise between the mother and the son the Redemption Certificate (Ex. 12) was issued in favour of Fazlur Rahman. The importance of the aforesaid facts seems to have been lost sight of at the trial; neither the parties nor the Court having referred to them at any stage of the trial. Before any decision can be pronounced with confidence, it is, in our opinion, necessary that there should be a further investigation into these facts, the parties being allowed to adduce all such evidence as they may and as would bear upon the history of the holding up to the date of the said Redemption Certificate. It is only fair to refer to another aspect of the case to which the plaintiff-respondent has referred and which would arise for consideration in case it be held that the original acquisition of Ijjatannessa on which the plaintiff has rested his title is either negatived or not established. It has been argued on his behalf that in that event there are enough findings of fact in the judgment appealed from on which it may be held that Ijjatannessa and her descendants had acquired a good and indefeasible title by adverse possession. The findings, such as they are, are in respect of facts which would be sufficient to indicate that she and her descendants were the sole owners. But when a question of acquisition of title by adverse possession has to be determined much clearer, fuller and more definite evidence relating to the different points of time have to be brought in. The evidence, such as it is, as bearing on the question of title by adverse possession, is in such a state that no definite opinion, one way or the other, can be pronounced. The parties should be allowed to adduce such evidence on this point also as they may desire to do.

We therefore set aside the decree appealed from and send the case back to the Court below to hold a further trial, allowing the parties to adduce further evidence on the two points noticed above. The appellant has not pressed her appeal in so far as it relates to Plot No. 2 of the schedule to the plaint. The appeal as regards that plot will stand dismissed. The appellant in our judgment was primarily to blame for the insufficiency of

1 Kessowji Issur v. G. I. P. Ry. (1907) 31 Bom 381=34 I A 115 (P C).

2 Parsotam v. Lal Iskan, 1931 P C 143=132 I C 721=55 I A 254 10 Pat 654 (P C).

evidence on the record and we accordingly order that she shall pay the costs of this appeal to the respondent. Let the additional papers which are now sought to be filed be sent to the lower Court along with the record of this case.

Derbyshire, C. J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 33

GUHA AND BARTLEY, JJ.

Emperor

v.

Bengal Salt Co. Ltd. and others

Government Appeal No. 5 of 1935, Decided on 25th November 1935.

Companies Act (1913), Ss. 92, 5 and 93—Prospectus filed in English before Registrar—Subsequent prospectus issued in Bengali without being filed before Registrar—Prospectus found not to contain certain particulars required by S. 93 and not to be verbatim translation of English prospectus—Complaint by Registrar under S. 92 (e)—Accused held liable to be convicted under S. 92 (5)—Question involved being of importance High Court held could not refuse to interfere.

R filed a prospectus fulfilling all requirements of law in the office of the Registrar, Joint Stock Companies, and subsequently issued a prospectus in Bengali. It was found that the prospectus in Bengali did not contain certain particulars required by S. 93, Companies Act, and was not a verbatim translation of the English prospectus. The Registrar filed a complaint under S. 92 (5) on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate holding the offence to be purely technical and omission not culpable acquitted *R* :

Held: that *R* was liable to be convicted under S. 92 (5), Companies Act. That the proceedings were initiated by the Registrar and not a private person and as the question involved was one of great importance in view of the scope of the Act and of necessity in the interest of the community of the strictest observance of its provision, the High Court could not refuse to interfere. [P 33 C 1, 2]

Khundkar—for the Crown.

S. C. Taluqdar, Manindra K. Bose, Mahendra N. Mitra and Jitendra Kumar Nag—for Respondents.

Bartley, J.—This is an appeal by the Legal Remembrancer, Bengal, against the acquittal of the respondents on a charge under S. 92 (5), Companies Act.

The facts are that the respondents filed a prospectus in English in the office of the Registrar, Joint Stock Companies, on 12th July 1934. This prospectus

fulfilled all the requirements of law. Subsequently they issued a prospectus in Bengali, substantially identical with the English Prospectus, but which did not contain certain particulars required by S. 93 of the Act. A copy of this document was forwarded by a private person, to whom it had been sent, to the Registrar, who thereupon filed a complaint under S. 92 (5) of the Act before the Chief Presidency Magistrate on the ground that the Bengali prospectus had been issued without having been filed before him. The learned Magistrate held that in effect the Bengali copy had been filed, that the offence was purely technical and that the omission was not culpable. He acquitted the accused.

We are of opinion that the view taken by the learned Magistrate was wrong. What was filed before the Registrar was a prospectus in English. The prospectus on which this prosecution is based was in Bengali and was not a verbatim translation of the English document. It did not in fact contain certain particulars specified in the English prospectus and required by law under S. 93 of the Act to be included in every prospectus issued on behalf of a company. The issue of such a document was clearly in contravention of S. 92 of the Act.

It was urged before us that this is not a case in which the High Court would interfere with an acquittal, in that the proceedings were initiated by a private individual.

This of course is not strictly true, as the complaint was made by the Registrar though the information reached him from a person to whom the prospectus was sent. Moreover the question involved in this case is one of great importance in view of the scope of the Act under consideration and of the necessity, in the interests of the community, of the strictest observance of its provisions. We therefore consider that we ought not to give effect to any such argument or refuse to interfere when, in our opinion, there has been a contravention of the law. We must therefore set aside the order of acquittal and direct the conviction of the respondents under S. 92 (5), Companies Act.

We do not however think it necessary to impose any further penalty on the respondents. The offence was undoubtedly technical in that a prospectus had

been filed and that the Bengali prospectus issued was, except for the omission of certain particulars, a translation thereof. The respondents are accordingly warned and discharged.

Guha, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 34

R. C. MITTER, J.

Mahendra Narayan Roy Chaudhury and others—Appellants.

v.

Dakshina Ranjan Roy Chaudhury and others—Respondents.

Appeal No. 2417 of 1932, Decided on 19th March 1935, from appellate decree of Sub-Judge, 2nd Court, Faridpur, D/- 31st August 1932.

(a) Hindu Law — Succession—Stridhan — Female inheriting stridhan does not get absolute interest in it.

! If a female inherits stridhan property, she does not get an absolute interest in it.

[P 35 C 1]

(b) Adverse Possession—Assertion of right —Assertion of right made during life-time of female holder holding life estate is of no avail as against reversioners.

So long as a female holding a life estate in certain property is alive, the reversioners who are entitled to succeed to the property have no right to get possession of it, and any assertion of right made during the lifetime of the female holder is of no avail as against the reversioners whose interest accrues on the death of the female.

[P 36 C 1]

(c) Adverse Possession—Cosharer in possession of whole joint property—His possession is not adverse in absence of assertion of hostile title by him to knowledge of co-sharers.

If a cosharer is in possession of the whole of the joint property, the possession would ordinarily be referred to a lawful title. It would not be adverse against his co-sharer, unless there be an assertion of hostile title by him to the knowledge of his cosharers: 1918 P C 1, Rel. on.

[P 36 C 2]

Naresh Chandra Sen Gupta and Bama Prosanna Sen Gupta—for Appellants.

Gopal Chandra Das and Navadwip Ch. Saha—for Respondents.

Judgment.—This appeal is on behalf of defendants in a suit instituted by the plaintiffs for declaration of title to a certain property and for recovery of possession. The Court of first instance granted the plaintiffs a decree for eight annas share and dismissed their claim with regard to the remaining portion of the property. The plaintiffs and the defendants being both dissatisfied with the

decree passed by the trial Court preferred appeals which were heard together by the Subordinate Judge, Second Court, at Faridpore. The learned Subordinate Judge dismissed the defendants' appeal but allowed the plaintiff's appeal. A decree has accordingly been passed which is entirely in favour of the plaintiffs. The defendants have preferred this appeal against the decree made by the Subordinate Judge, second Court, Faridpore. To follow the controversies between the parties the following facts have to be stated. The property which is the subject-matter of the dispute, that is to say the share of the property which is the subject-matter of the dispute, originally belonged to one Krishna Chandra Banerjee. He married twice. By his first wife he had a daughter named Digambari and by his second wife, Uma Sundari, he had another daughter of the name of Sushila. During his life-time Krishna Chandra Banerjee made a gift of half of the properties to his wife Uma Sundari who survived her husband. On the death of Krishna Chandra Banerjee. Uma Sundari was in possession of the eight annas share of the property in suit as an heir of Krishna Chandra Banerjee and the remaining eight annas on the basis of the gift made to her by her husband. She died in the year 1301 and on her death the share which had been gifted to her devolved upon her daughter Sushila. The share which belonged to Krishna Chandra Banerjee at the time of his death was inherited by both of his daughters, Digambari and Sushila. Sushila died in the year 1309 and this position is accepted that on her death the eight annas share which she inherited from her mother as her Stridhan property passed to the brother's sons of Krishna Chandra Banerjee, their names being Probhat, Jagat and Gopal. The other eight annas share of the property which devolved upon Sushila and Digambari by inheritance vested in Digambari alone by survivorship. It appears that before the death of Sushila a suit had been instituted by a third party to recover a sum of money from Sushila, Digambari and other persons and a decree was passed with Sushila appearing as one of the defendants. In 1904, this decree was put into execution and the property in suit was purchased by one Kailash Chandra. It does not appear whether the legal representatives of Su-

shila in respect of the property inherited by her from her mother as Stridhan were represented in the execution proceedings or not.

If they were represented in the execution proceedings then the effect of the sale would be to pass only the life interest of Sushila, because it is well established that if a female inherits a Stridhan property she does not get an absolute interest in it. At the date of the sale Sushila was dead and therefore the purchaser Kailash did not acquire anything. That sale undoubtedly passed the 8 annas share of the estate of Krishna Chandra which ultimately devolved upon her daughter Digambari by inheritance, but inasmuch as there is no evidence that the debt in respect of which the suit was brought was a debt binding on the estate of Krishna Chandra, the 8 annas interest in the property which Digambari inherited from Krishna Chandra would no doubt pass but it would give the purchaser an interest which would last as long as Digambari would be alive. The position therefore of Kailash was that he had acquired no interest in the 8 annas of the property, that 8 annas being the subject-matter of the gift of Krishna Chandra to his wife Uma Sundari, and had acquired the other 8 annas share in the property but had only a limited interest in it, namely an interest, which, as I have stated above, would last for the life-time of Digambari. In the year 1313 Kailash sold whatever he had purchased to Digambari. It may be that Kailash was the benamidar of Digambari. But whether he was a benamidar or not the position is not in the least altered. Digambari died in the year 1332 and on her death the 8 annas share of the property which belonged to Krishna Chandra Banerjee and devolved by inheritance on Digambari passed to the sons of Jagat and Probhat who were then the reversioners of Krishna Chandra Banerjee.

The plaintiffs have purchased from these reversionary heirs. With regard to the other 8 annas, the subject-matter of the gift, Digambari remained in possession till her death. In the year 1321 there was an Ekrarnama with Digambari as the first party and Probhat, Jagat and Gopal as the second parties. In the Ekrarnama it is recited that Krishna Chandra Banerjee had made a

gift of 36 items of property. After the settlement record had been finally published one of the items had been amalgamated with others. Therefore the position was that there were really 35 items of property which were in existence at the time of this Ekrarnama. The Ekrarnama recites that Probhat, Jagat and Gopal had instituted a certain suit against some third parties. As a result of the proceedings in that suit they apprehended that they would lose by lapse of time the interest which they got in the said 35 items of property on the death of Sushila. Then follow many clauses in the deed. In Cl. Ka of the deed it is recited that rights of the second parties in all the 35 items of property which were the subject-matter of the gift would remain intact and their rights in the property described in the schedule of that document would not be in any way affected because they were left in the possession of Digambari. The schedule to the document comprises 27 items of property and does not mention the property which is in dispute now. In Cl. Ja it is stated that in respect of these 27 items of property Digambari would be in possession as a licensee and from out of the income thereof she would maintain the Dev Sheva of Krishna Chandra Banerjee. Then it is stated that seven items of property are in possession of strangers and the second parties would recover the possession of the same. With regard to the property in suit it is simply stated that it has been sold.

No mention has been made as to who is the purchaser and who is in possession of that particular item of the property. It appears that in the year 1332 shortly before her death Digambari made a gift of the property in suit to two persons, namely Promoda and Romesh who in their turn have sold it to the defendants in 1332. So far as the title of the plaintiffs is concerned there cannot be any dispute with regard to half share of the property which Digambari inherited from her father; they are the reversioners. With regard to the other half which Krishna Chandra Banerjee made a gift of in favour of Uma Sundari their fathers became the owners on the death of Sushila and the present plaintiffs who are the sons as I have stated above, of Jagat, Probhat and Gopal have inherited the same from their father. Dr. Sen Gupta

appearing on behalf of the defendants-appellants contends that although the title may have devolved upon the plaintiffs in the manner stated above their rights to the properties have been extinguished by adverse possession on the part of Digambari. The lower appellate Court has repelled that contention. Dr. Sen Gupta for the purpose of establishing adverse possession on the part of Digambari has relied upon the Ekrarnama of 1321. Mr. Das for the purpose of repelling that contention has also relied upon the same document. It is therefore necessary to consider the effect of that document, because on its effect the question as to this eight annas share of the property in suit would depend.

So far as the 8 annas share of the property which Digambari inherited from her father is concerned there cannot be any question of adverse possession. The sale of the year 1904 only passed to Kailash, as I have stated above, an interest which would last for the life-time of Digambari. So long as Digambari was alive the present plaintiffs, who became entitled to the properties as reversioners only on the death of Digambari, would have no right to get possession and therefore if Kailash and any transferee from Kailash made any assertion that he had a higher right during the life-time of Digambari that assertion would be of no avail as against plaintiffs whose right to get possession accrued only in 1332 on the death of Digambari. On this principle I hold that with regard to that share the claim of the defendants founded on adverse possession must fail. With regard to the other 8 annas share, the subject-matter of the gift, the position stands in this way. Sushila died in the year 1309 and on her death the plaintiffs' predecessors Jagat, Probhat and Gopal became entitled to possession. If they had been kept out of possession for 12 years certainly their interest in that share would have been extinguished. The further question is whether in the circumstances of this case that share has been extinguished. By the sale of the year 1904 at which Kailash purchased, Kailash became a rightful owner to the extent of half of the property, namely the share which vested in Digambari by inheritance. The other 8 annas share in the property did not pass. When Digambari

took a conveyance from Kailash she stepped into the shoes of Kailash. The position therefore of Digambari from the year 1313 was that she was a co-sharer along with Jagat, Probhat and Gopal. In 1313 there had not been a prescription for a period of 12 years. Their title was still there. It had not been and could not have been extinguished by time because this is only four years from the death of Sushila. It may be assumed that Digambari was solely in possession of the property in suit but she was a co-sharer. She had the right to remain in possession because undoubtedly she was the owner of 8 annas of the property. The question therefore is whether her possession became adverse from the year 1313 or the possession of Kailash became adverse from the year 1904. It is an undoubted proposition of law that if a co-sharer is in possession of the whole of the joint property her possession ordinarily would be referred to a lawful title. It would not be adverse against her co-sharer unless there be an assertion of a hostile title by him to the knowledge of his co-sharers.

This principle has been well settled and it is not necessary to cite any case law on the point. The matter has been fully discussed and settled by the decisions of their Lordships of the Judicial Committee in the case of 28 C L J 437 (1). The question therefore is did Digambari assert a hostile title and that to the knowledge of her co-sharers, Probhat, Jagat and Gopal. Dr. Sen Gupta contends that there was such an assertion in the Ekrarnama of the year 1321. Mr. Das says that there is no assertion therein at all but the Ekrarnama goes further and admits the possession of Digambari as a possession of the licensee in respect of all the properties which were the subject-matters of the gift. I cannot on a fair reading of the Ekrarnama subscribe to the last contention of Mr. Das. Digambari admits that she is in possession as a licensee but her admission is expressly limited to 27 items of property described in the schedule. That in my judgment is the effect of Cls. Ka and Ja of that deed. But I do agree with the other contentions of Mr. Das that there is no assertion of a hostile title by Digambari in respect of the property in suit. In

1. *Hadit Singh v. Gurmukh Singh*, 1918 P C 1=47 I C 626=64 P R 1918=28 C L J 437 (P C).

Cl. Ja of the document there is only a recital of the fact that the property in suit has been sold. The document is silent as to who had purchased the property or who was enjoying the property as owner. Even the facts as to who was in possession of the property in suit in the year 1321 is not mentioned in the document. There is no assertion in the document that Digambari was holding possession of the same, much less she was holding possession of the same in her capacity as the purchaser from Kailash. In Cl. Ka of the document the second parties to the same assert that their title would not in any way be affected to the properties which were the subject-matter of the gift and the first party acquiesces in that statement. This is inconsistent with the position that the lady, Digambari intended to assert her hostile and exclusive title to the property in suit.

The construction attempted to be put by Dr. Sen Gupta on Cl. Ja of the document where it was stated that property in suit had been sold would be inconsistent with the stipulation contained in Cl. Ka of the document. I accordingly hold that the learned Subordinate Judge is right in holding that the possession of Digambari was the possession of a co-sharer and there was no assertion of any hostile title by her to the property in suit. That being so Digambari did not acquire any interest in the property by adverse possession. The suit being instituted within 12 years of Digambari's death there is no answer to the plaintiffs' claim. In this view of the matter I affirm the decree passed by the Subordinate Judge and dismiss the appeal with costs. Leave to appeal under S. 15 of the Letters Patent has been asked for but is refused.

R.M./R.K. Appeal dismissed.

A. I. R. 1936 Calcutta 37

MUKERJI AND S. K. GHOSE, JJ.

Prasanna Deb Raikat—Plaintiff—Appellant.

v.

Darjeeling Himalayan Ry. Co. Ltd., and another—Defendants—Respondents.

Appeal No. 280 of 1931, Decided on 3rd April 1935, from original decree of Sub-Judge, Darjeeling, D/- 27th June 1931.

Tort—Adjacent lands—Right to support—Suit for damages on account of withdrawal

of support—Right to support must be proved to have been infringed—Infringement takes place not until damage is sustained.

If a plaintiff proves that owing to an attempted withdrawal of support there is danger or apprehension of injury he may under certain circumstances be entitled to an injunction. But if damage is claimed the right to support must be shown to have been infringed and this infringement takes place as soon as and not until damages are sustained in consequence of the withdrawal of the support. A relation as between cause and effect will have to be established before a decree for damages may be made: 1933 Rang 18 Foll.; *Humphries v. Brogden*, (1850) 12 Q B 739; *Bonomi v. Blackhouse*, (1859) 9 H L C 503; *Dalton v. Angus*, (1881) 6 A C 740 and *Trinidad Co. v. Ambard*, (1899) A C 594, *Disting.* [P 41 C 2]

S. N. Banerji, Manmatha Nath Das Gupta and Apurba Charan Mukherjee—for Appellant.

Bagram, Ambicapada Chowdhury, S. C. Basak and Bijan Kumar Mukherji—for Respondents.

S. K. Ghose, J.—This appeal arises out of a suit brought by the plaintiff against the Darjeeling Himalayan Railway Company as the defendant 1 on the following allegations. The plaintiff is the owner of certain house properties in Darjeeling situated above the cart road and comprising what is called the Wilk's Hall Estate which includes Margaret Villa. The latter property stands on grounds at a distance of 453 feet above the railway lines which are on the cart road. Previous to the 8th August 1927, in spite of repeated protests and verbal notice, the defendant Railway Company wrongfully, negligently and in utter disregard of the natural safety and the acquired right of support in respect of the aforesaid Margaret Villa and its adjoining grounds, regularly and persistently carried on deep cutting on the steep hill-side for days together, till the boulders above were disturbed and lost their support and an artificial land-slip was caused on the aforesaid date with considerable damage, actual separation and subsidence of the forest lands, forming part of the said premises of the plaintiff and covering approximately an area of 40,000 square feet. This is para. 3 of the plaint. The plaintiff further alleged that his property had become unsafe and further land-slip was imminently expected. In consequence of this he brought the suit claiming damages against the defendant company for a sum of Rs. 50,000 and certain other reliefs. The defendant company in

their written statement denied the allegations against them and asserted that owing to natural causes the defendant company apprehended danger to their lines shortly before the land-slip occurred, and that they in the exercise of due diligence in order to avoid the danger took steps as far as lay in their power. They also denied that there were any protests made or notice given as alleged by the plaintiff. On the contrary the defendant company has suffered a heavy loss as the result of the land-slip. The Secretary of State for India in Council was added as defendant 2 and his written statement is on the same lines. Various issues were framed and of these issues 3, 4 and 5 are material to this appeal.

Issue 3: Did the defendant carry on any deep cutting negligently and in utter disregard of natural safety and the right of support and did the same cause the slip; and if so, are the defendants liable in any way. And what was the area of the slip? Issue 4: Has the land-slip affected the safety of the buildings "Margaret Villa" and lands adjoining the site? Has there been any damage at all? And if so to the extent of Rs. 50,000 or any sum? Are the defendants liable therefor? Issue 5: Has the plaintiff any cause of action for this suit even if there was any damage at all against the defendant company?

At the trial the case made for the plaintiff was that the cutting of the hillside by the Railway Company was started from the beginning of July 1927, whereas the defendants asserted that nothing was done until the 25th July 1927. On this point the learned Subordinate Judge found in favour of the defendants. He also found that the Railway Company had exercised great care at every step and that there were no protests of any kind on the part of the plaintiff. Then, as regards the cause of the disaster, the learned Subordinate Judge found that it was due to natural causes and not due to any action on the part of the Railway Company, but that it took place in spite of all precautions which could possibly be taken and were actually taken by the Railway Company. As regards the actual damage, the learned Judge found that no damage whatever was caused to the property of the plaintiff, except such as have been compensated for under the Land Acquisition Act. In the result the learned Subordinate Judge dismissed the suit. Hence this appeal.

It is admitted or taken as proved that the land-slip occurred on 8th August

1927 at about 10 p.m. between bridges 511 and 512 of the railway line on the cart road, the distance between these two points being 350 feet. Just above the cart road there is a strip of land called "Cart Road Reserve land" which is the property of the Railway Company. Above this is the land of the plaintiff. According to the map Ex. 2 prepared by the plaintiff the top of the land slip is about 169 feet above the railway lines. It went down to some distance below the cart road, but the evidence on this point is not definite. The area of the plaintiff's land affected by the slip is about 70 poles. The whole of this area together with 76 poles of unslipped land has been acquired by the Government since the occurrence and compensation amounting to Rs. 342-3-8 has been paid to the plaintiff.

The question raised in this appeal is comprised in issue 3 above quoted and the decision of the appeal turns upon a question of fact, namely whether the plaintiff has been able to prove that the slip was caused by the cutting of the hillside on the part of the Railway Company. As mentioned already, the Company admit that they started working from 25th July whereas it is the plaintiff's case that work was started about the beginning of July. This is deposed to by the following witnesses for the plaintiff who had occasion to see the locality before the slip actually occurred. P. W. 1, Mrs. O' Neal, has a residential house close to Margaret Villa. She deposes that she passed by that locality on 23rd July and also before that date and she saw the railway workmen digging and cutting all along the line. P. W. 2, Satya Ranjan Das Gupta says that he was in Darjeeling in July and August, that he passed by the road about 20 or 21 days before the slip, and that he saw the railway workmen cutting 200-250 feet along the place. P. W. 3, Sarat Ch. Chakravarti also deposes to the same effect. P. W. 9, Karak Lal Das is the stable superintendent of the plaintiff and he lives on the premises. He seeks to support the plaintiff's case as made in the plaint and deposes that he saw the railway men cutting the hillside on 8th July, again on 18th July, and the third time on 24th or 25th July before the slip had occurred on 8th August. He did not however write to inform his master till 8th August, vide

his letter Ex. 4 and his telegram of 9th August Ex. 6 was sent after the slip had occurred. Mr. S. K. Dutt, who was examined on commission as a witness for the plaintiff, stated that he saw some cutting going on 8 days or so before the slip, which is not inconsistent with the defendants' case. Hiralal Ghose, witness 7 for the plaintiff, states that about a month before the slip he saw the railway people shifting the railway lines as the stones were interfering with the traffic. The learned Subordinate Judge did not place any reliance on the evidence of Karak Lal Das. He is of course interested and we agree with the learned Judge in thinking that his evidence is unreliable. As regards the other witnesses, their evidence is not definite enough for the purpose of fixing a date on which the cutting of the hillside was begun. Not only as regards the date, but as regards the quantity and the nature of the work also, the evidence is very indefinite and it suffers from the fact that the witnesses were deposing long after the occurrence when they must have forgotten the details. Furthermore all this oral evidence is not supported by documentary evidence of any kind.

In addition to this the plaintiff has put in evidence the statements of certain persons who examined the place some time after the slip had occurred. One of them is Mr. K. Dutta Gupta, a District Engineer, who made enquiries with Babu Hiralal Ghose, P. W. 7, and made a report regarding the slip. Then there is Mr. Donelan who had been in the service of the railway company from 1889 to 1910 and has also acted as a Permanent Way Inspector. He deposes among other things to the composition of the soil near about the place of the occurrence and says that in his opinion the usual method to avoid a slip is to slope down the site by cutting away earth from the top by which the weight at the top is removed and strengthening the base by putting rivetment walls. Mr. S. K. Dutt also made an examination of the place after the slip. He says that he saw the place a day after the slip, but it appears from the evidence of Hiralal Ghose P. W. 7, that the examination might have been made about a month later. Generally speaking, the evidence of these witnesses as to the condition of the hillside immediately before the slip is based on

hearsay. The composition of the soil is stated to be sand mixed with boulders, which throws very little light on the question at issue and the opinion of these expert witnesses as to the cause of the slip is mere speculation. It does not go to prove that the cause must have been the work done on the hillside by the Railway Company. They did not notice springs, but it is admitted that springs do always come up to surface and might escape observation. The defendants have given evidence to show that the portion between bridges 511 and 512 was an old settlement. Their witness 5, Mr. Webber, who acted as Permanent Way Inspector at the material time, deposes that in 1926 there was a slight settlement. In July 1927 he noticed a similar settlement, and on the 26th July he sent a telegram to the Assistant Engineer, Public Works Department, vide Ex. C as follows :

Kindly sanction cutting of hillside as a large portion is coming down due to settlement which may lead to a serious block if not removed.

This evidence, which is amply corroborated by other witnesses, goes to show that by the 25th July the slip had already started. On the work being sanctioned by telegram on the 26th July this officer cut the rock which was infringing the running dimensions of the trains and removed the details. According to this officer this rock was at the Ghoom end (i. e. south) of the large rock, and it had moved forward and fallen on the road. The work went on from the 26th July, but the settlement was gradually taking place and eventually, on the 8th August at 10 p. m., the whole hillside between bridges 511 and 512 slid away to a length of 350 feet taking the cart road and the railway track with it. The witness Sarada Kanta Banerji, who is an Overseer on the Railway, confirms the aforesaid evidence of the Permanent Way Inspector. On the 25th July he noticed that the cart road between bridges 511 and 512 had sunk about 2 feet and a crack had formed and also a small land-slip came down from the hillside to the south of a big rock blocking the railway line and the cart road drain there. He engaged coolies to clear the slip from the railway track and the road drain. The nature of the work that was done in order to prevent further mishap would appear from the work memo which was prepared on the

1st August, vide Ex. M. This work comprised cutting and sloping the hillside, rock breaking and rock cutting and clearing slip.

There is no justification for drawing the inference that this work was the cause of the slip that occurred on the 8th August. Defence witness 1 Bhakat Bahadur Chattri and defence witness 2 Dhanbir, who were engaged for the work, depose substantially to the same effect. Mr. White, who was examined on commission, was the Assistant Engineer, Public Works Department, at the time and he sent the telegram sanctioning the cutting of the hillside on the 26th July. He says that from 26th July to the 8th August the hillside was sinking daily and subsequently he discovered a number of springs which fact was reported by him to the Executive Engineer vide Ex. Z (h). This letter is dated 19th December 1928, but according to the witness the date should be 19th December 1927. Counsel for the appellant has contended that this is false, but the falsity could easily have been demonstrated by calling for the correspondence referred to in the letter. For the purpose of this appeal the point is not material. Mr. Batterbery, witness 3 for the defendants, was the Resident Engineer on the railway, at the time, and he received the telegrams Exs. C and D on his arrival at Kurseong on the 29th July. On the 30th July he had occasion to examine the slip that had been reported in the telegram Ex. C. This statement is sought to be discredited by a reference to Ex. B, the travelling allowance bill of this officer. But there is nothing in that document which is inconsistent with his evidence and we are not prepared to disbelieve him. He says that between bridges 511 and 512, just south of a big upstanding rock, a small rock mixed with earth had moved down towards the track and the cart road showed a distinct crack and slight settlement. Thereupon he ordered the contractor's men to chip away the face of this small rock that was moving, as it was likely to infringe over running dimensions.

He also ordered the contractor to fill in with earth and to save the crack that had appeared on the cart road. He inspected again on the 30th July when the small rock face referred to above was being out and earth was being cleared from the drain and near the rock. This small

rock was about 15ft. x 10ft. x 5ft. On the 8th August he again went up to bridge 512 and found that the cart road had sunk much more than on the 30th July and there was still a slight movement to the south of the big rock. He noticed no sign of movement of the hillside below the cart road, but he noticed 3 or 4 springs 100-150 ft. below the road and immediately below the point where the settlement was taking place. On the morning of 9th August when he was coming up to Darjeeling he saw that a heavy slip had occurred and he would attribute the disaster to the springs below the cart road. He is positive that in July there was no work done between Ghoom and Darjeeling under the special repair estimate Therock referred to in this evidence went away with the big slip.

It appears that near about the bridge on either side of the slip area there is a jhora which is permanent and between the road and the hillside there is a drain. This however is not inconsistent with springs appearing at other places in the locality. The Railway Company, no less than the plaintiff, is interested in preventing a slip occurring at this place. The evidence shows conclusively that no cutting of the hillside took place before 25th July, that on that date a small slip occurred, and that this was the reason for the work being started on 26th July. At the trial the plaintiff sought to make a case that the company had been cutting the hillside for a month before the slip in order to remove two level-crossings between bridges 511 and 512 and to divert the railway track towards the hillside. This was denied (vide D. W. 5) and this case was given up during the argument in this Court. The evidence shows conclusively that by 25th July natural forces were already at work towards causing the land-slip. It may be that the cutting of the hillside hastened this disaster. But no such case was made by the plaintiff. The plaintiff sought to prove that the whole cause of the disaster was the cutting of the hillside, while the defendants started a counter theory that the cause was the appearance of springs. It might be both, but there is nothing to show to what extent each might have contributed to the result and no such argument on behalf of the plaintiff was advanced. Mr. Banerji for the plaintiff has contended that the cause must be

either the cutting or the springs, and that if the springs theory be given up then it must be the cutting. The expert evidence on the side of the plaintiff is all speculation. If speculation to some extent be unavoidable we may refer to the following passage in the evidence of Mr. Kerr who was the Superintending Engineer in charge :

The first thing I noticed when I got to the spot is that about 80 to 100 yards of the railway and road had slipped, that the slip had come down in practically a solid mass. It appears to have slipped down on an inclined plane. My reasons for saying this were that I noticed that the trees on the top of the mass that had come down were practically undisturbed and still vertical except round the edges of the slip. It seemed to me that the cause of the slip was that a mass of heavy and very hard rock was overlying a layer of shale and decomposed rock. The slip had been caused in the first place by water finding its way down between this large mass of hard rock and the underlying load of shale and decomposed rock. At the time of my visit the slip had practically slipped ; there was slight movement in the south corner due to an isolated boulder. The main slip, as far as I could make out, was absolutely steady.

This opinion was formed after inspection of the place on 9th August, that is, the day after the slip. This is an officer of experience and the opinion was formed apparently after a very careful observation. There is no reason why, in preference to this, the opinion of the expert witnesses on the side of the plaintiff should be accepted. The burden of proof as to the cause of the slip is upon the plaintiff and it is not discharged merely by showing that the theory of springs is untenable. As a matter of fact, we are not prepared to hold that this theory is altogether untenable merely on the ground that it was not put forward in the written statement. Apparently the officers of the defendants had not formed a definite opinion as to springs being the cause of the slip until some time after the occurrence. But, in any case, the case made by the plaintiff, that the slip was caused by the cutting of the hillside on the part of the Railway Company, is not based on any reliable evidence as to the extent of the cutting. The plaintiff however rushed to make a case of damage at Rs. 50,000 as will appear from the telegram Ex. 10 and the letter Ex. 8, both of 10th August 1927, and the demand made on the Railway Company by the letter Ex. 11 of 11th August 1927.

In the course of his argument the learned counsel for the appellant aban-

doned the case of negligence which was sought to be made at the trial. He pointed out that in any case, the defendant had dealt with the property and that he was entitled to the right to support from the adjacent or subjacent soil in respect of land in its natural state. He contended that in any case the action of the railway in dealing with the property resulted in the weakening of the support and therefore the defendants were liable even though they had acted carefully : see *Gale on Easement* Edn. 11, pp. 360 and 361. Mr. Banerji also drew our attention to the following cases : (1850), 12 Q B 739 (1), (1859), 9 H L C 503 (2), (1881), 6 A C 740 (3) and (1899) A C 594 (4). The fallacy of this argument is that Mr. Banerji has assumed that it is established that the slip was caused by the action on the part of the defendants. But this has not been established and it is this factor which distinguishes the present case from the cases cited. The more important ones amongst the aforesaid decisions have been referred to and discussed in the case of 11 Rang 47 (5) in which the law as regards the right to support has been considered. If a plaintiff proves that owing to an attempted withdrawal of support there is danger or apprehension of injury he may under certain circumstances be entitled to an injunction. But if damage is claimed the right to support must be shown to have been infringed and this infringement takes place as soon as and not until damage is sustained in consequence of the withdrawal of the support. A relation as between cause and effect will have to be established before a decree for damages may be made. This the plaintiff has failed to establish. Considering all the evidence we must agree with the trial Court in holding that the disaster was due to natural causes and that the plaintiff has not succeeded in proving that it was due to any action on the part of the defendants. In this view it does not become necessary to consider the question of

1. *Humphries v. Brogden*, (1850) 12 Q B 739=20 L J Q B 10=15 Jur 124=76 R R 402.
2. *Bonomi v. Blackhouse*, (1859) 9 H L C 503=28 L J Q B 378=5 Jur (N S) 1345.
3. *Dalton v. Angus*, (1881) 6 A C 740=50 L J Q B 689=41 L T 844=30 W R 196.
4. *Trinidad Co. v. Ambard* (1899) A C 594 = 68 L J P C 114=81 L T 132=48 W R 116.
5. *A. Minus v. E. Davey*, 1933 Rang 18=143 I C 292=11 Rang 47.

damages. The suit was rightly dismissed and the appeal must be dismissed.

As regards costs it has been contended that the costs of the Secretary of State for India in Council should be borne by the railway company at whose instance the former was made a party. Considering the circumstances, however, we think that the appeal should be dismissed with one set of costs to be divided between the two sets of defendants. The appeal must therefore stand dismissed with costs as aforesaid.

Mukerji J.—I entirely agree.

R.M./R.K. *Appeal dismissed.*

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NASIM ALI, J.

Mukaram Marwari—Plaintiff—Appellant.

v.

Mohammad Hossain — Defendant 2—Respondent.

Appeal No. 1190 of 1932, Decided on 11th January 1935, from appellate decree of Addl. Dist. Judge, Burdwan, D/- 16th February 1932.

Mortgage — Subrogation — Purchaser of equity of redemption expressly agreeing to pay prior mortgages and paying off the same is not entitled to subrogation—He merely discharges his own obligation.

If the debt is the debt of the person who paid or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation but is simply performance of his own obligation or covenant. [P 43 C 2]

Where, therefore, a purchaser of a portion of equity of redemption, retains at the time of the purchase a part of the price and expressly agrees by a covenant in the deed of purchase to discharge the prior mortgages, and thus absolves the mortgagor from the payment of the prior mortgages, taking upon himself the unconditional liability of paying of those debts, he is not entitled to claim subrogation as he merely discharges his own obligation under the covenant: *Throne v. Cann*, (1895) A C 11; *Hoare v. W. Tasker & Sons Ltd.*, (1905) 2 Ch 587; 9 Cal 961 (P C); 10 Cal 1085 (P C); 29 I A 9 (P C); 39 Cal 527 (P C); 2 C L J 288; 6 C L J 134; 11 I C 649 and 1932 P C 99, *Rel. on.*

[P 43 C 2]

Ramaprosad Mokherjee and Panchanan Choudhury—for Appellant.

Bijoy Chandra Chakravarti and Joggeswar Majumdar—for Respondent.

Judgment.—This appeal arises out of a suit on a mortgage bond which was executed by the predecessor in interest of defendant 1 in favour of the plaintiff on 6th November 1919. Defendant 2,

who contested the suit, was impleaded on the ground that he was a purchaser of a portion of the equity of redemption. His defence was that he satisfied two prior mortgages in respect of the property which he purchased and consequently he was entitled to stand in the shoes of the prior mortgagees whose claims were satisfied by him. The trial Court repelled the defence of defendant 2 and decreed the suit in full. On appeal by defendant 2 the lower appellate Court dismissed the appeal on the ground that the appeal was incompetent. A Second Appeal (S. A. 505 of 1930) was taken to this Court by defendant 2 and this Court set aside the judgment of the lower appellate Court and directed a re-hearing of the appeal according to law. Thereupon the lower appellate Court has re-heard the appeal and has allowed it in part. It has come to the conclusion that defendant 2 was entitled to get credit for Rs. 210 for satisfying the prior mortgages. Hence the present appeal by the plaintiffs.

The following points were taken by the learned Advocate in support of the appeal: (1) that defendant 2 was not entitled to subrogation, inasmuch as he satisfied the prior mortgages under a covenant, under which he was bound to discharge the prior mortgages; (2) that the payment by defendant 2, being only a payment as agent of the mortgagor, defendant 2 was not entitled to claim any subrogation; (3) that the lower appellate Court in coming to the conclusion that the intention of defendant 2 was to keep the mortgage alive did not take into consideration the fact that the previous mortgage bonds were not taken back at the time when they were alleged to have been satisfied; (4) that out of the five items of the property mortgaged by Ex E only one is included in the plaintiffs' mortgage and consequently defendant 2 who paid off Ex E was not entitled to claim the entire amount paid for the satisfaction of Ex. E by way of subrogation; (5) that the lower appellate Court has not come to any definite finding that the prior mortgages which were satisfied were for consideration; (6) that the satisfaction of the prior mortgage, Ex. E, was not a proper satisfaction, inasmuch as the money was not paid to the mortgagee but to the son-in-law of the mortgagee; and (7) that in any view of the case the lower appellate Court should not have allowed full

costs to defendant 2. As regards the first point the contention of the learned Advocate for the appellant is that defendant 2 at the time of his purchase retained a part of the price and expressly agreed by a covenant in the deed of his purchase to discharge the prior mortgages out of the same and consequently he having discharged his own obligation under the covenant was not entitled to claim subrogation. It cannot be disputed and in fact it was not disputed by the learned Advocate for the respondent that if the mortgagor, that is, the vendor of defendant 2, had himself paid off the previous mortgages out of the price, he could not claim subrogation, because in that case he would have performed his own obligation. This principle has now been expressly recognized by the legislature in the Transfer of Property Amendment Act, i. e. Act 20 of 1929. It is however contended by the learned Advocate for the respondent that the rule against subrogation of the mortgagor cannot be extended to defendant 2 who, as purchaser, satisfied the prior mortgages in order to protect his own interest. In other words the contention is that the continuance of the prior mortgages paid up by him must be presumed to be for his benefit, unless the contrary is shown and consequently his intention at the time of the satisfaction of the prior mortgages must be taken to keep them alive as a shield against any other encumbrance which might be discovered later on. Now it is well established that:

When the owner of an Estate pays charges on the Estate which he is not personally liable to pay, the question whether these charges are to be considered as extinguished and as kept alive is simply a question of intention. You may find the intention in the deed or you may find it in the circumstances attending the transaction or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot: (1895) A C 11 (1) at p. 18: see also 10 I A 62 (2), 11 I A 126 (3), 29 I A 9 (4) at p. 16, 39 I A 68 (5) at p. 81.

1. Thorne v. Cann, 1895 A C 11=64 L J Ch 1=71 L T 852.
2. Mohesh Lal v. Mohunt Bawan Das, (1883) 9 Cal 961=10 I A 62=13 C L R 221 (P C).
3. Gokuldoss Gopaldoss v. Rambux Seochand, (1884) 10 Cal 1035=11 I A 126=5 Sar 543 (P C).
4. Dinobondhu Shaw Chowdhury v. Jogmaya Dasi, (1902) 29 Cal 154=29 I A 9 (P C).
5. Syed Mahomed Ibrahim Hossein Khan v. Ambika Persad Singh, (1912) 39 Cal 527=14 I C 496=39 I A 68 (P C).

It is equally well established on authorities that:

If the debt is the debt of the person who paid it, or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation, but simply a performance of his own obligation or covenant. See Jones on Mortgages Edn. 7, Vol 2, p. 419. See also on Mortgages, Edn. 9 Vol 2, pp. 1452—1453, Story's Equity Jurisprudence, Edn. 14, Vol. 2, S. 707, (1905) 2 Ch D 587 (6) at 603, 2 C L J 288 (7) at p. 299, 6 C L J 134 (8) at p. 138 and 14 C L J 500 (9) at p. 505 and 36 C W N 4 (10).

In the present case it is clear from the deed of defendant 2's purchase that he absolved the mortgagor from the payment of the prior mortgage debts and took upon himself the unconditional liability of paying off those debts. There can be no doubt therefore that he simply performed his own obligation when he paid off the prior mortgages. Sir Dinshah Mulla in his commentary on the Transfer of Property Act has observed at p. 481 as follows:

The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or incumbrancer who discharges a prior incumbrance which he is, by contract, express or implied, bound to discharge. A person cannot claim subrogation when he simply performs his own obligation or covenant.

Referring to the decision of the Privy Council reported in 36 C W N 4 (10) referred to above, the learned author has observed as follows:

In a recent case before the Privy Council 36 C W N 4 (10) a purchaser covenanted to pay half the amount due on a mortgage and retained part of the price for the purpose; he did not pay until after the mortgagee had brought the property to sale. He then paid the whole of the decretal amount and set aside the sale. He was not entitled to subrogation as to half the mortgage debt he had covenanted to pay, nor as to the five per cent. paid to the auction purchaser. But he was subrogated as to the other half which he had not covenanted to pay.

I have already stated that defendant 2 was under an obligation under a covenant contained in the deed of his purchase to pay the prior mortgage debts. Therefore where he paid off those debts he simply discharged an obligation which was upon him under an express contract. Under these circumstances I am of opinion that

6. Hoare v. W. Tasker & Sons Ltd (1905) 2 Ch 587=74 L J Ch 643.
7. Surjiram Marwari v. Barhamdeo Persad, (1905) 2 C L J 288.
8. Bisseswar Prosad v. Lala Sarnam Singh, (1907) 6 C L J 134.
9. Satnarain Tewari v. Sheobaran Singh, (1911) 11 I C 649=14 C L J 500.
10. Jogmohan Das v. Jugal Kishore, 1932 P C 99=137 I C 475=36 C W N 4 (P C).

the first contention of the learned Advocate must prevail. In view of my conclusion on the first point it is not necessary to discuss the other points raised by the learned Advocate for the appellant in this appeal. The result therefore is that this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and the decree of the trial Court is restored. The plaintiff will be entitled to get from defendant 2 the costs incurred by him in this appeal and in S. A. 505 of 1930 in this Court as well as the costs of the lower appellate Court after remand.

Leave to appeal under S. 15 of the Letters Patent has been asked for in this case and is refused.

R.M./R.K.

Appeal allowed.

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COSTELLO AND LORT-WILLIAMS, JJ.

Dinonath—Plaintiff—Appellant.

v.

Hansraj Gupta and others — Respondents.

Appeal No. 122 of 1933, Decided on 5th July 1934.

Will—Construction—Clause in will to the effect that debts of testator were to be paid out of his estate "including charities and subscriptions promised"—Words including charities and subscriptions promised held to be void for uncertainty—Legacy thereby given held invalid—Charities and subscription held not to be debts—Parol evidence held inadmissible to prove to what charities testator had promised.

The only debts which may be proved in administration are debts at law and do not include promises made without consideration which are not binding. [P 45 C 1]

Where a general charitable intention is disclosed the legacy will not fail for want of uncertainty of object. [P 45 C 2]

Where a clause in a will was "I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised":

Held: that the words in the Cl. 1 of the will "including the charities and subscriptions promised" could not be given legal effect to and that part of the clause was void for uncertainty and legacies thereby given (if any) were invalid. [P 46 C 1]

Held further: that the charities and subscriptions referred to were not debts and could not be included in that category. [P 45 C 2]

Held also: that parol evidence was not admissible to show to what charities the testator had promised "the amounts and subscriptions" although for reasons of equity it might be admissible to establish trust: *In re, Whittaker*, 42 Ch D 119; *In re, Hetley* (1902) 2 Ch 866 and *Blackwell v. Blackwell* (1929) A C 318, *Rel. on*. [P 45 C 2]

Lort-Williams, J.—The validity or otherwise of a clause in a will is the only question for decision in this appeal.

Raghumull Khandelwal died on 5th September 1926, leaving a will dated 4th September 1926, and considerable property. Cl. 1 of the will is as follows:

I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised.

The will was type-written, but the words "including the charities and subscriptions promised" were written in ink, and initialled in the margin, apparently at the last moment, but before execution. By Cl. 14 thereof the testator bequeathed property of considerable value to trustees for the purposes of "education, hospital, orphanage, social service, widows and other religious and/or charitable purposes," to be applied as the trustees should think fit.

The executors issued advertisements to ascertain the names and the validity of the claims of parties to whom charities and subscriptions had been promised by the testator. Twenty-two claims, amounting in all to over six lacs of rupees, were made, mostly without any documentary proof. Of these alleged promises, no date was forthcoming with regard to three, two were alleged to have been made so far back as 1917, three in 1918, two in 1919, three in 1920, two in 1921, one in 1922, three in 1924, two in 1925 and one of a small amount in 1926, and less than Rs. 20,000 were alleged to have been promised since 1922. Of the total, under one lac of rupees only had been paid by the testator at the date of his death. In these circumstances, the executors decided to ask for the directions of the Court as to whether the charities and subscriptions promised, referred to in Cl. 1 of the will of Raghumull Khandelwal deceased, are valid and binding and payable out of the estate of the deceased or not.

The matter was heard by Ameer Ali, J., and the following issues were raised, inter alia: (1) Can the provisions of Cl. (1) as to "the charities and subscriptions promised" constitute such "charities and subscriptions" debts provable in the administration in the manner of legal debts although they may not be legal debts? (2) If not, are they legal debts? (4) Can the clause be construed as a legacy? (5) If so, is it a

valid legacy? (7) What is the true construction and effect of Cl. (1) of the will?

After further discussion the Judge formulated the following questions of construction: (1) What can be included in debts, the word "debts" in an ordinary direction for payment of debts by a testator so as to constitute those claims debts provable in the administration? (2) Can the testator of his volition give an extended meaning to the ordinary significance of the word "debts" in his will? (3) Can Cl. (1) constitute the promisee legatee? Can it be construed as a legacy? (4) If a legacy, is it valid or is it void for uncertainty?

It was contended on behalf of the claimants that there could be a class of debts in an extended sense, something between a debt and a legacy, and that the testator could by the terms of his will extend the class of debts. The learned Judge decided, and in my opinion correctly, against this contention, and held that the only debts which may be proved in administration are debts at law, and do not include promises made without consideration, which are not binding: 42 Ch D 119 (1). On the question of construction, he decided that Cl. 1 should be read as follows: "I direct my debts to be paid including the amounts and subscriptions promised to charities," and that the "amounts and subscriptions promised" were valid legacies, in the nature of limited charitable bequests, if and so far as they had been promised to charities, and he directed that an inquiry should be held to ascertain to whom such promises had been made, and the amounts which had been promised.

The main argument on behalf of the claimants on appeal has been based upon the maxim "*id certum est, quod certum reddi potest*," and the case of 69 E R 935 (2). This argument is based of course upon the assumption that Cl. 1 is capable of the construction put upon it by the learned Judge. Once it has been decided that the latter part of Cl. 1 means "amounts and subscriptions promised to charities," it might be possible to argue that there is no real uncertainty or ambiguity about the intended legatees, because the testator has defined them as

those to whom he has promised "amounts and subscriptions," and these and the amounts promised to each can be ascertained by inquiry, just as debts and creditors can be so ascertained. Even so, in my opinion, parol evidence could not be admitted for this purpose: In (1902) 2 Ch 866 (3), though for reasons of equity it might be admissible to establish a trust: 1929 A C 318 (4). It is true that where a general charitable intent is disclosed, the legacy will not fail for uncertainty of object. But no such general charitable intent is disclosed in Cl. 1: the testator's general charitable intentions are disclosed specifically in Cl. 14. But in my opinion the latter part of Cl. 1 is not capable of the construction put upon it by the learned Judge, and that part is void for uncertainty. It is capable of several constructions, each of which may reasonably represent what the testator really intended. In the first place, it is to be noted that the "charities and subscriptions promised" are included among debts, and are referred to in a clause directing payment of debts, and not in Cl. 14 which deals specifically with charitable bequests. This may mean that only such charities and subscriptions are referred to as are of the nature of legal debts, that is to say, promises which were made for consideration and which were legally binding upon the testator. Such for example, as periodical subscriptions payable to a club or other institution under the terms of a contract of membership, or where work has been undertaken or debt incurred at the promisor's instigation, or upon his promise to indemnify, express or implied. Or it may mean that the testator regarded his promises which only created moral obligations as being equivalent to legal debts, and wished them to be so treated by his executors.

Or the word "including" may have been intended to mean "in addition." That is to say, the charities and subscriptions promised were to be paid as legacies, in addition to the payment of debts. The latter part of the clause may refer only to amounts and subscriptions promised to charities, as thought by the learned Judge. But the testator did not say so, and if these amounts are to be regarded as lega-

1. In re, Whittaker, (1889) 42 Ch D 119.

2. In re, Sowerby, (1856) 69 E R 935=65 L T 764.

3. In re, Hetley, (1902) 2 Ch 866=71 L J Ch 769=87 L T 265.

4. Blackwell v. Blackwell, 1929 A C 318=98 L J Ch 251=45 T L R 208=140 L T 444.

cies. there seems to be no valid reason why subscriptions to institutions other than charitable should be excluded. It is almost impossible to say with certainty what the testator meant by the word "subscriptions". He may have meant only subscriptions in arrear at the time of his death, or he may have meant subscriptions which would become due in future, that is to say, he may have meant something in the nature of an endowment; because apparently some of the institutions which were brought into being as a result of his promised help could not be carried on at all, unless such help were to be continuous and permanent. Again it seems necessary to fix some limit of time during which the promises must have been made, but no indication of any such limit is given in the will. The testator cannot have intended to refer to promises which he may have made at any time during his life, perhaps many years before and long-forgotten, and if effect were to be given to such a provision, it would open the door to every kind of fraudulent claim. Yet no other limit is indicated and the Court cannot make the testator's will for him, or supply such a deficiency. It is true that of claims so far received the earliest date from no further back than 1917 if the three undated promises are disregarded, but the fact that the testator had met so few of his alleged promisees at the time of his death, seems to indicate that most of the claimants were not within his recollection or intention when he caused these words to be added at the last moment to Cl. 1 of his will.

For all these reasons I am of opinion that the words "including the charities and subscriptions promised" in Cl. 1 of the will, cannot be given legal effect to, and that this part of the clause is void for uncertainty: that the legacies thereby given (if any) are invalid, and that the charities and subscriptions referred to are not debts, and cannot be included in that category or within the direction to pay them. To this extent only the decision of the learned Judge is modified and the decree is set aside. There is of course nothing to prevent the trustees under Cl. 14, if they should think fit, from including some of these claimants among the charitable beneficiaries indicated in that clause. The appeal is allowed. Mr. H. D. Bose, leading counsel for all the

charities interested, having undertaken on their behalf not to appeal against this decision, it is ordered that the Receiver do pay out of the assets in his hands the costs of all parties appearing, including all reserved costs, upon the same terms and conditions, *mutatis mutandis*, as were imposed by the trial Court. The Advocate-General will get his costs as between attorney and client.

Costello, J.—I agree with the judgment which has been given by my brother Lord-Williams. I desire however to make one or two observations with regard to one point which was put before us in connexion with the question whether in any sense and in any circumstance the testator in using the expression "including the charities and subscriptions promised" could have had in mind obligations which might properly be comprised in the term "debts." It was suggested in the course of the argument before us in support of the validity of the latter part of Cl. (1) that there might possibly be cases where 'a subscription promised' actually constituted a debt enforceable in law and we were referred in that connexion to the decision in 14 Cal 64 (5), where it was held that a suit would lie to recover a subscription promised, if the subscriber knew that, on the faith of his and other subscriptions, an obligation would be incurred to a contractor for the purpose of erecting a building to be paid for out of the moneys subscribed. The plaintiff in that case was a Municipal Commissioner of Howrah and one of the trustees of the Howrah Town Hall Fund. It had been in contemplation to build a Town Hall in Howrah, provided the necessary funds could be raised, and upon that state of things being existent, the persons interested set to work to see what subscriptions they could obtain. When the subscription list had reached a certain point the Commissioners, including the plaintiff, entered into a contract with a contractor for the purpose of building the Town Hall, and plans of the building were submitted and passed; and as the subscription list increased the plans increased also and the original cost which was intended to be Rs. 26,000 swelled up to Rs. 40,000.

For the whole of that Rs. 40,000 the Commissioners, including the plaintiff,

5. Kedar Nath Bhattacharji v. Gorie Mahamed, (1887) 14 Cal 64.

were liable to the contractor as well as for the amount of the original contract, because the additions to the buildings were made by the authority of the Commissioners and with their sanction. The defendant, on being applied to, put down his name in the subscribers' book for Rs. 100, and the question was whether the plaintiff, as one of the persons who made himself liable under the contract to the contractor for the cost of the building, could sue, on behalf of himself and all those in the same interest with him, to recover the amount of the subscription from the defendant. Sir Comer Patheram, C. J., and Beverley, J., held that there was

a perfectly valid contract and for good consideration; it contains all the essential elements of a contract which can be enforced in law by the persons to whom the liability is incurred.

On the strength of that case, it was argued before us at any rate as regards those of the claimants under Cl. (1) of the will of Raghumull Khandelwal who had actually carried out or started building operations on the faith of promises made to them by the testator, they could undoubtedly benefit under the terms of Cl. (1), because there had been a relationship of a contractual character between them and the deceased which the law would recognise and give effect to. It was said therefore that the testator was not mistaken in thinking that some of his promises at least would be regarded as "debts" for the purpose of the administration of the estate after his death. With all possible respect to the learned Chief Justice and the other learned Judge who decided the case of 14 Cal 64 (5), just referred to, I take leave to doubt whether that case was rightly decided, particularly having regard to the decision in the English case of 54 L J Ch 811 (6) where in circumstances similar to those of the *Howrah* case (5), Pearson, J., in the course of his judgment said:

This is the first time when an attempt has been made, and made against a dead man's estate, to make it liable for a promise given by him during his lifetime to make a charitable contribution to any object. Certainly when I heard the case opened, I was struck with the novelty of the application. I asked whether there was any authority for it and I was told that there was none.

Later, the learned Judge says:

Mr. Cookson admitted very fairly at the be-

6. In re, Hudson Creed v. Henderson, (1885) 54 L J Ch 811=33 W R 819.

ginning that, unless he could show that there was a legal debt due from the estate of the testator, he had no case at all, and it was, therefore, necessary for him to shape the case so as to satisfy the Court that there was a positive legal contract entered into by the testator to pay the whole of this sum of £20,000 which rendered the estate of Mr. Hudson liable for so much of the £20,000 as was not paid by him during his lifetime.

Later in the judgment the learned Judge stated:

"I am utterly at a loss to ascertain that there was any consideration."

Again, he says:

The whole thing from beginning to end was nothing more than this: an intention of this gentleman to contribute to the fund and an intention of the Committee, so long as the different members of it remained members of that Committee, to dispose of that fund according to the purposes for which it was contributed. There really is in this matter nothing whatever in the shape of a consideration which could form a contract between the parties.

I respectfully agree with the views expressed by Pearson, J. It is to be noted that this decision was given in the month of May 1885 and the decision of Sir Comer Patheram was given only about a year later. The probability is that having regard to the length of time required for communication between England and India in the light is that English case was not brought to the attention of this Court when the *Howrah* case was being heard. I make these observations in order to emphasise what my learned brother has already said with regard to the impossibility of construing the clause under consideration as being a direction to pay debts. The terms of the clause are too vague and uncertain and obviously susceptible of such a variety of interpretations for the Court to give effect to them as constituting a gift as the nature of a legacy. I agree that this appeal must be allowed and the judgment of the learned Judge as regards his decision on Cl. (1) set aside. The question of costs is reserved till this day three weeks when this case will be set down "To be mentioned."

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 47

CUNLIFFE, J.

Gourilal Matilal and others

v.

Jitmal Mohata

S. C. Suit No. 9061 of 1933 and Suit No. 10448 of 1933, Decided on 13th August 1934.

Civil P. C. (1908), S. 115—It is not proper for counsel to go alone to Judge and impart information inimical to other side—It is also improper for Judge to pass order after hearing one side only—Case sent back for retrial as result of information so conveyed—Order held liable to be set aside.

It is not proper nor professional on the part of a counsel to go alone before a Judge or Judges in a private room and impart to them a matter very inimical to the other side. So also it is improper that the Judge, having received that information, should give advice as to what course should be taken when they have only heard one side of the question. It is an undesirable and improper course to adopt on the part of both the Counsel and the Judges.

[P 49 C 1]

Where, therefore, a Full Bench of the Court of Small Causes orders a case to be sent back for retrial, as a result of some information conveyed to them by the counsel for one party in their private room and at an ex parte interview, its order is liable to be set aside. [P 49 C 1]

Order.—This is the petition of one Jitmal Mohata, the plaintiff in a suit in the Small Cause Court, to obtain an order setting aside a direction of the Full Bench of that Court which allowed a re-opening of two cross-actions originally heard by the Sixth Judge of that Court. The learned Judge in question is no longer a Judge of the Small Cause Court. When the hearing for the new trial came on before the Full Bench he had been succeeded by another learned Judge. It is the practice of the Small Cause Court to form their Full Bench from the trial Judge and the Chief Judge of the Small Cause Court. On this occasion the Chief Judge was sitting with the successor of the trial Judge. The application was made under S. 38, Presidency Small Cause Courts Act. The matter comes before me by virtue of the provisions of the well-known S. 115, Civil P. C. It is a some-what curious and unusual combination of facts which has been detailed in the various affidavits before me now. What appears to have happened is this. The conduct of the petitioner's case in the trial Court was in the hands of a Mr. Bonnerjee. When this application for the new trial came on (and I may mention that it was launched by the respondents to this application, who were the opponents of Jitmal Mohata), a Mr. Dutt was briefed to look after their interests. On the other side, leading Mr. Bonnerjee, was another Mr. Dutt. Before the learned Judges entered the Court, when they were still in their private room, a certified copy of the schedule of the debts and

assets in insolvency of the trying Judge was placed in the hands of Mr. Dutt, the advocate for the respondent. Mr. Dutt looked through the schedule and there he found that Jitmal Mohata, the petitioner here, figured as a creditor of the trying Judge to the extent of Rs. 500. Mr. Dutt showed this schedule to the other Mr. Dutt, and I imagine that both the learned gentlemen at once appreciated that an awkward and embarrassing position had arisen. Mr. Dutt for the respondents, after some conversation with the lawyers on the other side, came to the conclusion and announced his intention of communicating this information to the learned Judges in their room.

What exactly happened there is somewhat in doubt. Mr. Dutt was called before me and gave his evidence, I thought, in quite a straightforward manner; but he did not say in chief in answer to Mr. Ghose that he told the Judges that he had informed the other Mr. Dutt of what had been found out and that he had asked him to come with him into the Judges' room and be present at the interview. Cross-examined rather severely however he stated that he told the learned Judges that he had communicated with his opponent and asked him to be present at the interview. Subsequently he admitted his recollection was not clear on the point. The line taken by the learned Judges at the end of the interview was that the Chief Judge advised Mr. Dutt to go back into Court, see his opponent and suggest to him that in the public interest and in the interest of the reputation of the judiciary they should come to an agreement privately that a new trial should take place. He did this, but the other Mr. Dutt refused to settle. In answer to me Mr. Dutt in the witness box admitted that when he obtained this information about the trial Judge he at once realised that he had an asset on his client's behalf and he had a new weapon to use in his application for a new trial. The learned Judges seem to have appreciated this too. There is no other inference to be drawn from the advice the Chief Judge gave to Mr. Dutt. It was argued also, though rather half-heartedly, that there were two other legal arguments developed before the learned Judges in addition to the insolvency point. In the upshot the Full Bench allowed the new trial, and it is

from that order, as I have already indicated, that this petition arises.

I have to make up my mind whether the Full Bench was influenced to send the case back for retrial by what was told them in their private room at this ex parte interview. With regard to this question the whole matter seems to me to turn on the manner it was presented to the Full Bench. Is it proper, is it professional, that counsel should go alone before a Judge or Judges in their private room and impart to the Judges in question a matter very inimical to the other side? And is it proper also that on having received that information the Judges in question should give advice as to what course should be taken when they had only heard one side of the question? It seems to me that there can be no doubt that this is an undesirable and improper course to adopt both, on the part of the advocate and on the part of the learned Judges. It was the Advocate's duty either not to visit the learned Judges at all and bring the matter out in open Court, or, if he was going to communicate with them privately, to insist on taking the legal advisers of the other side with him. On the other hand, it seems to me that it was no less the duty of the Judges in their private chamber to disregard the information altogether or to insist on hearing it communicated in the presence of the legal advisers of the other side, and to hear their arguments and contentions on this very controversial point as soon as possible. As I pointed out, these were not the courses which were adopted, and from my view I am convinced that the real reason why the case was sent back for retrial was because of this very striking, very harmful, piece of evidence which was presented to the Judges of the Full Bench in private.

The two other arguments which are said to be legal arguments, one based on a question of discount and the other based on a question of interest, do not seem to me, in truth and in fact, to be legal arguments at all. Those of us who have practised at the Bar know how easy it is to dress up a question of fact into a question of law, which on investigation proves to have no legal aspect whatever, or a legal aspect of such a minor character as not to deserve the dignity of the adjective. In these circumstances, I think that this order of the Full Bench of the

1936 C/7 & 8

Small Cause Court ought to be set aside, and that the judgment of the original trying Court should be restored. I may add that it has been pointed out to me that there is a possible explanation of the connection of the petitioner here with the debt to the learned Judge. Nothing has really been decided, because both sides have not been heard, and I am not going to suppose that judicial human nature is necessarily going to be unduly influenced by the fact that a Judge is engaged in trying one of his own creditor's case. It may be very undesirable that a case should be tried by a Judge where his creditor is concerned. It may very well be that such a question may be subject of an order for transfer; but once a Judge has undertaken the duty of trying a case of this nature, I am not going to presuppose that he would necessarily decide it in a different fashion. For these reasons the order I have indicated will be the order of the Court. Costs will follow the event.

R.M./R.K.

Order set aside.

A. I. R. 1936 Calcutta 49

R. C. MITTER, J.

Atul Chandra Roy and others—Plaintiffs—Appellants.

v.

Sarada Sundari Dhupi and another—Defendants—Respondents.

Appeal No. 1630 of 1932, Decided on 15th January 1935, from appellate decree of Sub-Judge, 1st Court, Bakarganj, D/- 4th April 1932.

(a) Record of Rights—Entry in—Interpretation—Land described as "Karsa Chakran"—Land constitutes service tenure and is not holding burdened with service.

Where the nature of interest in certain land is described in an entry in the record of rights by the words "Karsa Chakran," the entry means that the land constitutes a service tenure, when the character of the land is agricultural land and does not mean that it is a holding burdened with service. [P 50 C 2]

(b) Second Appeal—Question of law—Words of document misconstrued is not question of law.

Where the words of a document have been misconstrued it would not be a question of law. [P 50 C 2]

(c) Appeal—New case—Appellate Court making new and inconsistent case for party—Its judgment cannot be supported.

Where the lower appellate Court has no justification to make at the appellate stage not only a new case for the defendant, but also inconsistent with the defence as put forward in the

Srinagar.

Court of the first instance and negatived by both the lower Courts, its judgment cannot be supported. [P 50 C 2]

(d) **Landlord and Tenant—Service tenure—Land held in lieu of remuneration for service—Landlord can resume it on refusal to render service—Right is protected by S. 181, Ben. Ten. Act.**

Section 181, Ben. Ten. Act, in express terms protects the incidents of a service tenure from being affected by the provisions in the earlier portion of the Act by which occupancy and other rights are to be acquired. [P 51 C 1]

It is one of the incidents of service tenure that, where the land is held really in lieu of remuneration for service, the landlord has a right to resume it on refusal to render service. This right is specially protected by S. 181, irrespective of the fact whether the lands are agricultural or not or that the person holding it on service tenure actually cultivates it or not. [P 51 C 1, 2]

Rajendra Bhusan Bakshi—for Appellants.

Abinash Chandra Ghose—for Respondents.

Judgment.—This appeal is on behalf of the plaintiffs in a suit for recovery of possession. Plaintiffs' case is that the lands in suit were made over to the defendants to be held by them in lieu of service to be performed by them, the nature of the service being washing of the clothes of the plaintiffs. The land in suit is plot No. 504 and is admittedly the land used for the purpose of growing crops. The plaintiffs, I may state, are the proprietors of Taluk No. 900, Nos. 1 to 3 having two-thirds share therein and Nos. 4 to 7 the remaining one-third share. Of the three defendants who are washermen by caste, only defendant 1 put in a contest. Her only defence appearing from the written statement was that plot No. 504 along with Plot No. 503 constituted an ordinary tenancy held under the proprietors of Taluks Nos. 900 and 728 at a cash rent of Rs. 3 per year. Her case was not that though she and the other defendants had to render service to the landlords, the plaintiffs, the lands were only burdened with service.

Both the Courts below have held that plot No. 504 appertains to Taluk No. 900 alone and the story of the defendant that she held plots Nos. 503 and 504 at a cash rent under the proprietors of Taluks Nos. 907 and 728 is a false one. The Court of first instance held that it was really a service tenure and inasmuch as the defendants have refused to perform the service, plaintiffs are entitled to khas

possession. In that view of the matter the learned Munsiff decreed the suit. Defendant 1 preferred an appeal to the Subordinate Judge. The learned Subordinate Judge agrees with the finding of the learned Munsiff that the land in suit appertains to Taluk No. 900 alone and that the defence of defendant 1 that it along with plot No. 503 constituted an ordinary holding under the proprietors' Taluks Nos. 900 and 728 at a cash rent of Rs. 3 is a false one. But the lower appellate Court starts for defendant 1 a case which she never made in her written statement, a case of which there is no indication either in the judgment of the trial Court. The learned Subordinate Judge held that although no cash money was payable for the occupation of plot No. 504, the defendants had to render service for being allowed to remain in occupation of the same. These services he held were not the sole consideration for this occupation, that is to say, he held that the land in suit was only burdened with service. For the purpose of coming to this conclusion he relied upon an entry in the record of rights which was put in by the plaintiffs for the purpose of establishing their title to the lands in suit.

The entry shows that plot No. 504 is included in Taluk No. 900 of which the plaintiffs are the proprietors and the defendants are in possession. The nature of their interest is described by two words "Karsa Chakran". The learned Subordinate Judge interprets these words to mean a holding burdened with service. I do not agree with the interpretation put by the learned Subordinate Judge on this entry. If that entry has any meaning it means that the lands constituted a service tenure, the character of the lands being agricultural lands. I am not however basing my judgment upon the interpretation put upon the words 'Karsa Chakran'. It may be that these words may have been misconstrued, but that would not be a question of law. I do think that the judgment of the learned Subordinate Judge cannot be supported because he had no justification to make at the appellate stage for the defendants not only a new case but a case inconsistent with the defence as put forward in the Court of first instance, a defence which has been negatived both by the trial Court and by the lower appellate Court.

Mr. Ghose who appears on behalf of the respondents seeks to support the decree of the learned Subordinate Judge on a ground not mentioned in the judgment, but as it is a pure question of law I have allowed him to argue it. Mr. Ghose relying upon the case of 61 I A 93 (1) says that inasmuch as the lands which are in occupation of the defendants are agricultural lands actually cultivated by them, the defendants cannot be ejected, they having acquired occupancy rights therein although the lands were held for the purpose of rendering service. He says that although it may be that the lands were held in lieu of remuneration for the service still the character of the lands being agricultural lands and inasmuch as the defendants are themselves cultivating the same they have acquired occupancy rights. I do not see how the said decision of Sir John Wallis in 61 I A 93 (1) helps Mr. Ghose. There, the plaintiffs held the land under a service tenure. They had let out the same to certain cultivators who were the defendants. Later on, they instituted a suit for possession against the defendants. The defendants set up a plea that they had acquired occupancy rights. The Privy Council held reversing the decision of the Patna High Court that the defence was a valid defence, that is to say, although the plaintiffs held the lands as a service tenure they had let out the lands to the defendants who were agriculturists; the defendants had acquired occupancy rights and there was nothing in S. 181 to prevent the acquisition of occupancy rights by the defendants. That was a case where a question was raised between the service tenure holder and his tenants. It was not a case between the service tenure holder and his landlord.

Section 181, Ben. Ten. Act, in express terms, protects the incidents of service tenure from being affected by the provisions in the earlier portion of the Bengal Tenancy Act by which occupancy or other rights are to be acquired. It is one of the incidents of a service-tenure, that is to say, where the land is held really in lieu of remuneration for service that on refusal to render the service the landlord has a right to resume. This right is special-

ly protected by the provisions of S. 181, Ben. Ten. Act, no matter whether the lands are agricultural or not and no matter whether the defendant, the man who is holding on service tenure, actually cultivates it or not. In this view of the matter, I do hold that there is no substance in this contention. The result is that I set aside the judgment and decree of the learned Subordinate Judge and restore those of the learned Munsiff. The appeal is accordingly allowed with costs to the plaintiffs throughout.

R.M./R.K.

*Appeal allowed.***A. I. R 1936 Calcutta 51**

R. C. MITTER, J.

Krishna Chandra Rudrapal—Defendant—Appellant.

v.

Khan Mamud Bepari and others—Respondents.

Appeal No. 1495 of 1933, Decided on 13th December 1935, from appellate decree of Dist. Judge, Faridpur, D/- 12th April 1933.

(a) Vendor and Purchaser—Breach of contract—Purchaser paying money in part payment of price and not as earnest money is entitled to recover it.

Where a contract of sale is not completed, the purchaser paying certain sum in part payment of the price and not as earnest money is entitled to recover it with interest whether the breach is on his part or on the part of the seller. [P 52 C 1]

(b) Vendor and Purchaser—Contract of sale—Earnest money is guarantee for performance of contract—Breach on part of vendee—Earnest money is forfeited—Vendee contending that earnest money is not forfeited must prove that agreement prevents forfeiture.

Earnest money is a guarantee for the performance of the contract. If the transfer goes forward, it is a part of the purchase price, but if it falls through on account of the default of or breach by the vendee, it is forfeited, in the absence of a contract either express in its terms or to be inferred from the whole contract. If the purchaser says that the earnest money has not been forfeited, though the breach is on his part, he has to show that the agreement prevents the forfeiture. This he can do, if the same can be inferred from all the terms of the contract itself: 1926 P C 1; 1920 Cal 931; 1930 Bom 213; 1919 All 265 and *Palmer v. Temple* 9 A & E 508, *Rel. on.* [P 52 C 1, 2]

(c) Contract—Construction—Time essence of contract—Time is not ordinarily essence of contract—Parties can make it so by express agreement or subsequent notice.

Time is not ordinarily of the essence of the contract, but the parties can make it so by express agreement in the contract itself or sub-

1. Anup Mahto v. Mita Dasadh, 1934 P C 5=147 I C 977=13 Pat 254=61 I A 98 (P C).

sequently by giving reasonable notice to complete on a certain day or if the nature of the property intended to be sold requires it, as for instance if the contract is for the sale of life interest or a mining lease given for a fixed period of time. Time is not of the essence of contract simply because a period of completion is mentioned in the contract for sale of land.

[P 52 C 2 ; P 53 C 1]

G. C. Sen, Rajendra Bhusan Bakshi and Birendra N. Banerjee—for Appellant.

A. S. M. Akram—for Respondents.

S. C. Lahiri—for Deputy Registrar.

Judgment.—This appeal is on behalf of the defendant and arises out of a suit instituted by the plaintiffs to recover from him a sum of Rs. 475 (with interest) paid to him on the basis of a contract by which the latter agreed to sell to the plaintiffs a piece of land. The contract was an oral one, entered into on 28th Kartick 1335. By it the price was fixed at Rs. 1,375. It is the plaintiff's case that at the date of contract Rs. 375 were paid by them as earnest money and later on a further sum of Rs. 100 was paid in part payment of the price. There is nothing to show that the last mentioned sum was paid by way of earnest. The plaintiffs came to Court with the case that the balance of the price was to be paid in the month of Magh 1335 at the time of the conveyance, but before that, that is, at some time in Pous 1335, the defendant refused to sell. The defence is that the time for completion according to the contract was Augrahan 1335 and that the conveyance, was not executed by him as the plaintiffs failed to find the money. Both the Courts below have held that the contract could not be completed on account of the refusal by the defendant to convey his land, the breach being on his part. Whether the breach was on the part of the defendant or on the part of the plaintiffs, there is no defence to the plaintiffs' claim for the refund of Rs. 100. That was not earnest money and the plaintiffs are entitled to recover it with interest in any event. The question, therefore, is whether the plaintiffs can recover the other sum, namely Rs. 375, which admittedly was paid by way of earnest. It is well settled on the authorities that earnest money is a guarantee for the performance of the contract.

If the transaction goes forward it is a part of the purchase price, but if it falls through on account of the default of or breach by the vendee, it is forfeited, in

the absence of a contract either express in its terms or to be inferred from the whole contract. 1926 P C 1 (1), 24 C W N 967 (2), 1930 Bom 213 (3), and 41 All 324 (4). If the purchaser says that the earnest has not been forfeited, though the breach is on his part, he has to show that the agreement prevents the forfeiture. This he can do, if the contract says so in plain terms, or if the same can be inferred from all the terms of contract itself. In 9 A & E 508 (5) such an agreement was inferred from a clause in the contract that the party in default would pay a penalty of £1000, Lord Deenham, C. J., observing that "the intent of the parties being clear, that there should be no other remedy." Both the Courts below have held that time was the essence of the contract, but have not decided the question as to whether the date for completion was the month of Magh or the month of Augrahan. If the finding that time was the essence of the contract is a correct finding based on evidence, the question as to what was the time for completion, whether the month of Augrahan or Magh 1335, is a material one, as the plaintiffs' case is that the defendant refused to sell when an agent of theirs went to him with a part of the balance of the price in the middle of the month of Pous 1335. On looking into the judgments it seems as if the finding that time was of the essence is not based on evidence. The learned Subordinate Judge in one line says that he agrees with the Munsiff's finding on the point. The Munsiff records his findings on the said point in the following terms :

It is quite clear that time was a very prominent material of the contract. As a matter of fact, in a contract for sale of land like the present, usually time must have counted. I, therefore, hold that time was an essence of the contract.

If he meant to say that time is of the essence of the contract, simply because a period for completion is mentioned in a contract for sale of land, he is certainly

1. Chiranjit Singh v. Har Swarup, 1926 P C 1=94 I C 782 (PC).
2. Atul Krishna v. Sarat Chandra, 1920 Cal 931=59 I C 215=24 C W N 967.
3. Dinanath Damodar v. Malvi Mody Ranchhoddas and Co., 1930 Bom 213=127 I C 324=32 Bom L R 272.
4. Muhammad Habibullah v. Muhammad Shafi, 1919 All 265=50 I C 948=41 All 324=17 A L J 309.
5. Palmer v. Temple, (1839) 9 A & E 508=1 P & D 379=8 L J Q B 179.

wrong. It is not ordinarily of the essence of the contract, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a certain day or if the nature of the property intended to be sold requires it, as for instance if the contract is for sale of a life interest or a mining lease given for a fixed period of time. For the reasons given above I hold that the plaintiffs are entitled to a decree for Rs. 100 with interest, but their claim to the further sum of Rs. 375 which was paid by way of earnest must be further considered, and for that purpose I remand the case to the lower appellate Court. That Court will consider on the evidence the following points: (i) as to whether time was of the essence of the contract; (ii) if so, whether the time of completion was Augrahasan or Magh 1335. If it finds that time was of the essence of the contract and the time for completion was Augrahasan, it will dismiss the plaintiffs' claim to that sum of money, namely to Rs. 375 and interest claimed thereon. If the Court below finds either that time was not of the essence of the contract or that the time for completion was the month of Magh 1335, it will decree the plaintiffs' claim to that sum, for I maintain the finding of the lower appellate Court, which must be taken along with the plaintiffs' case, that the defendant refused to sell the lands in the middle of Pous 1335. The appeal is accordingly allowed in part and the case remanded to the lower appellate Court with directions to decide the plaintiffs' claim to Rs. 375 and interest thereon in the way indicated above. As the success of the appellant is only partial, the parties will bear their respective costs of this appeal. Future costs will be in the discretion of the lower appellate Court.

R.M./R.K.

*Case remanded.***A. I. R. 1936 Calcutta 53**

DERBYSHIRE, C. J., AND COSTELLO, J.

Ramprosad Surajmull — Plaintiff — Appellant.

v.

Motilal—Defendant—Respondent.

Appeal No. 8 of 1935, Decided on 22nd August 1935, from order of Panckridge, J., D/- 23rd January 1934, and 14th December 1934, respectively.

Calcutta High Court (Reference) Rules, Ch. 26, Rr. 4 and 8—*P* obtaining decree against *D* in 1920 for certain sum less an unascertained sum—Suit referred to Registrar for taking accounts—*P* appealing from decree—Suit remanded for finding and finding given—*P* doing nothing for 9 years till 1929—*P*'s appeal coming for hearing in 1929, dismissed for default—Reference never proceeded with—*P* again doing nothing for five years till 1934—*D* in 1934 praying that suit be dismissed for want of prosecution—*P*'s suit dismissed—Matter held to be governed by Rr. 4 and 8—Suit held to be rightly dismissed.

P obtained a decree in 1920 for a certain amount less one definite sum and less an unascertained amount. The suit was referred to the Assistant referee to take the accounts and the further hearing of the suit was adjourned until after the reference. *P* appealed from the decree. The suit was remanded to the trial Court for a finding on certain facts and there was a finding by the Court. Nothing however was done for about nine years, when *P*'s appeal appeared in the peremptory list. *P* did not appear and his appeal was dismissed as also an application by him for restoration of his appeal. The reference was never in fact proceeded with and nothing of any consequence was done by *P* for a space of five years. After five years, in 1934, a summons was taken out by the defendant *D* asking for an order that the suit be dismissed with costs for want of prosecution. *P* secured an adjournment and was directed to file an affidavit. Nothing was done by *P*. He again sought an adjournment on the next date, it was refused and *P*'s suit was dismissed for want of prosecution:

Held: that the matter was governed by the provisions of Rr. 4 and 8, Ch. 26, Reference Rules. It was *P*'s duty and not that of the defendant *D* to file the decree in the Account Department of the Registrar's office and that was not done and therefore the lower Court was justified in coming to the conclusion that *D* could apply under R. 8 for dismissal of the suit for want of prosecution; even if *D* were held to be the party having the carriage of reference it was open to *P*, on *D* not having taken any steps within 30 days, to ask under 2nd part of R. 8 to have all proceedings under the reference stayed and to obtain a final decree in the suit which he could execute. After the lapse of 30 days *P* had a present right to enforce the decree as he could have applied to have the reference stayed and a final decree made. *P*'s position was analogous to that of a mortgagee who obtained a preliminary decree and then did nothing towards putting himself into the position of being able to obtain a final decree before the lapse of 12 years from the date of the preliminary decree: 1914 *P C* 150, *Ref.*; 1924 *P C* 198, *Disting.*

[*P* 55 C 2; *P* 56 C 2; *P* 57 C 1]*B. C. Ghose* and *S. P. Chowdhary*—for Appellant.*S. N. Banerjee* and *M. N. Banerjee*—for Respondent.

Costello, J.—This is an appeal against two orders made by Panckridge, J., one

on 23rd January 1934 and the second on 14th December 1934. The latter order was made as the result of an application on behalf of the plaintiffs in the suit to set aside a previous order which had been made by the learned Judge, purporting to act under R. 8, Ch. 26, Reference Rules, of this Court whereby the plaintiffs' suit was dismissed for want of prosecution. An examination of the history of the litigation between the parties demonstrates very clearly that neither the plaintiffs nor the defendant have any merits in the matter. The suit was instituted as long ago as 13th December 1918 for the recovery of the sum of Rs. 12,665-11-9 alleged to be due on a mutual, open and current account. The written statement was filed on 14th February 1919 and the defence taken by the defendant was to this effect: the current account referred to in the plaint was admitted but defendant claimed to be entitled to credit by way of set off for the sum of Rs. 3,343-12-0 said to be due to the defendant from the plaintiffs on account of certain dealings in silver bars. The defendant also claimed to be entitled to a half share of the profits of a joint venture in connection with a transaction concerning 75 bales of Grey Shirting material. On 9th January 1920 Greaves, J., made a decree in favour of the plaintiffs. That decree was for the amount claimed less the set off claimed by the defendant on the silver bar account and less such profits as the defendant might be entitled to arising out of the joint transaction in Grey Shirting material. It is important to observe the precise form of the decree. The operative part reads as follows :

It is ordered and decreed that the defendants do pay to the plaintiff firm the sum of Rupees 12,665-11-9 less the sum of Rs. 3,343-12-0 and also the amount representing the half share of the defendant's firm in the net profits accrued in respect of the joint venture in respect of 75 bales of Grey Shirting to be agreed upon between the parties in the pleadings in this suit mentioned with interest to run after 7 days on the ascertained amount if the amount is agreed at the rate of 6 per cent per annum until realisation thereof; otherwise the question of interest be reserved until after the Assistant Referee of this Court shall have made his report as hereinafter directed.

And then comes the direction :

And it is further ordered and decreed that the further hearing of this suit be adjourned and that it be referred to the said Assistant Referee to take an account of the profits as were made by the joint venture in respect of

75 bales of Grey Shirtings in the pleadings in this suit mentioned.

Then there is a direction with regard to costs. So that on 9th January 1920 the position was that the plaintiffs obtained a decree for a certain amount less one definite sum and less an unascertained amount, and the further hearing of the suit had been adjourned until after the reference. From that decree the plaintiff appealed on 9th February 1920. On 16th June of that year there was a decree made by the Court of appeal remanding the suit to the Court of first instance in order that there might be a clear finding with regard to the alleged existence of an agreement for the dealings and transactions between the parties to form part of the one current account in connexion with which the plaintiff was making his claim in the suit.

The matter again came before Greaves, J. and on 26th July 1920 there was a further finding by him on the issue which was sent back to him by the Court of appeal. Greaves, J. held that the agreement which was set out in para. 2 of the written statement had been satisfactorily established. Greaves, J. also made an order that the costs of the further hearing on remand were to be dealt with by the Court of appeal when the matter was further considered by that Court. For some reason or other, which has not been satisfactorily explained, nothing more happened until virtually nine years later. On 3rd July 1929 the plaintiffs' appeal appeared in the peremptory list. The plaintiffs, it seems, did not appear and the appeal was then dismissed with costs for want of prosecution. It appears that after that there was some kind of negotiation of a settlement. Be that as it may, the reference was never in fact proceeded with, but on 15th July 1929 the plaintiffs made an application for the restoration of the appeal to the list. That application was dismissed with costs. Nothing of any consequence was done by the plaintiffs for the space of a further five years. Accordingly on 6th January 1934 a summons was taken out by the defendant returnable on 9th January 1934 asking for an order that the suit should be dismissed with costs for want of prosecution. The plaintiffs secured an adjournment until 23rd January 1934 and they were directed to file an affidavit by 19th Janu-

ary. Apparently however nothing was done prior to 23rd January. On that date the matter came before Panckridge, J. and an attorney appeared on behalf of the plaintiffs and sought a further adjournment which was refused, and the learned Judge thereupon made an order dismissing the plaintiff's suit for want of prosecution. That is one of the orders now complained of.

On 5th February 1934 there was an application on behalf of the plaintiffs for a re-consideration of the matter, as they said, in view of the plaintiffs' inability to attend the Court on 23rd January. That application originally came before an acting Judge of this Court who took the view that the matter ought to stand over until after the return of Panckridge, J. at the end of the long vacation in 1934. Ultimately the matter was dealt with by Panckridge, J. on 14th December 1934, when the application was heard by him and ultimately dismissed by a judgment of that date, and that is the judgment we have now to consider. The learned Judge said :

This is an application on behalf of the plaintiffs to set aside an order I made purporting to act under R. 8, Ch. 26 of the Reference Rules dismissing the plaintiffs' suit for want of prosecution.

Then he set out some of the history of the matter. Then he states :

No steps were taken with regard to the reference, although it was prima facie incumbent on the plaintiffs to take such steps in terms of R. 4. The reason for the plaintiffs' failure to take any action in the matter is said to be the fact that negotiations were in progress for an amicable arrangement between themselves and the defendant. The defendant took out a summons which was returnable on 9th January. The plaintiffs appeared on that day and at their request I adjourned the application until 23rd January in order that they might have an opportunity of placing before me materials as grounds of opposition to the order asked for in the defendants' summons. 23rd January arrived and on that occasion no materials in opposition were forthcoming and I made an order in terms of the summons taken out by the defendants and dismissed the suit.

The present appeal, as I have said, is directed against the two orders of 23rd January 1934 and 14th December 1934 and it was filed on 4th January 1935, that is to say, very nearly 12 months after the making of the first of those two orders. No satisfactory explanation has been put forward by Mr. Ghose for no appeal against the order of 23rd January being preferred at the proper time. Mr.

Ghose merely says in extenuation rather than in explanation that in the circumstances no appeal was filed because on 5th February there was the application for a reconsideration of the matter by the learned Judge himself. In my view the filing of that application for a review affords no protection to the plaintiffs in answer to the contention that so far as the order of 23rd January 1934 is concerned this appeal was filed out of time, in that it was lodged long after the lapse of twenty days from the date of the order. We are therefore in this position: We can only concern ourselves with the judgment and order of 14th December 1934. There is one further passage in that judgment which I desire to quote. The learned Judge said :

The first point taken by learned counsel for the plaintiffs is that Rr. 4 and 8 have no application. He points out that the reference was directed with a view to reducing the defendant's liability under the decree and that therefore the defendant should take the necessary steps in the reference. He also submits that the reference rules cannot contemplate the dismissal of a money decree already passed. I think with regard to that it is sufficient if I say that no reason has been shown why these legal arguments could not have been advanced when the matter was before me on the former occasion, and I do not think that I should be justified in entertaining them now.

In my opinion the only matter the learned Judge had to consider on 14th Dec. 1934 was whether there was sufficient cause or excuse for the plaintiffs in not appearing on 23rd January 1934 and putting whatever contention they then desired to make. Upon a consideration of the facts of the case and after examining the affidavits which have been put in, in connection with this matter I think we ought to come to the conclusion that the learned Judge was quite justified in holding as he did that there was no reason why he should re-open the matter or reconsider the order which he had made on 23rd January 1934. And even if we go behind that order and consider the merits of the case I should say that the learned Judge was, in the circumstances of this case, quite right in holding that the matter was governed by the provisions of R. 4 and R. 8, Ch. 26 of the Rules of this Court. Mr. B. C. Ghose has contended that the plaintiffs were in this position : they obtained a decree made on 9th January 1920 which was still subsisting and therefore it was not competent to the learned Judge to dismiss the suit and in

that connexion Mr. Ghose put before us the decision in 51 I A 321 (1) and he relied upon the judgment of Lord Phillimore. It is to be observed however at the outset that that judgment was given in connexion with a case which was originally filed not in this Court or any other Chartered High Court but in one of the Courts of the Mofussil. Therefore it was not a case which fell within the purview of any rules analogous to R. 4 or R. 8, Ch. 26 of the Rules of this Court. In my opinion these two rules are applicable to the present case, and the only question which arises is whether or not the terms of the two rules are such as would enable the learned Judge to make the order which he made on 23rd January 1934. R. 4 provides that :

An office copy of every decree or order directing a reference shall be filed in the Account Department of the Registrar's office by the party having the carriage of the reference within a week after the filing of the decree or order, and in default, may be filed in the Account Department by any other party within a week thereafter.

Mr. B. C. Ghose has argued that in the present case the plaintiffs had not the carriage of the reference because the effect of the decree of 9th January 1920 was to entitle them to a certain sum less an unascertained sum which might be deducted for the benefit of the defendant after the matter had been considered by the Assistant Referee. Mr. Ghose contended that in the circumstances it was the duty of the defendant to set in motion the machinery, necessary for the taking of the account in connexion with the Gray Shirting business. If that was the position no doubt it could be said that the defendant was the party having the carriage of the reference, but in my opinion nothing occurred in this case which could rightly be said to have the effect of relieving the plaintiffs from the duty of proceeding with their suit so as to put themselves into the position of being able to obtain a decree which they could eventually put to execution. The plaintiffs instituted the suit and they were seeking to recover a sum of money from the defendant. They could not recover any sum whatever from the defendant until after the reference had taken place. Therefore it seems to me that in the cir-

cumstances of this case the learned Judge could come to the conclusion that it was the duty of the plaintiffs and not that of the defendant to file the decree in the Account Department of the Registrar's office. Admittedly that was not done. In fact no steps were taken within thirty days to apply for and file the decree or order of reference and no office copy was filed in the Account Department within the time prescribed by R. 4. Therefore it was not unreasonable for the learned Judge to come to the conclusion that the defendant could properly apply under the provisions of R. 8 for the dismissal of the suit for want of prosecution as contemplated by that rule. Mr. Ghose has put forward somewhat the extravagant and indeed startling proposition that it was open to the plaintiffs to rest content with the decree which they had obtained (which, said Mr. Ghose, was merely a preliminary decree) and do nothing towards putting themselves into the position of being able to enforce that decree for an indefinite and indeed infinite period of time. That is a proposition which cannot be accepted. As I pointed out to Mr. Ghose in the course of the argument it seems to me that the plaintiffs in this case are in a dilemma for either they obtained a decree or they did not. If they did not obtain a decree in the strict sense of the term then quite clearly it was open to the learned Judge to dismiss the suit for want of prosecution seeing that some 16 or 17 years had elapsed since the date of the institution of the suit and some five or six years since the plaintiffs had made any active move in the matter. If on the other hand it can rightly be said that the plaintiffs did obtain a decree, then the position was that the decree, even if it was merely a decree in the nature of a preliminary decree, was subject to the provisions of Art. 183 of the Schedule of the Limitation Act, for the language of that Article is sufficiently wide to cover the position which the plaintiffs had created for themselves. That Article prescribes that the period of limitation within which a judgment, decree or order of a Court established by Royal Charter can be enforced is a period of 12 years and that period begins to run from the time when

1. Lachmi Narain Marwari v. Balmukund Marwari, 1924 P C 198=81 I C 747=51 I A 321=4 Pat 61 (P C).

the present right to enforce the judgment, decree or order accrues to some person capable of enforcing such right.

Now, as I see it, in the year 1920 the position was this: the plaintiffs ought to have filed a copy of the decree in the Account Department as being the parties having the carriage of the Reference, but even if the defendant was the party having the carriage of the Reference because it was to his advantage to have a Reference held on the chance of being able to set off a certain amount against the plaintiffs' claim, then the defendant not having taken any steps within 30 days it would have been open to the plaintiffs under the 2nd part of the provisions of R. 8 to ask that all further proceedings under the Reference should be stayed and thereupon to obtain a final decree in the suit, that is to say, a decree in such form as the plaintiffs could proceed to put it into execution. The plaintiffs however did nothing whatever. Therefore it seems that it must be taken that after the lapse of 30 days the plaintiffs had a present right to enforce the decree seeing that they could have applied to have the Reference stayed and a final decree made. That they did not do. The position seems to have been very analogous to that of a mortgagee who has obtained a preliminary decree and then does nothing towards putting himself into the position of being able to obtain a final decree before the lapse of 12 years from the date of the preliminary decree. In connection with this point I may refer to the case of 21 C L J 118 (2) which was a case which ultimately came before the Judicial Committee of the Privy Council. Their Lordships dismissed an appeal from the decision of this Court which was to the effect that where the Court in the exercise of its ordinary original civil jurisdiction passes a preliminary mortgage decree under S. 88, T. P. Act, 1882, an application under S. 89 of the Act for an order absolute for sale of the mortgaged property made after 12 years from the date of the preliminary decree would be barred by Art. 183, Sch. 1, Lim. Act, 1908. In all the circumstances of this case I am of opinion that the judgment given by Panckridge, J., on 14th December 1934, was correct and therefore this appeal should be dismissed with costs.

2. Munna Lal v. Sarat Chunder, 1914 P C 150= 27 I O 683=42 I A 88=42 Cal 776=21 C L J 118 (P C).

Derbyshire, C. J.—I agree and I have nothing to add.

R.M./R.K.

Appeal dismissed.

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DERBYSHIRE, C. J. AND COSTELLO, J.
Inland Steam Navigation Workers' Union, In re.

Appeal: decided on 19th August 1935, against orders of Registrar of Trade Unions, D/- 7th June 1935.

Trade Unions Act (1926), Ss. 8, 11—Application for registration of Union—Objects of Union not going outside objects prescribed in Act and all requirements of Act complied with—Registrar is bound to register Union and is not entitled to go into other questions—Appeals from orders refusing to register Union should be taken by single Judge sitting alone.

The Office of the Registrar of Trade Unions is one created by the Trade Unions Act of 1926, and the functions which the Registrar has to perform are prescribed by that Act. The functions of the Registrar are laid down in S. 8.

[P 59 C 2, P 60 C 1]

Where an application is filed before the Registrar for the registration of a Union, under the provisions of the Trade Unions Act, the duties of the Registrar are to examine the application and to look at the objects for which the Union is formed. If those objects do not go outside the objects prescribed in the Act, and if all the requirements of the Act and the regulations made thereunder are complied with, it is his duty to register the Union. [P 60 C 2]

An application filed before the Registrar for registration of a Union was rejected by him on the ground that the Union was for all practical purposes the same as another Union which had been previously declared unlawful under S. 16, Criminal Law Amendment Act. The Registrar in passing the order relied on a letter written by the Secretary of the Union to the Bengal Government in which it was prayed that the ban on the other Union be raised. The Registrar appeared to have acted on the letter without giving the Union any opportunity of explaining the statements made therein. The Union went in appeal to the High Court under S. 11. The original proceedings were started by a petition in which the petitioner described himself as the Secretary of the Union and prayed that a Rule might be issued to the Registrar to show cause why the order passed by him should not be set aside. Later an application was made to the High Court for having the matter put in the list to be dealt with before it and for a date to be fixed for the hearing:

Held: that the functions of the Registrar were limited to seeing that the requirements of the Act had been complied with and he was not entitled to go into the question, whether or not the Union in question was the same which had been declared unlawful. The Registrar, when he relied on the letter to the Bengal Government, ought to have brought to the notice of the Union before he acted on it and given it opportunity to explain the statements made

therein. The order of the Registrar refusing to register the Union should be directed to be taken by a single Judge sitting alone so that if necessary, evidence could be taken. [P 60 C 2]

Per *Costello, J.*—That there was considerable doubt as to whether the procedure that had been followed was correct. [P 61 C 1]

I. P. Mukerjee—for Appellant (Union).

S. M. Bose—for the Registrar.

Derbyshire, C. J.—This matter comes to us by way of appeal from the Registrar of Trade Unions for Bengal. The appeal is brought under S. 11, Trade Unions Act of 1926. [Sub-Ss. 1 to 3 read as follows:]

"Any person aggrieved by any refusal of the Registrar to register a Trade Union or by the withdrawal or cancellation of a certificate of registration may, within such period as may be prescribed, appeal (a) where the head office of the Trade Union is situated within the limits of a Presidency town or of Rangoon, to the High Court, or (b) where the head office is situated in any other area, to such Court, not inferior to the Court of an additional or assistant Judge of a principal Civil Court of original jurisdiction, as the Local Government may appoint in this behalf for that area. (2) The appellate Court may dismiss the appeal, or pass an order directing the Registrar to register the Union and to issue a certificate of registration under the provisions of S. 9 or setting aside the order for withdrawal or cancellation of the certificate, as the case may be, and the Registrar shall comply with such order. (3) For the purposes of an appeal under sub-S. (1) an appellate Court shall, so far as may be, follow the same procedure and have the same powers, as it follows and has when trying a suit under the Code of Civil Procedure, 1908, and may direct by whom the whole or any part of the costs of the appeal shall be paid, and such costs shall be recovered as if they had been awarded in a suit under the said Code."

In the petition which brings the matter before us it is stated that on 8th March 1935 a meeting of the employees of all Inland Steamer Services in the Province of Bengal was held at Jorabagan Park in the town of Calcutta and the employees assembled resolved to form a Union in the name of "Inland Steam Navigation Workers' Union" and the said Union was formed on the date. It is also stated in para. 2 that the rules of the said "Inland Steam Navigation Workers' Union" were

so framed as to enable all employees of all Inland Steamer Services in India to become members of the said Union and the subscription was fixed on a monthly basis. Para. 3 states that thereafter, on the 26th March 1935, an application was filed before the Registrar of Trade Unions for registration of the said Union under the provisions of the Indian Trade Unions Act, 1926. Para. 4 states that thereupon, on the 16th May 1935, the Registrar refused to register the Union and passed the following order:

The application below purports to be an application for registration under the Indian Trade Unions Act, 1926, on behalf of a Union calling itself the Inland Steam Navigation Workers' Union. A few days before this application was filed the General Secretary of this Union addressed the Government of Bengal in a letter dated 22nd March 1935 and stated that he had been directed by the general body of the Inland Steam Navigation Workers' Union, formerly known as R. S. N. and I. G. N. and Ry. Workers' Union, to approach Government and request that the notification under S. 16, Criminal Law Amendment Act, 1908, declaring the R. S. N. and Ry. Workers' Union an unlawful association might be withdrawn. The rules and the constitution of the so-called Inland Steam Navigation Workers' Union are for practical purpose identical with those of the banned Union: the principal officers are common to both and in view of the declaration in the Union's letter of 22nd March 1935 that this Union was formerly known as R. S. N. and I. G. N. and Ry. Workers' Union I have no hesitation in finding that the present application is an attempt to have the Union which was registered on 18th September 1934 and No. 62 and thereafter declared an unlawful association registered under a new name. The application is accordingly refused.

The letter that is referred to by the Registrar is headed Inland Steam Navigation Workers' Union, Head Office, 209, Cornwallis Street, Calcutta, dated 22nd March 1935, addressed to Sir John Woodhead Esq., Chief Secretary to the Government of Bengal,

Respected Sir,

Unlawful bodies.

I have been directed by the general body of the Inland Steam Navigation Workers' Union to approach your good self with the following few lines for your kind information and necessary order.

That the R. S. N. and I. G. N. and Ry. Workers' Union was organised by me in September last 1934.

That within a short period it had enrolled about 6,000 members and the majority of them are clerks.

That 98 percent members of the Executive Committee including the president belonged to the active service of industry.

That myself was the General Secretary and Mr. S. N. Banerji was one of the Vice-Presi-

dents of the Union who had no connexion with any Communist Party in India or abroad.

That except myself, Banerji and few members of the Union were ever allowed to deliver speeches in the meetings of the said Union.

That, the so-called communist had no hands or any connexion with this particular Union.

That this Union had no connexion with Communist International nor its object preached or methods adopted.

That this Union had no touch with the peasants' movement.

That this Union had never received any financial help from outside nor from any other party in India.

That this Union approached on several occasions the Government Officials and Labour Commissioner to secure redress of the steamer employees.

That this Union submitted an application for a Board of Conciliation: vide Trade Disputes Act of 1929.

That this Union never carried out any programme of mass revolution nor advocated militant communist methods.

That on 10th March last in the protest meeting neither myself nor Mr. Banerji made any sort of violent speeches which might be in the record of the Police Report.

That Mr. Colson, Commissioner of Police, is personally known to me for the last eight years who can speak well of me.

Under the circumstances, when the Government of India have expressed their desire to lift the ban on genuine Trade Unions, should we not get its advantage?

A favourable decision will highly oblige.

I have the honour to be,
Sir,

(Sd.) K. C. Mittra.

Thereafter the present appellant endeavoured to open the matter with the Registrar of Trade Unions with a view to secure registration of this Trade Union amplifying the letter that I have read with arguments to show that the appellants were and are Trade Unions different from the one declared to be unlawful by the Government. These arguments were not successful as on 24th May the Registrar of Trade Unions, Bengal, wrote back that he was not prepared to revise the orders that he had made in his letter of 16th May. From that order the appellants have appealed under the provisions of the Act above cited to this Court. This is the first appeal of its kind which has come before this Court. We are in doubt as to whether the matter ought to be dealt with by a single Judge on the original side or by two Judges sitting here in what is ordinarily called an appellate Court. We directed the matter to come before us. It may be that in future such appeals from the Registrar of Trade Unions in matters of this kind

will be directed to be taken by a single Judge sitting alone so that if it should be necessary, evidence can be taken. Now the first thing that strikes me is that the Registrar relied on a letter which was written by the Secretary of the appellant Union to Sir John Woodhead as showing that this Union was, for all practical purposes, the same as the I. G. N. Union which had been declared to be unlawful under S. 16, Criminal Law Amendment Act. He appears to have acted on that letter without giving the appellant any notice of it or without giving them any opportunity of dealing with the statements therein set out.

In my view, if the Registrar was going to rely upon that letter he ought to have brought it to the notice of the appellants before he acted on it and given them an opportunity to say anything that they had to say with regard to it. It is quite true that after he had given the decision the matter was raised again and the appellants were given an opportunity of saying what they had to say. But that is not enough. Such opportunity ought, in my view, to have been given before the Registrar considered that letter—if indeed he ought to have considered that letter at all. The office of the Registrar of Trade Unions is one created by the Statute of 1926 and the functions which the Registrar has to perform are prescribed by that Act. By that Statute, in S. 2 (h), Trade Union is defined, and it is defined to be any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions. Then there is a proviso which does not come in in this case at all. S. 4 of the Act provides for mode of registration; S. 5 deals with application for registration; S. 6 prescribes provisions to be contained in the rules of a Trade Union; S. 7 empowers the Registrar to call for further particulars and to require alteration of name; S. 8 provides that the Registrar on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form

as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration. S. 9 prescribes the form of the certificate of registration; S. 10 deals with cancellation of registration. S. 15 sets out the objects on which the general funds of the Union may be spent. S. 16 deals with the constitution of a separate fund for political purposes. S. 17 deals with criminal conspiracy in trade disputes. S. 18 deals with legal proceedings and other suits in certain cases. S. 22 prescribes the proportion of officers to be connected with the industry. S. 23 deals with the change of name of the Trade Union. S. 24 deals with amalgamation of Trade Unions; S. 27 deals with the dissolution of Trade Unions. S. 28 deals with the returns to be made by Trade Unions. S. 29 gives the Local Government, subject to the control of the Governor-General-in-Council, powers to make regulations for the purpose of carrying into effect the provisions of the Act. Under S. 29 in the Province of Bengal regulations have been made which are called Trade Union Regulations of 1927. They make provisions for various ministerial acts and duties to be carried on in connexion with the registration and the carrying on and rendering of accounts and returns of Trade Unions.

Now it has been said on behalf of the Registrar that he was quite right in refusing to register this Union. It is said that he came to the conclusion on the facts before him that this Union was really the I. G. N. Union under a different name. The I. G. N. Union had been declared to be an unlawful Association. Therefore he was justified in refusing to register this Union. In my view, the Registrar in taking up that attitude is wrong. The functions of the Registrar are laid down in S. 8.

The Registrar on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration shall register the Trade Union . . .

Then the prescribed form is set out. The new Union may or may not be a continuation of the other Union or its successor. Whether the new Union is or is not the same as, or successor to the old Union, depends on evidence. Until further evidence is forthcoming in my view it is impossible to say whether the new Union is or is not the same as the old Union or the successor to the old Union.

In my view, the duties of the Registrar were to examine the application and to look at the objects for which the Union was formed. If those objects were objects set out in the Act, and if those objects did not go outside the objects prescribed in the Act and if all the requirements of the Act, and the regulations made thereunder had been complied with it was his duty, in my view, to register the Union. If at sometime that Union is deemed by those who have the power to deal with the matter to be an unlawful association within S. 16, Criminal Law Amendment Act this Union can be proscribed as an unlawful association in the same way as any other body. But in my view the Registrar is not, at this stage, entitled to go into that question; his functions in my view are limited to seeing that the requirements of the Act have been complied with. We have not before us the necessary materials to decide whether this Trade Union should be registered, and I am of opinion that this appeal should be allowed and the matter should be sent back to the Registrar for him to consider the question as to whether the requirements of the Act, and the regulations made thereunder, with regard to registration, have been complied with or not. If, on the face of the application, the objects and the provisions for carrying them out are within what is allowed by the Act and the requirements as to registration have been complied with, he should register; if not, he should decline to register. We think, in the circumstances, there should be no order as to costs on either side.

Costello, J.—This matter has come before us as an appeal under S. 11, Trade Unions Act of 1926. The original proceedings were started by a petition dated 13th July 1935. In that petition one Kalidas Bhattacharji who has described himself as the General Secretary of the Inland Steam Navigation Workers' Union prayed that a rule might be issued on the Registrar of Trade Unions to show cause why the order made by him, dated 16th May 1935, refusing to register the Inland Steam Navigation Workers' Union should not be set aside and the Union registered. The matter in due course came before a Judge sitting on the original side of this Court. Then a question was raised as to whether the proper procedure had been adopted by the petitioner as

representing the Trade Union the registration of which has been refused by the Registrar, and the learned Judge who dealt with the matter seems to have come to the conclusion that as the word "appeal" was used in S. 11 it seemed likely that the right procedure was for the matter to come direct to this Court. Later an application was made before us for having the matter put in the list to be dealt with before this Court and for a date to be fixed for the hearing. At that time we had not had the advantage of considering in detail the provisions of S. 11 or of considering the corresponding provisions of the English enactment dealing with the registration of Trade Unions. But today in the course of the arguments as a result of some research, if I may be allowed to say so, on the part of the Court it now appears that there is considerable doubt as to whether or not the procedure that has been followed in this matter is correct. I need not repeat the terms of S. 11. The provisions have already been read by my Lord the Chief Justice and it is not necessary that I should recite them again. S. 11 is obviously based upon S. 2, sub-S. 4, English Trade Unions Act of 1913. That section provides that :

Any person aggrieved by any refusal of the Registrar to a combination as a trade union, or to give a certificate that an unregistered trade union is a trade union within the meaning of this Act, or by the withdrawal under this section of a certificate of registration, or of a certificate that an unregistered union is a trade union within the meaning of this Act, may appeal to the High Court or in Scotland to the Court of Session, within the time and in the manner and on the conditions directed by rules of Court.

In S. 11, sub-S. (1) of the Indian Act the only direction given with regard to the appeal is that "it must be within such time as may be prescribed." A period has been prescribed by the rules made under the provisions of S. 29 of the Act. As regards the manner and the conditions on which the appeal should take place instead of saying "in the manner and on the conditions directed by rules of Court" we find in sub-S. (3) of S. 11 that it is enacted that :

For the purpose of an appeal under sub-S. (1) an appellate Court shall, so far as may be, follow the same procedure and have the same powers as it follows and has when trying a suit under the Code of Civil Procedure, 1908.

The position therefore is this: that in England appeals against a refusal to register the procedure is regulated by rules of

Court. Appropriate rules were in fact made in the year 1913 and they prescribe that the procedure is to be by way of summons taken out in the Chancery Division of the High Court of Justice. I need only refer to the first of those rules. It says :

All appeals to the High Court under S. 2 (4), Trade Unions Act, 1913, shall be brought in the Chancery Division of the High Court and shall be commenced by originating notice of motion within two months of the decision of the Registrar or within such further time as the Registrar or the Court may think fit to allow. And the rules of the Supreme Court for the time being in force shall (except if and so far as otherwise provided by these rules) apply to all proceedings on any such appeal.

It seems to me that the provisions of sub-S. 3 of S. 11 indicate that when there is an appeal to this Court it should come before a Judge sitting on the original side of the Court, who is to deal with the matter, if necessary in the same way as if he were trying a suit under the provisions of the Code of Civil Procedure. By reason of the provisions of sub-S. 3 of S. 11 it is obvious that it is not necessary that any further rules should be prescribed either by the Local Government or by the Court other than the one rule which has been prescribed providing for the period of limitation for filing an appeal.

There is one other matter in connection with that section which I desire to refer to and it is this—One cannot help feeling that there is a curious anomaly in this section in that the result of its provisions seems to be that in the case of a small trade union established in the mofussil any refusal of registration which is after all a refusal by an official of the Government of the Province can be challenged and must be challenged in some local Court exercising original jurisdiction and not in the first instance in the High Court. The result of that is that in the case of a comparatively small and unimportant trade union in the mofussil there will be two opportunities to challenge the decision of the Registrar of Trade Unions whereas in the case of a large and important trade union having its head office in Calcutta there will apparently be only one opportunity of challenging the decision of the Registrar namely, by an appeal direct to this Court. I entirely agree with what has fallen from my Lord concerning the question of procedure, but I desire to make it quite

plain that so far as I am concerned I am by no means satisfied that the right procedure has been adopted on the present occasion. If and when a similar matter arises the appellant and the legal advisers of the Registrar ought to consider very carefully as to the form of the procedure to be adopted before any proceedings in this Court are instituted. As regards the merits of this appeal I only desire to add a word or two. The functions of the Registrar in connection with the registration of trade unions are clearly indicated in S. 8 of the Act. They are all comprised within that one section:

The Registrar, on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration shall register the Trade Union.

The corresponding section in English law is S. 13, sub-S. 2, Trade Unions Act of 1871, which provides:

The Registrar, upon being satisfied that the trade union has complied with the regulations respecting registry in force under the Act shall register such trade union and such rules.

Under the English Act the "regulations" are made by the Secretary of State. An examination of those regulations shows however that they contain very little more than is contained in the Rules made by Government under S. 29, Trade Unions Act. If there is any difference, S. 8 is if anything more stringent or rather more definite than the corresponding English provisions. It would seem that the function of the Registrar is merely to look and see whether on the face of the application which is put before him the requirements of the Act have been complied with. It is true that subsequent to the Act of 1871 in England additional provisions came into force by virtue of sub-S. 2 of S. 2 of the Act of 1913 which provides that

The Registrar of Friendly Societies shall not register any combination as a trade union unless in his opinion, having regard to the constitution of the combination, the principal objects of the combination are statutory objects.

I think the language of S. 8 is in the form in which we find it in order to make it quite clear that the Registrar has not only to consider the provisions of Ss. 5, 6 and part of S. 7 or sub-S. 2 of the section, but has also to consider the implications of S. 2 (b) of the Act and, in addition, the provisions of S. 15. Putting all these things together it comes to this: that the Registrar has to satisfy himself

that the declared objects of the Trade Union or the alleged Trade Union are such that the Trade Union can be registered. That is only another way of saying that he should satisfy himself as to the "objects," and as to the destination and use of the general funds of the Society. It seems to me that the Registrar can do very little more than satisfy himself that the technical requirements of the Act have been complied with. As regards the objects he can only look to the ostensible objects of the Trade Union. If he finds that the procedure in connection with the application is in order and if on the face of the application form which makes reference to the Rules of the Trade Unions he finds that the objects are apparently lawful, legitimate and intra vires the Trade Union, and if he further finds that the funds are only to be used in furtherance of those objects, then he has no option but to register the Trade Union, no matter what happens to it subsequently if, it, in fact, proceeds counter to law or seeks to carry out its lawful objects in an unlawful way. In the present case I doubt very much whether it was within the power of the Registrar to consider at all the question whether the applicants were really another Trade Union which had been proscribed and which was seeking the registration under a different name. But even assuming that it was competent for the Registrar to go into that matter in connection with the objects of the Trade Union it seems clear that in the present case he ought to have given to the applicants an opportunity to explain away, if they could, the statement which occurred in the letter of the 22nd March 1935.

I am of opinion that without prejudice to the question as to whether the right procedure has been adopted or not, this matter should go back to the Registrar with a direction that he should decide the question as to whether this Trade Union should be registered or not solely upon the basis of the provisions of S. 8, Trade Unions Act, 1926, and not otherwise.

B.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 63

JACK, J.

Nabendra Kishore Roy — Plaintiff—
Appellant.

v.

Keramat Ali Munshi and others—Res-
pondents.

Appeal No. 830 of 1933, Decided on 9th December 1935, from Appellate decree of Addl. Sub-Judge, First Court, Noakhali, D/- 17th September 1932.

(a) Bengal Estates Partition Act (5 of 1897), S. 81 (3)—Partition of estate—Presumption is that proceedings have been regular and that notice under S. 81 (3) has been served.

In case of partition of an estate the presumption is that the proceedings were regularly taken and that partition has not been carried out unless the regular notices as required by S. 81 (3) have been served. [P 63 C 2]

(b) Bengal Estates Partition Act (5 of 1897), S. 81—Order by partition officer under S. 81 cannot be challenged by way of defence to suit for rent—It can only be challenged by suit or proceeding in which all parties to partition are made parties.

An order passed by a partition officer while acting under S. 81, exercising the powers of quasi judicial officer, cannot be challenged by way of defence to a suit for rent in absence of other parties to the partition. It can only be challenged by a suit or proceeding in which all the parties to the partition are parties: 1925 Cal 437, Foll. [P 63 C 2]

Bankim Chandra Banerjee—for Appel-
lant.

Nagendra Chandra Chowdhury and Bireswar Chatterjee for Dy. Registrar—
for Respondents.

Judgment.—This appeal has arisen out of a suit for recovery of arrears of rent on the basis of an estate partition. The suit was decreed in part in the trial Court. The appeal to the lower appellate Court was allowed and the suit was dismissed on the ground that no notices were served on the defendants at the time of the partition as required by S. 81, Cl. 3, Estates Partition Act. It appears that on an application for information the plaintiff was informed that the notices issued under S. 81 had been destroyed and that neither at the trial Court nor at the appellate Court did he produce certified copies of the order sheet showing that notices had actually been served. The trial Court held that the search petition showing that notices had been destroyed raised a presumption of the service of notices

which was not rebutted nor denied. I am inclined to think that he was correct in this inasmuch as the presumption is that the proceedings were regularly taken and that the partition would not have been carried out unless the regular notices had been served. However, since the learned Judge in the Court of appeal below was not prepared to make this presumption, the plaintiff offered to produce a certified copy of the order sheet showing that notices had been served. The learned Judge refused to allow the plaintiff time for this purpose. In this, I think, his discretion has not been wisely exercised, for the plaintiff may have been under the impression that the presumption would arise, that the due formalities had been observed and that no further proof of the service of notice would be required in the absence of any evidence that the notice had not been served. Certified copies of the partition orders have now been produced and I think that in the circumstances, I ought to admit them at this stage. They show that in fact the notices were duly served upon the defendants.

The only point of law that is raised in this Court is that inasmuch as the different defendants held different jamas under the plaintiff and his predecessors, the partition officer had no jurisdiction to pass the order allotting to the defendants this single jama under the plaintiff in lieu of the several jamas which they had held under the proprietors of the estate. The learned trial Court referred to the case of 29 C W N 221 (1) and held that in this rent suit he was not in a position to give relief to the defendants as regards the amalgamation of their jamas. In that case it was held that the orders passed by the Deputy Collector while acting under S. 81, Estates Partition Act, exercising the powers of a quasi judicial officer cannot be challenged by way of defence to a suit for rent in the absence of the other parties to the partition. In this case the other proprietors who were parties to the partition are not parties and in these circumstances the order allotting this jama to the plaintiff in the partition proceedings cannot be challenged. As held in that case, it could only be challenged by a suit or proceeding in which all the parties to the partition were parties.

1. *Chandra Chatterjee v. Kali Charan*, 1925 Cal 437=86 I C 414=29 C W N 221.

There were two other points raised in the Court of appeal below and left undecided. One of these points referred to the claim for enhancement and the amount of enhancement allowed by the trial Court on behalf of the appellants. The other point was a point raised in the cross-appeal on behalf of the respondents that the trial Court was wrong in holding that his claim up to 1336 was barred under R. 2, O. 2, Civil P. C. The parties now agree to give up their claims on these two points in favour of each other. There is accordingly no necessity of referring the case back for the decision of these points. The trial Court's orders on these points will be left undisturbed. The result is that the plaintiff is entitled to the rent which he claims to the extent allowed in the trial Court and the decree of that Court is restored. In view of the fact that this appeal has been necessitated by the failure of the plaintiff to file the certified copies in due time, I make no order as to costs in this appeal.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 64

GUHA AND BARTLEY, JJ.

Purna Chandra Chowdhury—Defendant—Appellant.

v.

Alep Biswas—Plaintiff—Respondent.

Appeal No. 575 of 1934, Decided on 27th November 1935, from appellate order of Dist. Judge, Dacca, D/- 1st October 1934.

(a) Bengal Village Self-Government Act (5 of 1919), S. 101—Rules framed under Rr. 6, 8, 9 and 38—Jurisdiction of civil Court to try question of eligibility or otherwise of candidate for election is barred.

Rules 6, 8, 9 and 38 framed under S. 101 of Bengal Village Self-Government Act, bar the jurisdiction of a Civil Court to try a question whether a particular person was a qualified voter or not and consequently whether his election was void on the ground of his not being a qualified voter. The Circle Officer is the authority or special tribunal constituted to decide the question of a person's eligibility to vote. The authorities constituted by the Bengal Self-Government Act are the final authorities in the matter of conducting elections after deciding the eligibility of voters, on objections raised before them or without objection, and the provisions contained in the Act bar the jurisdiction of a civil Court to try the question of eligibility or otherwise of a candidate for election: 1935 Cal 10, *Rel. on.* [P 65 C 1]

(b) Interpretation of Statutes—Intention of Legislature—Expression in subsequent enactments or amendments can be used for inter-

preting earlier enactments and in giving effect to intention of Legislature.

Expression's used by Legislature in subsequent enactments or amendments of law can be used for the purpose of interpreting earlier enactment and in giving effect to intention of legislature, express, or implied, so far as the particular provisions of the law are concerned. [P 65 C 1]

Nares Chandra Sen Gupta and *Khitindra Kumar Mitra*—for Appellant.

Abul Hossein—for Respondent.

Judgment.—This appeal has arisen out of a suit for setting aside an election held under the Bengal Village Self-Government Act, 1919, and the rules thereunder, in which the defendant was elected as a member, on the ground that he was not eligible to stand as a candidate for election. It may be mentioned that the case now stated in the plaint was not before the election authorities by way of protest against the candidature of the defendant for election; the objection relating to his eligibility was raised for the first time in the suit. The trial Court came to the decision, on an exhaustive review of the provisions of the law and on reference to the decisions of this Court, bearing upon the subject under consideration, that the suit was not maintainable. According to the Munsiff in the trial Court, the legislature has set up a special tribunal to decide the points sought to be raised in the suit, and the suit could not therefore be entertained by a civil Court; it was pointed that the plaintiff had indulged in the luxury of litigation without having taken proper steps before authorities constituted by the Bengal Village Self-Government Act, in proper time. On appeal, the decision of the trial Court was reversed by the learned District Judge of Dacca, who has directed that the plaintiff's suit be heard on the merits. The defendant has appealed to this Court.

It appears to us to be clear that the decision of the District Judge cannot be supported, specially in view of a recent decision of this Court in 38 C W N 838 (1), in which provisions contained in the Bengal Local Self-Government Act, and the election rules framed thereunder, which bear close resemblance to the provisions contained in the Bengal Village Self-Government Act, with which we are concerned in the case before us, were fully considered by Nasim Ali, J. We

1. *Mabedar Rahaman v. Kanti Chandra Basu*, 1935 Cal 10=154 I C 82=61 Cal 980=59 C L J 523=38 C W N 838.

are in entire agreement with that decision. In our judgment, Rr. 6, 8, 9 and 38 framed under S. 101. Bengal Village Self-Government Act, barred the jurisdiction of the civil Court to try a question whether a particular person was a qualified voter or not, and consequently whether his election was void on the ground of his not being a qualified voter; as the Circle Officer was the authority or the special tribunal constituted to decide the question of the defendant's eligibility as a voter, a question which was not even raised before the authority constituted by law. Furthermore, as it has been said, there are occasions when expressions used by the legislature in subsequent enactments or amendments of law can be used, for the purpose of interpreting earlier enactments, and in giving effect to the intention of the legislature, express or implied, so far as particular provisions of the law were concerned. Judged from this latter standpoint, the intention of the legislature, as definitely expressed now by an amendment of the law, was clear, that the authorities constituted by the Bengal Village Self-Government Act, were the final authorities in the matter of conducting elections after deciding the eligibility of voters, on objections raised before them, or without objection, as in the case before us; and that its intention was that the provisions contained in the enactment bar the jurisdiction of the civil Court to try the question of eligibility or otherwise of a candidate for election.

In view of the conclusion, we have arrived at, mentioned above, the appeal must be allowed, and we direct accordingly. The decision of the Court of appeal below is set aside: and the suit in which the appeal has arisen is dismissed with costs to the defendant throughout, including the costs in this Court. The hearing fee in this appeal is assessed at 2 gold mohurs.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 65

GUHA AND BARTLEY, JJ.

J. E. Gubbay—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 1110 to 1112 of 1935, Decided on 11th December 1935.

(a) Bengal Excise Act (5 of 1919), Ss. 74 and 81—Accused tried under Bengal Excise

1936 C/9 & 10

Act—Magistrate is empowered under S. 5, Identification of Prisoners Act, to direct accused to be measured and photographed for purposes of investigation.

The provisions contained in Ss. 74 and 81, Bengal Excise Act, make the provisions of the Criminal Procedure Code applicable to investigations by Excise Officers. The Bengal Excise Act does not lay down a complete procedure for investigation of offences under the Act and the provisions of Ch. 9 of the Act, relating to the procedure in the matter of detection, investigation and other matters including trial of offences, in which Ss. 74 and 81 find place, make it clear that it is mainly the procedure laid down in the Criminal Procedure Code that has to be followed in investigations into offences under the Bengal Excise Act. [P 66 C 2]

A Magistrate is, therefore, empowered under S. 5, Identification of Prisoners Act, to order a person to be measured and photographed for the purpose of any investigation or proceeding under the Code of Criminal Procedure.

[P 66 C 2]

(b) Identification of Prisoners Act (33 of 1920), S. 2—"Police Officer" includes Excise Officer in conduct of investigation, exercising powers conferred by Code of Criminal Procedure.

The definition of "Police Officer" contained in S. 2, Identification of Prisoners Act, would include an Excise Officer who in the conduct of an investigation of an offence exercises the power conferred by the Code of Criminal Procedure: 1934 Cal 580, *Foll.* [P 66 C 2]

(c) Identification of Prisoners Act (33 of 1920), S. 5—Order directing measurements and photograph of accused to be taken—Magistrate clearly stating that measurements and photographs are necessary for investigation—Failure to state reasons specifically does not make order illegal.

Where an order by a Magistrate under S. 5, Identification of Prisoners Act, directing a person to be measured and photographed for purposes of investigation, clearly states that the Magistrate is satisfied that for the investigation of the case the photographs and the measurements of the accused are necessary, the mere circumstance that no reasons are specifically stated by the Magistrate in his order does not make the order illegal. [P 66 C 2; P 67 C 1]

(d) Criminal P. C. (1898), Ss. 439, 498—Sessions Judge directing accused to show cause why their bail should not be enhanced solely because accused challenged Magistrate's order under S. 5, Identification of Prisoners Act, directing measurements and photographs of accused to be taken—Order is not proper—Question should be left to be dealt with by Magistrate.

An order by a Sessions Judge directing accused tried under the Bengal Excise Act to show cause why their bail should not be enhanced, solely on the ground that the accused challenged the order by the trying Magistrate under S. 5, Identification of Prisoners Act, directing measurements and photographs of accused to be taken, is not proper. The question whether there is any valid reason for enhancement of bail should be left to the Magis-

trate who might very well deal with the matter on materials placed before him. [P 67 C 1]

S. N. Banerjee, Nirmal Ch. Chakrabarty, C. C. Biswas and Paritosh Sarkar—for Petitioner.

A. K. Bose and Anil Chandra Ray Chaudhury—for the Crown.

Order.—The facts and circumstances of the case giving rise to the applications on which these Rules were issued may be briefly stated: An investigation in which the complicity of the petitioners in the matter of offences contemplated by S. 46, Bengal Excise Act, has been started by the Excise authorities, and the petitioners were during the course of such investigation arrested. On furnishing bail to the satisfaction of the Magistrate before whom the petitioners were placed after their arrest, they were released from custody. At a time when they were on bail an Inspector of Excise applied to the Magistrate for permission to take measurements and photographs of the petitioners, and it was mentioned in the application that measurements and photographs were required for the purpose of the investigation. The application for taking measurements and photographs was made under S. 5, Identification of Prisoners Act, and the Magistrate in his order recorded on 1st November 1935 stated that he was satisfied that for purposes of investigation of the case photographs and measurements were necessary; and direction was given to the petitioners to allow them to be taken. As against the aforesaid order of the Magistrate, the petitioners moved the learned Sessions Judge of the 24 Perganas, with the result that the Judge held that the Magistrate was competent to pass the order. The Sessions Judge in the order passed by him on 9th November 1935 stated also that the petitioner had secured reduction of their bail by undertaking to assist the authorities. The Judge directed the petitioners to show cause why their bail should not be enhanced. The Rules granted by this Court are directed against the orders passed by the Sessions Judge.

The main points raised in support of the Rule were that the investigation of the Excise Authorities not being one under the Code of Criminal Procedure, S. 5, Identification of Prisoners Act, could not possibly apply; the Excise authorities had no power to apply for taking

measurements and photographs, and the Magistrate had no authority to grant such application, as was done by him on 1st November 1935. The questions must, in our opinion, be answered against the petitioners in view of the clear provisions contained in S. 74 and S. 81, Bengal Excise Act, which make the provisions of the Code of Criminal Procedure applicable to investigations by Excise Officers. The Bengal Excise Act does not lay down a complete procedure for investigation of offences under the Act; and the provisions of Ch. 9 of the Act relating to the procedure in the matter of detection, investigation and other matters including trial of offences, in which Ss. 74 and 81 referred to above find place, leave no doubt that it was mainly the procedure laid down in the Code of Criminal Procedure that has to be followed in investigation into offences under the Bengal Excise Act. In the above view of the case, there can be no question as to the applicability of S. 5, Identification of Prisoners Act, under which a Magistrate is empowered to order a person to be measured and photographed for the purpose of any investigation or proceeding under the Code of Criminal Procedure. The definition of "Police Officer" contained in S. 2, Identification of Prisoners Act, must be read now in the light of the decision of the Full Bench of this Court in 61 Cal 607 (1), in which it has been laid down that an excise officer, who in the conduct of an investigation of an offence against the excise, exercises the powers conferred by the Code of Criminal Procedure is a police officer. The decision of the Full Bench cannot be whittled down by saying that it is to be confined to the question whether an excise officer in charge of an investigation was a police officer within the meaning and for the purposes of S. 25, Evidence Act, only, and for no other purpose.

The further contention urged in support of the Rule issued by this Court related to this: that the Magistrate's order did not indicate that he was satisfied on any materials placed before him, that measurements and photographs, as contemplated by S. 5, Identification of Prisoners Act, were necessary for the

1. *Ameen Sherif v. Emperor*, 1934 Cal 580=1934 Cr C 841=150 1 C 561=35 Cr L J 1071=61 Cal 607=59 C L J 555=38 C W N 930 (F B).

purposes of investigation by Excise authorities, and the direction in that behalf containing the order was erroneous and unsustainable. In our judgment there is no substance involved in this contention, as the order clearly states that the Magistrate was satisfied that for the investigation of the case photographs and measurements of the accused were necessary; the circumstance that no reasons were specifically stated by the Magistrate in his order does not make the order illegal. On the conclusions we have arrived at, as indicated above, the order passed by the learned Sessions Judge on 9th November 1935, affirming the Magistrate's order of 1st November 1935, must be upheld. The direction of the Sessions Judge that the petitioners are to show cause why their bail should not be enhanced, does not commend itself to us, as it proceeds solely on the basis that the petitioners had challenged the order of the Magistrate passed on 1st November 1935. In our judgment, the question whether there is any valid reason for enhancing the bail granted to the petitioners should be left to the Magistrate, who might very well deal with the matter of enhancement of bail, on materials placed before him, by the Excise Authorities, if they are so advised. In the result, the Rules are disposed of in the manner indicated above. The order of the Sessions Judge affirming those of the Magistrate are upheld. The Judge's orders directing the petitioners to show cause why their bail should not be enhanced is modified in the manner mentioned above.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 67

GUHA AND BARTLEY, JJ.

Bhujendra Nath Biswas and others—Objectors—Appellants.

v.

Sushamoyee Basu and another—Decree-holders—Respondents.

Appeals Nos. 147 and 148 of 1935, Decided on 11th December 1935, from appellate orders of Dist. Judge, Hooghly, D/- 9th January 1935.

Civil P. C. (1908), S. 47—Certain persons obtaining possession of property on relinquishment by female limited owner expressly agreeing to pay decretal debts due against her—They are bound to pay decretal debt—Decree-holder can proceed by way of application under S. 47—Separate suit to enforce con-

tract is not necessary—Decree-holder, although stranger to agreement, can enforce it.

A stranger to a contract which is to his benefit is entitled to enforce the agreement to his benefit. [P 68 C 2]

Where certain persons obtain possession of certain properties on relinquishment by a female limited owner, expressly agreeing to pay certain decretal debt due against her, they are, upon the principles of justice, equity and good conscience, bound to pay the decretal debt in execution of the decree. There is no necessity on the part of the decree-holder to take recourse to a separate suit to establish the contractual liability in view of the scope of S. 47, Civil P. C. They can proceed by way of an application under S. 47. [P 68 C 1]

The decree-holder, although stranger to the contract which is to his benefit is entitled to enforce the agreement to his benefit apart from the position that the party concerned accepted liability in the matter of satisfaction of the debt due to the decree-holder: 23 Cal 454 and 62 C L J 55, *Rel. on.* [P 68 C 2]

A. N. Bose, Bijon K. Mukherjee and Hirendra Ch. Ghose—for Appellant.

S. C. Bose, Kamalakshya Bose, Nirode Bandhu Roy and Indir Ch. Ghose—for Respondents.

Judgment.—These appeals have arisen out of applications under S. 47, Civil P. C., made in proceedings in execution of decrees. The decrees sought to be executed were passed in suits for rent; and the question raised by the persons against whom the decrees were sought to be executed, appellants in this Court, was that they were not liable under the decrees put into execution; that the decrees could not in law be allowed to be executed against them. The facts necessary for the purpose of a decision of this question arising for consideration in these appeals, may be very shortly stated. The decrees for rent, were passed against the three daughters of one Radhajiban Mustafi, whose estate is now in the hands of the appellants as the ultimate reversioners of Radhajiban. Of the three daughters of Radhajiban, Bhababhabini survived her sisters, and she divested herself of her estate in favour of the reversioners. It would appear that the reversioners had divided the estate of Radhajiban as amongst themselves with the assent of the sole surviving daughter of Radhajiban, Bhababhabini. The properties attached and sought to be sold in the proceedings in execution giving rise to these appeals, were by virtue of the arrangement come to by the reversioners amongst themselves claimed by the appellants as their separate property,

against which the execution of the decrees obtained against the three daughters of Radhajiban could not be allowed to proceed.

The arrangement as to division of properties between the reversioners was evidenced by two documents, Exs. A and B; in the case in paras. 12, 13 and 14 of the document Ex. B, arrangement in regard to the payment of decretal dues and other dues for and against the parties to the document, the reversioners, subsisting before the arrangement was made. The appellants in this Court, who raised objection to the execution of the decrees against them, undertook liabilities which included liability in respect of the decretal debt which was sought to be realised in the execution proceeding with which we are concerned. The appellants it would appear to be clear from the contents of the documents Exs. A and B agreed in unmistakable language to treat the properties in their hands as part of Radhajiban's estate. On the clear stipulations contained in documents Exs. A and B the appellants could not be allowed to say that the properties sought to be proceeded against in execution, were separate or self-acquired properties and were therefore exempt from being proceeded against in execution of decrees for rent due, so far as properties which were admittedly left by Radhajiban, and were in the hands of Radhajiban's daughters, at the time when the decrees were passed.

It was urged in support of the appeals that even though the documents Exs. A and B had the effect of fixing liability on the appellants, the decree-holders, as strangers to the contract evidenced by those documents, could not get the benefit from such a contract in proceedings in execution of decrees. That there is no necessity for having recourse to a separate suit for enforcing the contract, in the matter of satisfaction of the decretal debt, goes without saying; and the argument in support of the position that there is necessity for a suit for establishment of contractual liability does not bear serious examination, in view of the scope of S. 47, Civil P. C. The right of strangers to a contract has to be determined in the case before us with reference to the state of facts on which the right of the decree-holders to proceed against the properties in the hands of the appellants is based. The appellants obtained posses-

sion of the properties by virtue of relinquishment by a female limited owner during her lifetime, upon the express condition that they should pay her debts. Upon general principles of justice, equity and good conscience, the appellants were bound to pay the decretal debt in regard to which execution was levied in the case before us [see in this connection 23 Cal 454 (1)], and in our judgment there can be no doubt, and it can be taken to be well settled on principle and authorities, that a stranger to a contract which is to his benefit is entitled to enforce the agreement to his benefit, apart from the position that the party concerned accepted liability in the matter of satisfaction of debt due to the stranger (see 62 C L J 55 (2), and the cases referred to therein). In the case before us, the appellants had by virtue of the clear stipulations contained in the documents Exs. A and B accepted liability so far as the decretal debts in question were concerned.

In the above view of the case before us, we affirm the decision arrived at by the District Judge in the Court of appeal below, that the proceedings in execution, giving rise to these appeals, should be allowed to proceed, as competent. The appeals are dismissed with costs. The hearing fee in these appeals is assessed at three gold mohurs. In view of the decision we have arrived at in these appeals, it is not necessary to decide the points arising on the cross-objections preferred by the respondents in this Court. The cross-objections are allowed to be withdrawn, without any order as to costs in the same.

R.M./R.K. *Appeals dismissed.*

1. Chintamani Dutt v. Mohes Chandra Banerjee, (1896) 23 Cal 454.
2. Bibhuti Bhusan Ghose v. Baikunta Nath Mondal, (1935) 62 C L J 55.

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R. C. MITTER, J.

Chanchala Bala Debi—Plaintiff 1—Appellant.

v.

Sashibhusan Das and others—Respondents.

Appeal No. 323 of 1933, Decided on 28th November 1935, from appellate decree of Dist. Judge, Midnapore, D/- 19th September 1932.

Compromise—Legal practitioner—Suit instituted by A and B compromised by B in absence of A without having authority from A—B acting on advice of pleader—Solenamah filed by pleader—Vakalatnamah in pleader's favour empowering him to compromise case—A held not bound by compromise—Pleader held not to have been acting on basis of power given to him.

A suit instituted by A and B and a minor was compromised by B in absence of A and without any authority from A to compromise the suit on his behalf. It was found that B was asked by the pleader appearing for all the plaintiffs, to consider the terms proposed by the other side and to accept them as in his opinion they were beneficial, and that on acceptance of the terms by B, the draft was prepared and the solenamah was filed by the pleader, as he thought that A would have no objection. The vakalatnamah which A and B had executed in the pleader's favour empowered him to compromise the case:

Held: that A was not bound by the compromise simply because his pleader signed and filed the solenamah. Although the vakalatnamah had given the pleader power to compromise, he was not purporting to act on the basis of that power; he was merely acting "as a messenger between the two clients." A would have been bound by the compromise if he had given B power to compromise on his behalf: 1935 P C 119, *Applied*. [P 70 C 1, 2]

Rama Prosad Mukherjee—for Appellant.

Sarat Chandra Jana, Hiran Kumar Roy and Mohit Kumar Chatterjee—for Respondents.

Judgment.—This appeal is on behalf of plaintiff 1 and arises out of a suit (Title Suit No. 232 of 1931) instituted by him and plaintiff 2, a minor, to set aside a compromise decree passed in Title Suit No. 176 of 1930. The last mentioned suit was brought by plaintiff 1, plaintiff 2 and their uncle, pro forma defendant 6, to establish their title to and recovery of possession, from the principal defendants of the lands described in Schedule Ka annexed to the plaint. The relevant facts are these: One Ram Krishna Samanta, grandfather of plaintiffs 1 and 2, and father of pro forma defendant 6, lent money to defendants 3 to 5 and the predecessor in interest of defendants 1 and 2. He took as security the properties described in Schedule Ka and Kha. Ram Krishna obtained a mortgage decree and in execution of the said decree caused the mortgaged properties to be put up to sale and himself purchased the same at the Court sale in the year 1919. It is the plaintiffs' case that Ram Krishna took physical possession of the properties described in Schedule Kha, and remained in actual

possession, but he took only symbolical possession of the property of Ka Schedule, which continued to remain in the possession of his judgment-debtors, it being their dwelling house. The plaintiffs' further case is that the landlords obtained a collusive rent decree, put up the defaulting tenure to sale, and one Keshab Naik purchased the same. Keshab is said to be the benamidar of the principal defendants. On these allegations Ram Krishna instituted the aforesaid Title Suit No. 176 of 1930 against the principal defendants. In that suit he prayed for recovery of possession of the properties described in Schedule Ka only, the properties described in Schedule Kha not being the subject-matter of the said suit. During the pendency of the said suit Ram Krishna died and his heirs, plaintiffs 1 and 2, and pro forma defendant 6, were duly substituted as plaintiffs in his place. Pro forma defendant 6 used to look after the said Title Suit No. 176 of 1930 on behalf of all the plaintiffs. It is in evidence that at a late stage of the suit, i.e. on 19th June 1931, the principal defendants of the suit approached plaintiff 1 and pro forma defendant 6 and proposed terms of compromise to them direct.

The terms proposed were that the plaintiffs and pro forma defendant 6 were to give up their claim to the Ka Schedule property, that the principal defendants agreed to leave the plaintiffs and pro forma defendant 6 in undisturbed possession of the Kha Schedule properties and that if the principal defendant paid to the plaintiffs and pro forma defendant 6 a certain sum of money within a certain time, the plaintiffs and the pro forma defendant 6 were to convey to the principal defendants the properties of Schedule Kha except a pucca house. At that time plaintiff 1 demanded Rs. 2,500 as the price to which the principal defendants did not agree, and the proposal fell through. The suit was fixed for hearing on 22nd June 1931. On that day pro forma defendant 6 came to Court with witnesses and was on the witness box. With the permission of the Court, he was got down from the witness box and terms were proposed to him. Plaintiff 1, Manmatha, was not present in Court on that date, and pro forma defendant 6 had no authority given to him by plaintiff 1 to compromise on his behalf. The vakalatnama which plaintiff 1 and pro forma defendant 6 had exe-

cuted in favour of their pleader, Babu Srenath Dass, empowered the latter to compromise the case. The deposition of Srinath Babu is material. He says that the pro forma defendant 6 was brought down from the witness box with the permission of the Court and he requested him to accept the terms proposed by the other side as beneficial. The terms were that the plaintiffs (of Suit No. 176 of 1930) were to give up their claim to the Kha Schedule properties, that the defendants would not disturb their possession in respect of the Kha Schedule properties, and that if the defendants paid to the said plaintiffs Rs. 2,200 within the month of Magh 1338, the plaintiffs would convey to the defendants the Kha Schedule properties except a pucca house. The pucca house was however as is the finding of the lower appellate Court, erroneously included in the properties which the plaintiffs were to convey to the defendants on receipt of the said sum of money, Rs. 2200. The evidence of Srenath Babu, the pleader is definite.

The terms were proposed to pro forma defendant 6 and he (Srenath Babu) made recommendations to him (the pro forma defendant 6.) When the said pro forma defendant 6 accepted the terms the draft was prepared and the Solenamah was filed by Srenath Babu, as he thought that plaintiff 1 had no objection. In this state of the evidence I am of opinion that plaintiff 1 is not bound by the compromise, simply because his pleader signed and filed the Solenamah. The principle formulated by their Lordships of the Judicial Committee in 39 C W N 1185 (1) to my mind applies to this case. The pro forma defendant 6 was present in Court; he was asked by the pleader to consider the terms and to accept them as in his opinion they were beneficial. Although the vakalatnama had given him power to compromise, Srenath Babu was not purporting to act on the basis of his said power. His evidence makes that clear. He referred to his client, pro forma defendant 6, who was present in Court. He was merely acting more as a "messenger between the two clients", as Lord Atkin puts it in 39 C W N 1185 (1). In these circumstances, plaintiff 1 can only be held

bound by the compromise if, and only if, he had given the pro forma defendant 6 power to compromise on his behalf. The lower appellate Court was therefore not right in holding that plaintiff 1 was bound by the compromise simply because the vakalatnama authorised Srenath Babu to compromise. In this view I hold that the compromise decree must be set aside against plaintiff 1 also.

There is, however, another point which I merely notice in passing. If the defendants have to rely on Srenath Babu's vakalatnama, there is a difficulty. The vakalatnama empowered Srenath Babu to compromise the suit in which he appeared. The terms in the solenamah about the conveyance of the Kha Schedule properties by the plaintiffs to the defendants are clearly beyond the scope of Title Suit No. 176 of 1930. If that be so, I have grave doubts if the vakalatnama was sufficient to empower Srenath Babu to compromise Title Suit No. 176 of 1930 on the terms recited above without reference to his clients. However I need not pursue this point further, for I allow the appeal on the ground mentioned above. The result is that the compromise decree passed in Title Suit No. 176 of 1930 is set aside in its entirety, and the said suit is revived with liberty to the plaintiffs in that suit to proceed on with it from the stage at which it was left just before the consent decree was passed. I set aside the consent decree in its entirety, i. e. against pro forma defendant 6 also, having regard to the fact that a different contract would result if it be held that he is to convey his undivided share of the lands of Schedule Kha for a proportionate price. The appellant will have her costs against the defendants throughout. The cross-objection is dismissed but without costs.

R.M./R.K.

Appeal allowed.

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GUHA AND BARTLEY, JJ.

Secy. of State—Defendant—Appellant.
v.

Jitendra Nath Roy—Plaintiff—Respondent.

Appeals Nos. 1260, 1261, and 1262 of 1933, Decided on 22nd November 1935, from appellate decrees of Dist. Judge, Jessore, D/- 17th February 1933.

(a) Bengal Cess Act (9 of 1880), S. 16—Service of notice under S. 16 is not merely

1. Sheonandan Prosad Singh v. Abdul Fateh Mohammad Reza, 1935 P C 119=156 I C 694=62 I A 196=14 Pat 545=39 C W N 1185 (PC).

matter of procedure but is part of law—Non-compliance with provision makes assessment invalid.

The service of notice under S. 16, Bengal Cess Act, is not merely a matter of procedure but is part of the law with reference to which valuation or re-valuation as contemplated by law can be made by the revenue authorities and liability imposed in the matter of payment of cesses; and non-compliance with the law by failure to serve notice under S. 16 makes the assessment of cesses invalid under law. The service of notice is made imperative by law and where it is not served, the person assessed is entitled to a declaration that the cess re-valuation is ultra vires, illegal and not binding on him. [P 72 C 2]

(b) Bengal Cess Act (9 of 1880), Ss. 4 and 24—Note to S. 24 and R. 66, Cess Manual are not ultra vires and in-operative—They are not inconsistent with definition of "cultivating raiyat" as given in S. 4—Re-valuation made on basis of note to S. 24 and R. 66 of Cess Manual is not illegal.

The note to S. 24, Cess Act, and R. 66 in the Cess Manual cannot be held to be ultra vires and in-operative, as having been made by the Board of Revenue without jurisdiction. They are not in any way inconsistent with the definition of "cultivating raiyat" as contained in S. 4 of the Act, and revaluation under the Cess Act made on the basis of the Note to S. 24 and R. 66 of the Cess Manual is not illegal.

A raiyat may be a tenure-holder within the meaning of the Cess Act and the distinction between holder of a tenure and a cultivating raiyat and not between holder of tenure and a raiyat must be recognized: 15 C L J 428 and 1928 Cal 508, Rel. on. [P 72 C 2]

Bijon Kumar Mukerji—for Appellant.

H. D. Bose, C. C. Biswas, Hemendra Chandra Sen and Surendra Nath Bose—for Respondent.

Judgment.—This appeal has arisen out of a suit instituted by the plaintiff-respondent for a declaration that certain re-valuation proceedings in connexion with assessment of cess under the provisions contained in the Cess Act (Bengal Act 9 of 1880) were illegal, ultra vires and not binding on the plaintiff. The question relevant for the purpose of this appeal raised before the Courts below, and which was argued in support of the appeal was whether the re-valuation for imposition of cess made in respect of Jessore portion of Touzi No. 132 of the Jessore Collectorate, under S. 21, Cess Act, was ultra vires, illegal and not binding against the plaintiff, for non-service of notice under S. 16, Cess Act, upon the plaintiff, the plaintiff, not having been otherwise cognizant of the order calling for return as prescribed by law, before the making of valuation under S. 21 of the Act.

The Courts below have concurrently

found on evidence before the Courts that there was no proof of any notice served on the plaintiff as contemplated by S. 21, Cess Act, and that the plaintiff was not otherwise cognizant of the same before the estate in question was valued for cess purposes, under S. 21, Cess Act. On the findings referred to above, the decision of the Courts below was that the assessment of cesses on revaluation was illegal and not binding on the plaintiff. It was urged in support of the appeal that the service of notice under S. 16, Cess Act, was merely a matter of procedure; non-service of such notice could not in any way vitiate the assessment proceedings; the jurisdiction of the revenue authorities in the matter of revaluation in the case was acquired by the proclamation to make return by the parties concerned under S. 14, Cess Act, the non-service of notice under S. 16 of the Act could not render the proceedings invalid. There is no question that the publication of a proclamation gives jurisdiction to the Collector in the matter of assessment of cesses on proper valuation of lands; but the subsequent procedure contemplated by the Cess Act, for the purpose of making valuation as contained in S. 16, Cess Act, could not be ignored, in fixing liability, so far as payment of cess was concerned. The elaborate provisions contained in Ss. 16, 17 and 18 leave no room for doubt that following the procedure mentioned therein was as much binding on the revenue authorities seeking to assess and impose liability as the party who were required to lodge returns on service of notice on them, as provided by S. 16, Cess Act. There was penalty imposed for omitting to make return (S. 18); and the provisions that follow, contained in Ss. 19 and 20 make it abundantly clear how the failure to make returns after service of notice affects the right of the parties to collect rent in respect of the property sought to be assessed or re-assessed to cesses under the Cess Act. It is also significant that it is only on not furnishing return after service of notice under S. 16 that the Collector is empowered to make his own valuation. In our judgment the provisions contained in the Cess Act to which reference has been made above make it abundantly clear that service of notice under S. 16, Cess Act, was not merely a matter of procedure, but was a part of the law with reference to which valua-

tion or revaluation as contemplated by law could be made by the revenue authorities, and liability imposed in the matter of payment of cesses; and non-compliance with the law by failure to serve notice made the assessment of cesses invalid under the law. The service of notice is made imperative by law, for the purpose of valuation of lands under the Cess Act, and that must be the case, in view of the position that the State would not impose any liability on a subject without giving him an opportunity to be heard. If there is any ambiguity in the statute, although in our opinion there is none, in the matter of the effect of non-service of notice under S. 16, Cess Act, it was the duty of the State to use language of precision when it was imposing liabilities upon its subjects; the benefit of the doubt is the right of the subject. The reasonable construction of the provisions of the Cess Act to which reference has been made above, lead to the conclusion that notice under S. 16 of the Act was imperative, before assessment of cess could be made by the revenue authorities on valuation of lands; and notice not having been served, as provided by law, the plaintiff was entitled to a declaration that the cess revaluation in respect of the Jessore portion of Touzi No. 132 was ultra vires, illegal and not binding against him. In the result the appeal fails and it is dismissed with costs.

(S. A. Nos. 1261 and 1262 of 1933)

These two appeals have arisen out of suits instituted by the plaintiff appellant in this Court, for declaration that a cess revaluation in respect of properties mentioned in the plaints was illegal, ultra vires and not binding on the plaintiff. The question in controversy in the appeals relates to the assertion made by the plaintiff in the suits that the revaluation in question was made on the basis of a Note to S. 24, Cess Act, Bengal Act 9 of 1880, and R. 66 of the Cess Manual, which the Board of Revenue had no authority under the law to frame, and which were inconsistent with the definition of "cultivating raiyat" as contained in the Cess Act. The Courts below give their decision on the question mentioned above against the plaintiffs in the suits, in which these appeals have arisen. The question to be considered is whether Note to S. 24, Cess Act, and R. 66 made by the Board of Revenue were in consonance with the pro-

visions of S. 106 of the Act. There can be no question that it was within the competency of the Board of Revenue to make rules and otherwise provide for the proper execution of the Cess Act, in respect of valuation of the assessment and of the levy of cesses. The question then was whether there was anything contained in the Note to S. 24 and in R. 66 of the Cess Manual, inconsistent with or repugnant to the definition of a "cultivating raiyat" as contained in S. 4, Cess Act, inasmuch as so long as the Note and the rule in question are not repugnant to the provisions of the Act, they cannot be held to be ultra vires or in-operative. As has been repeatedly pointed out by this Court, a raiyat may be a tenureholder within the meaning of the Cess Act, and thus in order to claim the privilege of a cultivating raiyat under the Cess Act, a person must be an actual cultivator of the soil, and the total rent payable by him for all his holdings must not exceed Rs. 100 per annum. A raiyat may be a tenure holder within the meaning of the Cess Act; and the distinction between a holder of a tenure and a cultivating raiyat, and not between a holder of a tenure and a raiyat, must be recognized: See 15 C L J 428 (1), 47 C L J 545 (2). In our judgment therefore, the Note to S. 24, Cess Act and R. 66 in the Cess Manual, cannot be held to be ultra vires and inoperative, as made by the Board of Revenue without jurisdiction.

They are not in any way inconsistent with the definition of "cultivating raiyat" as contained in S. 4, Cess Act, and the Courts below have rightly held that revaluation under the Cess Act could not be held to be illegal on the ground that it was made on the basis of Note to S. 24, Cess Act and R. 66 of the Cess Manual framed by the Board of Revenue, which were both in force at the time when the re-valuation in question was made. On the conclusion arrived at by us, as mentioned above, the decree of the Courts against which these appeals were directed are upheld, and the appeals are dismissed with costs.

R.M./R.K.

Appeals dismissed.

1. Peary Mohan Roy v. Sarat Kumari Debi, (1912) 15 C L J 428=14 I C 177.
2. Sarat Chandra Deb v. Dharani Mohan Roy, 1928 Cal 508=113 I C 240=55 Cal 1305=47 C L J 545=32 C W N 610.

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LORT-WILLIAMS AND NASIM ALI, JJ.

Benoyendra Chandra Pandey and another—Accused—Appellant.

v.

Emperor—Opposite Party.

Death Ref. No. 4 and Appeals Nos. 160 and 161 of 1935, Decided on 10th January 1936.

(a) Criminal Trial—Evidence — Admissibility of—Court should lean in favour of accused and exclude evidence of doubtful or remote relevance.

When considering the question of admissibility, the Court should lean always in favour of the accused, and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance. [P 79 C 1]

(b) Criminal Trial — Trial by Jury—Non-directions and misdirections — Judge not warning jury that statement attributed to individual accused, is not evidence against other, in event of jury finding that individual guilty—Judge stating case for prosecution and argument in support of it without pointing parts of it, not supported by evidence—Judge referring to statements regarding which there is no evidence and to contents of documents which are inadmissible and irrelevant—All these amount to non-directions and misdirections.

Where the Judge in his charge to jury, omits to remind the jury that the statement attributed to individual accused is not evidence against the other accused in the event of the jury finding that individual guilty and the Judge repeatedly states the case for prosecution and the arguments in support of it without clearly pointing to the jury, those facts of it which are not supported by evidence or which depend merely upon glosses upon evidence; and states that one of the accused is suffering from venereal disease, when there is no evidence to that effect; and while referring to certain anonymous petitions tells the jury that evidence given on oath is of much greater value than statements made by unknown persons in the anonymous petition when there is nothing to show that the statements were made, instead of telling them that the evidence which was improperly admitted in evidence, is of no value and directing to reject it as irrelevant, and where he refers to the contents of documents which are inadmissible and irrelevant, all these amount to misdirections and non-directions. [P 79 C 1, 2]

(c) Criminal Trial — Trial by jury — Misdirection—Accused in criminal trial are under no obligation to prove their innocence or adduce evidence in their defence—Remarks of Judge in charge to jury that accused have failed to give explanation of facts adduced in evidence against them amounts to misdirection — He should, at least, give accused opportunity of explanation.

The onus of proof in criminal cases never shifts to the accused and they are under no obligation to prove innocence or adduce evi-

dence in their defence or to make any statement. [P 79 C 2]

Where therefore the Judge in his charge to the jury, repeatedly draws the jury's attention to the fact that the accused have failed to give any explanation of facts adduced in evidence against them, his remarks amount to misdirection. In any case if the Judge intends to make such remarks, it is his duty first to give the accused an opportunity of explanation by drawing their attention specifically to the evidence upon which the Judge relies: *Woolmington v. The Director of Public Prosecutions*, (1935) A C 462, Foll. [P 79 C 2]

(d) Criminal Trial — Appeal — Evidence—Appreciation—Decision of case turning upon question as to what inference is to be drawn from well established facts about which there is no doubt—High Court is entitled to draw necessary inference.

Where, the decision in a case does not really turn upon questions about the veracity of witnesses or upon the finding of doubtful facts but upon the question what inference is to be drawn from well established facts about the existence of which there is not and cannot be any reasonable doubt, the High Court, is at least, if not better qualified, than the jury to draw the necessary inference. [P 80 C 1]

(e) Criminal Trial — Sentence — Delay of over four months in preparation of paper book is unreasonable and requires explanation—Accused under sentence of death for about ten months as result of delay and long vacation—High Court will take the fact into consideration along with other circumstances in altering sentence.

Where in an appeal and a reference from a sentence of death, there is a delay of four months in getting the paper book ready such delay in a capital sentence case is unreasonable and requires explanation. [P 80 C 2]

Where as the result of the delay and the intervention of the long vacation, the appellants have remained under sentence of death for about ten months, the High Court will take the fact into consideration along with all the facts and circumstances of the case in not confirming the sentence of death but reducing it to one for transportation for life. [P 80 C 2]

(f) Criminal P. C. (1898), Ss. 374, 418 and 423—Accused sentenced to death can appeal on matter of fact as well as of law—High Court can come to its own conclusion as to guilt or innocence of accused independently of verdict of jury and opinion of trial Judge—It should, however, attach greatest possible weight to verdict of jury, if answering reasonable test.

Accused sentenced to death have under S. 374 read with S. 418, in the High Court a right of appeal on matter of fact as well as of law. [P 83 C 2]

In disposing of a reference under S. 374, and appeals by persons sentenced to death, the Judges of the High Court are entitled to come to their own independent conclusions as to the guilt or innocence of accused independently of the verdict of the jury, or of the opinion of the Judge. But although they are not bound by

the verdict of the jury, they must attach greatest possible weight to the verdict of the jury, if it answers a reasonable test. [P 83 C 2]

It cannot be said that in dealing with a reference under S. 374 and appeal by accused only two courses are open to the High Court, i. e., to acquit the accused or to order a re-trial. [P 84 C 1]

In disposing of a reference under S. 374 and the appeals by the accused, the Judges of the High Court are bound to satisfy by going through the evidence whether the accused have been rightly convicted, but in doing so they must attach considerable weight to the verdict of the jury. If after examining the evidence which is admissible in law they find even without any opportunity of hearing witnesses and seeing their demeanour, that certain facts emerge from the evidence as proved beyond reasonable doubt and the decision in the case depends upon inference to be drawn from these proved facts, they are not bound to order retrial. When however the evidence cannot be properly weighed by the Court without hearing witnesses and seeing their demeanour in the witness box and they are not in a position to say whether the facts from which inferences are to be drawn are true or false, re-trial should be ordered: 2 C W N 49; 1928 Cal 430; 1931 Cal 178 and 1933 Cal 426, *Rel. on.* [P 84 C 1]

(g) Penal Code (1860), Ss. 120-A and 302—Conspiracy to commit murder—Express proof of conspiracy is not necessary—Agreement to carry out unlawful object may be inferred from acts and conduct—Evidence must show common plan as to exclude reasonable possibility of acts having been done separately and connected only by coincidence.

In case of a charge of a conspiracy to commit a murder, it is not necessary that there should be express proof of conspiracy. It is not necessary to prove that two or more persons came together actually agreed in terms to have the common design and to pursue it by common means and so to carry it into execution. [P 84 C 1]

There may be no witnesses to say that in their presence the conspirators agreed to carry out an unlawful object. From the acts and conduct, agreement can be inferred. If it is proved that they pursued by the acts the same object often by the same means, one performing one part of the act and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, the Court is at liberty to draw the inference that they conspired together to effect that object. The question whether certain acts were done in pursuance of a conspiracy or were done separately without any pre-arranged plan depends upon the evidence in each case. The evidence must show a common plan so as to exclude a reasonable possibility of the acts of the conspirators having been done separately and connected only by coincidence: *R. v. Murphy* (1837) 8 C & P 297, *Foll.* [P 84 C 1, 2]

(h) Criminal Trial—Evidence—Proof of case against accused must depend on positive evidence of guilt given by Crown and not on absence of explanation by accused—Accused

involved by evidence in state of considerable suspicion—He must for his own safety prove facts reconciling suspicious circumstances with his innocence.

Although it is true that the proof of a case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself but from the positive alternative evidence of his guilt that is given by the Crown, it is not an unreasonable thing and it daily occurs in investigations both civil and criminal that if there is a certain appearance made against a party if he is involved by the evidence in a state of considerable suspicion he is called upon for his own sake and his own safety to state and to bring forward the circumstances whatever they may be which might reconcile such suspicious circumstances with perfect innocence: *Regina v. Frost*, 4 St Tr N S 85, *Foll.* [P 84 C 2]

N. K. Basu, Probodh Chandra Chatterjee, Debendra Narain Bhattacharjee, Debabrata Mookerjee, Bireswar Chatterjee, Sukumar Dey, Santosh Nath Sen, and S. C. Chaudhuri—for Accused.

Advocate-General, Anil Chandra Rai Chaudhuri and Srish Chandra Chaudhuri—for the Crown.

Lort-Williams, J.—This case is probably unique in the annals of crime. On 4th December 1933, Amarendra Chandra Pandey died in Calcutta. It is alleged that he died of plague, the germs of which had been injected into his arm by some person, who has not yet been discovered, on Howrah station on the 26th November. The two appellants Benoyendra Chandra Pande and Taranath Bhattacharjee along with Durga Ratan Dhar and Sivapada Bhattacharjee and others unknown were charged with conspiring to murder Amarendra in pursuance of which conspiracy Amarendra was murdered in the manner alleged. Benoyendra was charged also with abetment of murder and Sivapada was charged also with offences under Ss. 201 and 202, I. P. C. Benoyendra and Taranath were found guilty by a unanimous verdict of the offences with which they were charged and were convicted and sentenced to death. Durga Ratan Dhar and Sivapada Bhattacharjee were found not guilty and acquitted. Benoyendra and Taranath have appealed on the ground of misdirection and illegal admission of evidence. We have to consider these two appeals and a reference under S. 374, Criminal P. C. Benoyendra and Amarendra were half-brothers and members of the Pakur Raj family and jointly inherited their father's estate in 1929. At that time Benoyendra was 27

and Amarendra 16 years old. They were also joint reversionary heirs of their aunt Rani Surjabati. Benoyendra became the Karta of the family on his father's death, and pursued a course of life which, rightly or wrongly, offended and outraged the family, including Surjabati and Amarendra. They considered that he was extravagant, and objected to his relations with a dancing girl named Balikabala, and to his failure to provide money adequate for the suitable upkeep and education of Amarendra.

This friction between Benoyendra and the rest of the family gradually increased, especially with Amarendra, who was advised by Surjabati and his relatives Rabindra Nath Pandey and Baidya Nath Pandey. Its existence has been denied by Benoyendra, but it is fully confirmed by documentary evidence of undoubted authenticity. In 1931 Amarendra attained his majority, and in 1932 he began to take definite steps to assert his rights in the joint estate, and in open opposition to Benoyendra. On the 12th May he executed a several power of attorney in favour of persons who could not be controlled by Benoyendra, though he was subsequently induced by Benoyendra's threats and promises to cancel it on the 6th July. These facts and the growing friction between the brothers are confirmed in a series of letters which passed between them, in which also for the first time the question of partition was openly mooted. During the Puja vacation of 1932, Amarendra was staying with Surjabati at Deoghar. One day Benoyendra came there accompanied by a compounder. He and Amarendra went for a walk together, after which Benoyendra and the compounder departed. A few days after Amarendra began to be ill and his illness was diagnosed by Dr. Sourendra Nath Mukherjee as being due to tetanus infection, which he treated with injections of anti-tetanus serum. A telegram was sent to Benoyendra at Pakur to bring the family physician. He brought instead the appellant, Taranath, a doctor from Calcutta, and wanted Dr. Sourendra to keep Dr. Taranath as his assistant. Dr. Sourendra refused because he got the impression that Dr. Taranath was trying to induce him to abandon the serum treatment in favour of injections of morphia.

Subsequently, Benoyendra appeared again, this time with Dr. Dhar, who

persuaded Dr. Sourendra reluctantly to give a further injection of serum he had brought from Calcutta, and later still Benoyendra came again with both Dr. Dhar and Dr. Sivapada who prescribed medicines for the patient. These however were not given to him because his relatives were by this time suspicious about both Benoyendra and the doctors who were brought by him. Subsequently, Amarendra developed an abscess at the place where Dr. Dhar's injection had been given, and a sinus which was eventually opened by Dr. L. M. Banerjee in Calcutta. The Crown regarded all these happenings at Deoghar as overt acts of the conspiracy to murder Amarendra. The learned Sessions Judge quite properly excluded evidence of statements alleged to have been made by Amarendra about what happened when he and Benoyendra went for a walk together. Bearing in mind that morphia was admitted to be a correct treatment for tetanus if used as ancillary to serum and for the purpose only of reducing the accompanying convulsions and that there was evidence of the existence of a bleb upon Amarendra's foot which he had pricked with a pin, and that both Dr. Dhar and Dr. Sivapada have been acquitted, I consider that it is safer to disregard the Deoghar incidents altogether in considering the question of the guilt or innocence of the appellants. This illness of Amarendra left him with a permanently damaged heart, and he did not otherwise recover his health until April 1933.

In November 1932 Benoyendra began to take steps to obtain the withdrawal from the Allahabad and other Banks of certain cash deposits belonging to the joint estate and amounting to Rs. 13,000. This he achieved by obtaining in June 1933 in the joint names of himself and Amarendra a succession certificate empowering Benoyendra and Amarendra jointly and severally to collect the debts. Subsequently Amarendra learnt about this withdrawal and began to take more active steps to protect his interests, and consulted pleaders with the object of calling Benoyendra to account, and bringing about a partition of the joint estate either amicably or by means of a suit. In October 1933, a sum of Rs. 17,000 was paid into Pakur Court in respect of a compromise decree in favour of the joint estate, and Benoyendra made strenuous

efforts to withdraw it. This came to the knowledge of Amarendra who, upon the advice and with the assistance of Rabindra, filed a petition of objection on 17th November, with the result that an order for withdrawal was refused, and Benoyendra failed to get this money until sometime after Amarendra's death. Thereupon Benoyendra returned to Calcutta and attempted to persuade Surjabati to send for Amarendra. Upon her refusal he sent a bogus telegram to Amarendra in the name of Surjabati on 18th November, with the result that Amarendra came to Calcutta on the 19th. The strained relations between the brothers had now reached breaking point, and all the family and especially Amarendra were thoroughly suspicious of Benoyendra and feared that he would stop at nothing to injure Amarendra. The brothers met and discussed at length the question of partition which Amarendra in opposition to Benoyendra, wished to be settled at Pakur.

While in Calcutta Amarendra went to the Purna Theatre with his relative Jyotirmayee and her party. Benoyendra was seen hovering about the theatre and its precincts in the company of another man described as short, dark-complexioned and wearing khaddar. Surjabati and Amarendra decided to leave Calcutta on 26th November and Benoyendra learnt about this the night before. On that night he was seen at Howrah Station in the company of a short, dark-complexioned man in khaddar. The next day he called at Surjabati's house, ascertained the exact time of her departure, and announced his intention of coming to see the party off. Surjabati went to the station accompanied by Amarendra, his sister Banabala and his deceased half-sister's daughter Anima, and they found Benoyendra waiting for them at the station entrance. The party passed through the booking-staff on their way to the platform. Amarendra headed the procession and Benoyendra brought up the rear. On the way Amarendra was jostled by someone coming from the opposite direction whom he afterwards described as a black man in khaddar who was not a gentleman.

Immediately after, Amarendra felt a prick in his right arm and exclaimed "someone has pricked me." Benoyendra made light of the matter saying that it was nothing, but Amarendra rolled up

his sleeve and showed the mark of the prick to his relatives including Benoyendra and Kamala Prasad Pande, and his friend Asoke Prokash Mitra. Kamala Prasad especially was suspicious and feared that the incident was due to some foul play. All the members of the family had been surprised at Benoyendra's unexpected courtesy in coming to see them off, as such behaviour was unusual for him. Kamala begged Amarendra not to go by the train, but to stay in Calcutta and have his blood examined, but Benoyendra was annoyed and rebuked him and said that they were making a mountain out of a mole-hill and urged Amarendra to go. In the train the anxiety of the party grew, and after arriving at Pakur and after receiving an urgent letter from Kamala and upon the advice of Rabindranath, Amarendra decided to return to Calcutta with Rabindra, where they arrived on the 29th. There he was examined by Dr. Nalini Ranjan Sen Gupta who found the mark of a prick on his arm like the mark of hypodermic needle. On the 30th Dr. Nalini advised an immediate blood culture and this was made by Dr. Santosh Kumar Gupta. On 4th December Amarendra died. After a thorough and exhaustive testing of the blood culture on white rats and by means of other tests it was definitely established that Amarendra's blood was infected with germs of bubonic plague and this was reported to the public health authorities.

At the trial a mass of evidence was given by medical experts, who were cross-examined very thoroughly and at great length with the object of establishing the probability or possibility that the diagnosis that Amarendra died of plague was wrong, or that the blood culture had been confused with the culture of some other person's blood, or had been either accidentally or deliberately contaminated, or that Amarendra had contracted plague either from his half-sister Kananbala who is alleged to have died of mumps on 10th September 1933, or otherwise naturally from a flea-bite or some other source.

I do not propose to discuss this evidence again, but I have considered all of it very carefully and I am satisfied that the Crown succeeded in proving beyond the possibility of reasonable doubt that Amarendra died of plague, the germs of which were injected into his arm on

Howrah Station as alleged, by some person at present unknown. Immediately after Amarendra's death some of his relatives began to discuss with Kalidas Gupta, a pleader, well known to the family and living at Pakur, the question of instituting a police enquiry. These discussions went on throughout December and in January, and it was ascertained that Benoyendra had been a boon companion of Taranath to whom he had been introduced by Balikabala, and that all three had been in close friendship and association for more than two years, and that Taranath was a doctor and a trained bacteriologist. Eventually a petition was presented to the Deputy Commissioner of Police at Calcutta by Kamala Prosad Pandey on 22nd January 1934 and Sub-Inspector Sarat Chandra Mitra began to make a confidential inquiry.

Upon information given by Kalidas, Benoyendra was arrested on 16th February while on his way by train to Bombay. The case was formally instituted on the 17th and Taranath was arrested on the 18th. Kalidas proceeded to Bombay on business and there got in touch with a guide named Ratan Salaria who was able to give much valuable information about visits paid by Benoyendra to Bombay both alone and in the company of Taranath. The investigation proceeded at Bombay and Calcutta and the following surprising facts were elucidated. On 12th May 1932, the day upon which Amarendra executed the several power of attorney already mentioned, the stamp for which had been purchased the previous day, Taranath sent an express prepaid telegram to the authorities of the Haffkine Institute at Bombay asking them to send virulent plague culture for laboratory work. At this time Benoyendra was staying at a hotel in Calcutta, and on that day Balikabala accompanied by an officer of the Pakur estate arrived at the hotel. Although Taranath went to the length of adding after his name the letters D. T. M. (Diploma of Tropical Medicine) to which he was not entitled, the authorities of the Haffkine Institute refused to supply the culture, unless Taranath first obtained the permission of the Surgeon-General of Bengal.

Later in May, Taranath approached Dr. Ukil of Calcutta, and on the faith of Taranath's statement that he had dis-

covered a cure for plague and wished to test it with plague culture, he induced Dr. Ukil to allow him to work in his laboratory under his supervision. Plague culture was obtained from Dr. Naidu of the Haffkine Institute, but Taranath was not allowed to handle it. Attempts were made to subculture the strain supplied, but there was no growth and the strain was destroyed. Taranath tried to induce Dr. Ukil to indent for culture a second time, but he refused. Eventually in 1933, Taranath obtained from Dr. Ukil a letter of introduction addressed to the officer-in-charge of the Haffkine Institute with the request that Dr. Taranath as a bacteriologist might be granted facilities of making experiments in connection with the curative value of a drug which he had discovered and which he considered to be effective in cases of plague.

On 30th April 1933, Benoyendra went to Bombay and entered his address in the Orient Hotel registered as of Tagore Castle Lane Calcutta, which was not his address, but Taranath's. He engaged Ratan Salaria as his guide, and told him that he had come to Bombay with the object of obtaining facilities for testing a curative drug for plague on behalf of a brother doctor. He asked for a Times of India Directory in order to ascertain the names of the doctors attached to the Haffkine Institute. The next day he saw Dr. Naidu and gave him Taranath's letter of introduction and said that he was his friend and had been sent in advance to find out whether Dr. Naidu would grant the desired facilities. Dr. Naidu told him that his friend must first write to the Director of the Haffkine Institute and obtain his permission, otherwise he could not help him. The same evening Benoyendra left for Calcutta.

On 1st July, Benoyendra, went again to Bombay and stopped at the Sea View Hotel. Again he gave the Tagore Castle Lane address and engaged the same guide. On arrival he made strenuous efforts, including offers of money, to obtain plague culture from Dr. Nagarajan and Dr. Sathe—two veterinary surgeons attached to the Haffkine Institute, but failed. He however obtained from Dr. Nagarajan the information that he could get plague culture at the Arthur Road Infectious Diseases Hospital. Thereupon he saw Dr. Patel, the Superintendent of that Hospital, and asked him to allow his

doctor friend to work in his laboratory on his alleged cure. Eventually Dr. Patel was persuaded to accede to this request, and he instructed his assistant, Dr. Mehta that a Bengali doctor was coming to do some work on plague bacilli and to give him facilities. At Benoyendra's request Dr. Mehta obtained Dr. Patel's permission to indent for one tube of live plague culture from the Haffkine Institute pending the arrival of Dr. Taranath. Taranath arrived on 7th July and stayed at the same hotel with Benoyendra, who eventually paid the bill. Benoyendra and Taranath together purchased rats in the market.

Dr. Patel introduced Taranath to Dr. Mehta who prepared some subcultures, and Taranath tested the cultures upon the rats with the result that they died of plague. At times Taranath was assisted by Dr. Mehta, but he was not always present during the experiments. Taranath was allowed to work freely in the laboratory and had the use of all the necessary appliances. He also brought with him a small bag containing instruments. On the evening of 12th July, when an experiment on one of the rats was still incomplete, Taranath told Dr. Mehta that he had urgent work in Calcutta and must leave immediately. He asked him to convey his thanks to Dr. Patel and said that he would return later on, but he never returned nor did he correspond with either Dr. Patel or Dr. Mehta. Benoyendra and Taranath left Bombay together that night for Calcutta. While in Bombay Benoyendra made strenuous endeavours to get Amarendra's life insured for Rs. 51,000 with a condition that the policy should not be contested after Amarendra's death. This unusual condition was not accepted and the insurance was not effected. Long statements by Benoyendra and Taranath were read at the trial and amounted substantially to a denial of guilt and of the truth of the inferences which the Crown sought to draw from the facts given in evidence. Taranath's explanation of the Bombay incidents was that he thought that he had discovered a cure for plague and wanted to test its efficacy. He asked Benoyendra to take the letter of introduction to Bombay and make the necessary enquiries because Benoyendra happened to be going on business of his own. Benoyendra's explanation was that he had

to go to Bombay on business connected with the film industry in which he was interested, and that he had made enquiries for Taranath simply as an act of friendship.

Dr. Mehta saw no signs of any cure or medicine being applied by Taranath to the rats during the experiments. Apart from statements made by Benoyendra and Taranath, there is not a vestige of evidence to show that Taranath either had or thought he had at any time discovered a cure for plague, or wished to test it, or that Benoyendra had any other purpose in going to Bombay than either to procure plague culture, or to obtain for Taranath facilities which would enable to procure it. The practicability of removing culture from the Arthur Road Hospital, carrying it from Bombay to Calcutta and keeping it alive from July to December, was established beyond doubt by the medical evidence. Upon arrest Taranath told Sub-Inspector Mitra that he had never been to Bombay with Benoyendra, that he had no idea of the culture of plague bacilli, that he had never been to Bombay in his life, and that he had never approached any doctor for any letter of introduction for Bombay. He admitted that he had known Benoyendra for 3 or 4 years. Later, while on bail he went to the police and altered this statement, and admitted that he had been to Bombay, but not with Benoyendra. At the trial he denied that he had known Benoyendra prior to September or October 1932.

Benoyendra admitted that he had been to Bombay to arrange for film work, but denied that Taranath had ever been with him to Bombay. Further he said that he had never heard anything about Amarendra having been pricked at Howrah Station. While on bail, upon being asked by Gouri Sen, who is connected with the Medical Supply Concern where Taranath was employed as a bacteriologist, "Well, and how are you in this murder?" Taranath replied "What little I have done, those who have done more have not been arrested." Apart from the denials which I have already mentioned, Benoyendra alleged in his defence that the whole case was false and was due to a conspiracy to get rid of him which was concocted by his relatives with the aid of Kalidas Gupta. Of this alleged conspiracy there is not a vestige

of evidence. The learned Advocate for the appellants have complained of the wrongful admission of evidence and misdirection and non-direction by the learned Sessions Judge, and of his failure adequately to examine the appellants under the provisions of S. 342, Criminal P. C. There is some justification for these criticisms.

A good deal of evidence both oral and documentary was admitted which was of doubtful relevance and which it would have been wiser to exclude. When considering the question of admissibility, the Court should lean always in favour of the accused, and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance. Some evidence also was admitted which was clearly inadmissible and irrelevant. For example Ex. 20, being a letter from Rabindra to Kalidas, Ex. 67 being a letter from Baidyanath to Amarendra, and the contents of certain anonymous petitions found upon Benoyendra when arrested, being Exs. 73, 76, 77 and 78. The admission of the contents of Ex. 76 was somewhat serious error because it contained a reference to statements made by Amarendra about the cause of his tetanus infection, which evidence had quite properly been excluded by the learned Judge at another stage of the trial.

Of oral evidence wrongly admitted, there was the statement by Kamala Prosad on p. 70, Vol. 1 of the paper book, that he had his suspicions about Benoyendra because he had heard from Amarendra something about the cause of his tetanus. Also the statement by Jatindra Das Gupta on p. 421 that another witness, Tota Singh had told him that "Bhaya" meant Taranath. Tota Singh in his evidence denied this. Of instances of misdirection and non-direction the learned Judge omitted to remind the jury that statements attributed to individual accused, such as those attributed to Sivapada on pp. 38, 113 and 488, would not be evidence against the other accused in the event of the jury finding that individual not guilty. Also he repeatedly stated the case for the prosecution and the arguments advanced in support of it, without clearly pointing out to the jury those parts of it which were not supported by evidence, or de-

pended merely upon glosses upon evidence. Further on p. 703 he stated to the jury that they had already heard in evidence that Benoyendra was suffering from venereal disease. This undoubtedly was liable to prejudice the accused. There was no such evidence, because Ex. 75 which was Benoyendra's Blood Examination Report, was, quite properly, not tendered in evidence, being irrelevant and inadmissible. Further with regard to the anonymous petitions which I have mentioned already, the learned Judge referred, on pp. 708 and 712, to their contents, and told the jury that evidence given on oath was of much greater value than statements made by unknown persons in anonymous petitions, when there was nothing to show that the statements were made whereas he ought to have told them that this evidence, which had been improperly admitted, was of no value, and directed them to reject it as irrelevant. Similarly, he referred to the contents of other documents which I have held to be inadmissible and irrelevant, such as Ex. 67 on p. 712. Further, on p. 746, he referred to Balikabala as the common keep of Benoyendra and Taranath, of which there was no evidence, and on pp. 748 and 750 he said that Amarendra's body had been cremated speedily, thanks to Benoyendra's bribe to the Registrar at the burning ghat, of which there was no real evidence.

With regard to the Judge's alleged failure to examine the accused generally at the end of the case for the prosecution the learned advocates have pointed out that he repeatedly drew the jury's attention to the fact that the accused had failed to give any explanation of facts adduced in evidence against them. In my opinion, this criticism is justified. Bearing in mind that the onus of proof in criminal cases never shifts to the accused, and that they are under no obligation to prove their innocence or adduce evidence in their defence or to make any statement, the learned Judge's remarks amounted to misdirection. Upon this point the law has recently been re-stated clearly and emphatically by Viscount Sankey, L. C. in 1935 A C 462 (1). And in any case, if the learned Judge intended to make such remarks, it was undoubtedly his duty first to give the accused an opportunity

1. Woolmington v. The Director of Public Prosecutions, (1935) A C 462.

of explanation by drawing their attention specifically to the evidence upon which the learned Judge relied. On the whole however I have come to the conclusion that none of these errors are more than comparatively minor blemishes on what was otherwise a careful and very able charge, and a masterly exposition of intricate evidence, at the end of a long and difficult trial. Nevertheless, if I thought that these errors had seriously prejudiced the accused, or that their omission would possibly have led to a different result, or that they had caused any failure of justice it would have been necessary to order a new trial. The decision in this case, however does not really turn upon questions about the veracity of witnesses or upon the finding of doubtful facts, but upon the question what inference is to be drawn from well-established facts about the existence of which there is not and cannot be any reasonable doubt. This Court is at least as well, if not better, qualified than the jury to draw the necessary inference.

For the purpose of this decision I have eliminated from consideration all evidence which was inadmissible or of doubtful relevance. I have also disregarded the evidence of Gouri Sen about the truth of which there may be some doubt, and of Benoyendra's alleged attempts to interfere with possible witnesses after the death of Amarendra. Taking into consideration only the incidents at Bombay and at Howrah Station, and the medical and documentary evidence, the questions to be decided are, what inferences are to be drawn from these facts, and whether more than one inference is reasonably probable. After very careful consideration I have come to the conclusion that the only possibly reasonable inference is, that the two appellants conspired together to murder Amarendra, and that for this purpose they provided some person at present unknown with plague culture which was obtained by them from Bombay as alleged, and that that person, upon their instigation, murdered Amarendra by injecting the germs of plague into his arm at Howrah Station as a direct result of which he died. I am satisfied beyond any reasonable doubt from the evidence given by the medical experts and the health authorities, that the plague culture could not possibly have been obtained elsewhere than at Bombay and in the

manner alleged. It is clear from the evidence that Benoyendra and Taranath had the means of obtaining plague culture and that Benoyendra had the motive to use it in the manner alleged. There is evidence that no other likely or possible person could have had either the means or the motive, and there is no evidence that anyone else had either means or motive.

The motive for this crime is clear and abundant and requires no elaboration. It is proved by the documentary evidence alone, apart from the statements of witnesses whose evidence may possibly have been coloured by bias or suspicion. The result is that each of these appeals must be dismissed. The murder was committed more than two years ago. The appellants were arrested in February 1934, were committed for trial in May, and were on trial until February 1935. The appeals and the reference were received in the office of this Court on 25th February, but the paper book was not ready until 2nd July, a delay of over four months. In a capital sentence case this delay is unreasonable and requires explanation. The result of this delay and the intervention of the long vacation had been that the appellants have remained under sentence of death for approximately ten months. In consideration of these facts, and all the facts and circumstances of this case, which depends solely upon circumstantial evidence, and in the hope that this course may lead to the discovery and apprehension of the actual perpetrator of this atrocious crime, we do not confirm the sentence of death, but sentence each of the appellants instead to transportation for life.

Nasim Ali, J.—I agree. Mr. Basu appearing on behalf of the accused Benoyendra has contended before us that we have no power to affirm the conviction of the accused, if the verdict of the jury on which the conviction is based is found by us to be erroneous owing to misdirections of the Judge. The line of reasoning adopted by Mr. Basu is as follows: By proviso to S. 376, Criminal P.C., sentence of death cannot be confirmed by this Court until the appeal of the accused has been disposed of. By S. 418 (1), of the Code, where the trial is by jury, appeal lies on a matter of law only. In disposing of appeals in such cases the powers of the appellate Court are limited by S. 423

of the Code (1). If there is no error of law the appeal fails. If there is an error of law the appeal succeeds. Admission of inadmissible evidence, misdirections or non-directions on material points are errors of law. Sub-s. 2 of S. 423, authorises the Court to alter or reverse the verdict of a jury if it is erroneous owing to a misdirection of the Judge. As soon as the verdict is found to be erroneous owing to misdirection of the Judge this Court is bound to set aside the verdict as well as the conviction and sentence. After the conviction and the sentence are set aside nothing remains to be confirmed under S. 376 (a) of the Code. Two courses are thereafter open to this Court (a) to acquit the accused or (b) to order a re-trial. This Court can go into facts for either of those two purposes. It cannot go into facts and substitute its own verdict in place of the verdict of the jury which has been already set aside. The word "erroneous" in sub-s. (2) of S. 423 does not mean wrong in facts but wrong in the process by which it has been arrived at. The expression "in fact has occasioned a failure of justice" in S. 537 (d) of the Code does not imply failure of justice in reality, i.e. on merits. It implies prejudice or some substantial wrong to the accused. S. 167 of the Evidence Act must be read subject to the general principle laid down (1894) A C 57 (2), that the right to be tried by a jury is a cherished right and cannot be taken away by the Court of appeal.

In support of this argument reliance was placed by the learned Advocate in the following cases, 21 Cal 955 (3), 25 Cal 230 (4), 4 C W N 576 (5), 14 C W N 493 (6), 39 All 348 (7), 46 Cal 895 (8). In 21 Cal 955 (3) there was no appeal on facts. The word "erroneous" in S. 423 was taken to mean wrong not on facts but wrong in the process by which it was arrived at. The reason given for this

interpretation was that the word must be read in connection with the words that follow. In this case the principle in (1894) A C 57 (2) was applied and no reference was made to S. 167, Evidence Act. (1894) A C 57 (2) proceeded on the principle that right to be tried by jury is a cherished right and if an accused be deprived of that right, substantial wrong is done to the accused and there is miscarriage of justice. The verdict of the jury was set aside and the accused was acquitted. In 25 Cal 230 (4) the verdict of the jury was found to be vitiated by misdirections. This Court set aside the verdict and ordered a re-trial in view of the decision in *Waffadar's case* (3). In this case also there was no appeal on facts. In 4 C W N 576 (5) the principle in *Makin's case* (2) was applied. In this case there was no appeal on facts. The misdirections of the Judge were found to have misled the jury upon a material point. The Court of appeal was not in a position to say what effect the misdirection might or might not have on the minds of the jurymen. Under these circumstances it was held that the prisoners were prejudiced and there had been failure of justice. The conviction was set aside and a retrial was ordered. In 14 C W N 493 (6) the principle in *Sadhu Sheikh's case* (5) was followed. There was no appeal on facts. S. 167, Evidence Act, did not apply to it as no inadmissible evidence was placed before the jury. In this case re-trial was ordered in the case of some of the accused. In 39 All 348 (7) the appeal was against an order of acquittal. The Allahabad High Court followed the principle laid down in 21 Cal 955 (3), set aside the conviction and ordered a re-trial.

In 46 Cal 895 (8) there was no appeal on facts. The verdict of the jury was based on some inadmissible evidence. S. 167, Evidence Act, was not applied as the trial was by jury and the appeal lay on a matter of law only. In this case however it has been observed that the true rule is that the Court of appeal should not confirm the conviction of the appellant or regard the legal evidence as sufficient to justify the decision unless it is satisfied that the verdict of the jury would have been the same if no evidence had been wrongly admitted and that the same principle should be applied to the wrongful admission of evidence as to misdirections of law. In this case the Court

2. *Makin's case*, (1894) A C 57.

3. *Waffadar Khan v. Queen-Empress*, (1894) 21 Cal 955.

4. *Ali Fakir v. Queen-Empress*, (1897) 25 Cal 230.

5. *Sadhu Sheikh v. Queen-Empress*, (1900) 4 C W N 576.

6. *Harzir v. Emperor*, (1910) 14 C W N 493=5 I C 315=11 Cr L J 196.

7. *Emperor v. Ikramuddin*, 1917 All 173=39 I C 331=39 All 348=18 Cr L J 491.

8. *Ramesh Chandra Das v. Emperor*, 1919 Cal 514=50 I C 660=20 Cr. L J 324=46 Cal 895=29 C L J 513=23 C W N 661.

was not in a position to predict that the verdict of the jury would not have been the same if no evidence had been wrongly admitted. The appellant was discharged in this case, as re-trial was held to be a matter of discretion. The learned Advocate-General appearing for the Crown invited our attention in this connection to the following cases: 19 Bom 749 (9), 25 Cal 711 (10), 26 Mad 1 (11), 26 C W N 558 (12), 40 C L J 313 (13), 58 Cal 96 (14), 59 Cal 1361 (15) and 1933 Bom 153 (16). In 1933 Bom 153 (16) the Bombay High Court dissented from the decision in 21 Cal 955 (3). In this case the verdict of the jury was vitiated by some inadmissible evidence. The learned Judges however applied the provisions of S. 167, Evidence Act, and affirmed the conviction and sentences though the appeal lay as a matter of law only. The reasons given were: (1) no authority was cited in 21 Cal 955 (3) in support of the interpretation of the word "erroneous" in S. 423 of the Code. (2) In view of the provision of S. 167, Evidence Act, and Ss. 537 and 423, Cl. (d), Criminal P. C., the principle in (1894) A C 57 (2) was not applicable in India. The learned Judges applied the test laid down in 5 W R 80 (17), viz., whether if the case had been tried by a Judge and assessors the Court would set aside the verdict.

It was pointed out that a re-trial should be ordered where the evidence is of such a character as to render it difficult to pronounce upon its value without hearing witnesses, but where the evidence is one sided and practically undisputed and the result depends upon the

inference from that evidence the matter should be determined by the Court of appeal and no re-trial should be ordered. In 25 Cal 711 (10), this Court dissented from the decision in 21 Cal 955 (3). The reasons given are (1) that the principle enunciated in (1894) A C 57 (2) is not applicable in this country as the policy of this country is different, (2) that nowhere the law lays down that when the verdict is set aside the Court must necessarily direct a new trial. In this case the appeal lay on a matter of law only. In 26 Mad 1 (11) the test in 5 W R 80 (17) was applied. It is pointed out that trial by jury is a comparatively recent innovation in India and even now all the offences are not so tried. The principle in (1894) A C 57 (2) should not be applied to a country where the history and essential characteristics of the law of trial by jury are very different. It has been observed in this case that S. 418 simply means that if there is an error of law the appeal will lie, and if there is no such error no appeal will lie and that the section does not prohibit the Court in a case where an appeal lies on a question of law from deciding questions of fact which other sections of the Code require the Court to decide in order to do justice to the case. In this case it is also pointed out that the words "in fact" in S. 537, indicate that in order to determine whether there has been a failure of justice in fact we must look into the facts to see what they are. 21 Cal 955 (3) and 25 Cal 230 (4) were dissented from by the learned Judges.

In 26 C W N 558 (12) there was an appeal on a matter of law only. Though there had been misdirections, this Court refused to set aside the verdict and dismissed the appeal as it came to the conclusion after examining the evidence, that the misdirection in fact did not occasion a failure of justice. In 40 C L J 313 (13) this Court did not interfere with the verdict of the jury though it was based on some inadmissible evidence in view of the provision of S. 167, Evidence Act, as apart from the inadmissible evidence there was sufficient evidence to justify the decision. In 58 Cal 96 (14) this Court has laid down that even if the verdict of the jury is erroneous owing to misdirection in a proper case this Court should deal with the whole case under the power and duty conferred upon it by

9. Queen-Empress v. Ram Chandra, (1895) 19 Bom 749
10. Taju Paramanik v. Queen-Empress, (1898) 25 Cal 711=2 C W N 369.
11. Emperor v. E. W. Smither., (1903) 26 Mad 1=2 Weir 521.
12. Superintendent and Remembrancer of Legal Affairs v. Syam Sundar, 1922 Cal 106=71 I C 367=26 C W N 558=24 Cr L J 143.
13. Harendra Nath v. Emperor, 1925 Cal 161=84 I C 451=40 C L J 313=26 Cr L J 307.
14. Government of Bengal v. Santiram Mondal, 1930 Cal 370=1930 Cr C 634=32 Cr L J 10=127 I C 657=53 Cal 96.
15. Saroj Kumar v. Emperor, 1932 Cal 474=1932 Cr C 464=139 I C 873=33 Cr L J 854=55 C L J 120=59 Cal 1361.
16. Ram Chandra v. Emperor, 1933 Bom 153=148 I C 333=1933 Cr C 465=35 Bom L R 174=5 Cr L J 747.
17. re Elahi Buksh, (1866) 5 W R 80=Beng J R Sup Vol 459 (F B).

law. This was an appeal against an order of acquittal. In 59 Cal 1361 (15) it has been laid down by this Court that before we can interfere with the verdict of the jury we must be reasonably satisfied that not only the Judge misdirected the jury but that his misdirection has caused them to come to a conclusion which is in fact wrong. In deciding 1933 Bom 153 (6) the Bombay High Court followed the principle laid down in the case reported in 19 Bom 749 (9). In this case though the appeal lay on a matter of law only Patkar J., made the following observations:

In a case of trial by jury the appellate Court has power in the event of any misdirection or admission of inadmissible evidence either to convict or to acquit the accused according as the evidence is or is not sufficient for conviction. Where the facts have to be determined and the evidence is of such a character that it renders it difficult to pronounce any opinion as to its character without hearing witnesses, re-trial may be ordered.

It may be noticed here that in the Code of 1872 (S. 283) the words used were

has occasioned a failure of justice either by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence.

In the Code of 1882 the latter words were omitted and the section simply read "has occasioned a failure of justice." After the decision in 21 Cal 955 (3) and 25 Cal 230 (4) the words "in fact" were inserted and the explanation and an illustration were added in 1898. In 26 Mad 1 (11) Benson, J., observed :

The words 'in fact' were introduced into the Code in 1898 apparently in order to emphasise the duty of the Court to go into merits before interfering in consequence of a misdirection or other error.

It is not disputed by Mr. Bose that in an appeal against an order of acquittal this Court can go into facts and convict the accused though the verdict may be erroneous owing to a misdirection of the Judge. Mr. Bose also concedes that in appeals against the conviction this Court after setting aside the verdict on the ground of misdirection has power to go into facts and acquit the accused. The learned Advocate-General contended that this Court has power under S. 423 to dismiss the appeal (even if verdict is erroneous in the process by which it has been arrived at) if this Court find that the conviction is right on the merits. From the reported cases it appears that there is a divergence of judicial opinion

on the question whether in cases where the appeal lies on a matter of law only the appellate Court has power in the event of any misdirection by the Judge or admission of inadmissible evidence to deal with the whole case on merits and to dispose of the case finally. The later decisions of this Court show that this Court has such power. In cases however where the appellants have been sentenced to death they have in this Court an appeal on matter of fact as well as of law. S. 374, read with 418 (2), supports this view. In disposing of a reference under S. 374 and the appeals by the persons sentenced to death we are therefore obliged to come to our own independent conclusions as to the guilt or innocence of the accused independently of the verdict of the jury or of the opinion of the Judge. In these cases the questions of misdirection are of less importance. But though we are not bound by the verdict of the jury we must attach greatest possible weight to the verdict of the jury if it answer a reasonable test. [See 2 C W N 49 (18), 32 C W N 345 (19), 34 C W N 1154 (20), and 37 C W N 595 (21).] Much reliance was placed by Mr. Bose on a decision of this Court of the year 1927 in 31 C W N 881 (22), in which the following observations were made:

The learned Deputy Legal Remembrancer has argued that the entire case is open to us under S. 374, Criminal P. C. No doubt that is so ; but that assumes that whatever has happened before the case comes to this Court has been done in strict accordance with the provision of the law, viz., that there had been a proper trial before a Judge and jury. But we are unable to say that there has been a proper trial in the case, the only course that is open to us is to set aside the conviction and sentence and to direct a re-trial.

This was a very peculiar case. In this case the Judge told the jury that there was no case considering the matter from any point of view other than the point

18. Queen-Empress v. Chatradhar, (1898) 2 C W N 49.

19. Gulkhan v. Emperor, 1928 Cal 430=109 I C 482=32 C W N 345=29 Cr L J 546=47 C L J 240.

20. Emperor v. Pachoo Shaikh, 1931 Cal 178=1931 Cr C 242=128 I C 817=34 C W N 1154=32 Cr L J 190 (H B).

21. Emperor v. Ashraf Ali, 1933 Cal 426=1933 Cr C 624=143 I C 473=37 C W N 595=34 Cr L J 533 (S B).

22. Emperor v. Rajab Ali Fakir, 1927 Cal 631=103 I C 750=46 C L J 31=31 C W N 881=28 Cr L J 742. *Sinha, A.*

of view presented by the prosecution and that the only course open to them was to bring in a verdict of guilty. Under these circumstances this Court held that there has been no proper trial. It may be noticed that in this case also it has been observed that in a reference under S. 374 the entire case is open to us. In disposing of a reference under S. 374 of the Code and the appeals by the accused, we are therefore bound to satisfy ourselves by going through the evidence whether the accused have been rightly convicted, but in doing so we must attach considerable weight to the verdict of the jury. If after examining the evidence which is admissible in law we find even without any opportunity of hearing witnesses and seeing their demeanour, that certain facts emerge from the evidence as proved beyond reasonable doubt and the decision in the case depends upon inference to be drawn from these proved facts, we are not bound to order a retrial. When however the evidence cannot be properly weighed by the Court without hearing witnesses and seeing their demeanour in the witness box and we are not in a position to say whether the facts from which inferences are to be drawn are true or false, retrial should be ordered. I am therefore unable to accept the broad proposition that in dealing with reference under S. 374 and the appeal by the accused only two courses are open to us, viz. either to acquit the accused or to order a re-trial.

Now the charge against the accused is that between May 1932 and December 1933 at Bhawanipore, Calcutta, Howrah and Deoghar, Pakur, Bombay and other places they along with others were parties to a conspiracy to commit murder of Amarendra and in pursuance of the said conspiracy Amarendra was in fact murdered by the introduction, on 26th November 1933 of virulent plague bacilli in his body which resulted in his death on 4th December 1933. It is not necessary that there should be express proof of conspiracy. It is not necessary to prove that two or more persons came together, actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. There may be no witnesses to say that in their presence the conspirators agreed to carry out an unlawful object. From the acts and conduct agreement

can be inferred. If it is proved that they pursued, by the acts, the same object often by the same means, one performing one part of the act and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, you are at liberty to draw the inference that they conspired together to effect that object: (1837) 8 C & P 297 (23). The question whether certain acts were done in pursuance of a conspiracy or were done separately without any pre-arranged plan depends upon the evidence in each case. The evidence must show a common plan so as to exclude a reasonable possibility of the acts of the conspirators having been done separately and connected only by coincidence. (His Lordship then considered the evidence and proceeded). There are therefore no circumstances to show that his attempts to get plague culture in 1932 and his activities at the Arthur Road hospital in 1933 were in connection with his experiments on any plague cure. It is true that:

The proof of a case against the prisoner must depend for its support not upon the absence or part of any explanation on the part of the prisoner himself but from the positive alternative evidence of his guilt that is given by the Crown. It is not however an unreasonable thing and it daily occurs in investigation both civil and criminal that if there is a certain appearance made against a party if he is involved by the evidence in a state of considerable suspicion he is called upon for his own sake and his own safety to state and to bring forward the circumstances whatever they may be which might reconcile such suspicious circumstances with perfect innocence, (1839) 4 St Tr N S 85, 443 (24).

From the facts and circumstances of the case the only reasonable inference is Taranath went to Bombay for the purpose of securing plague culture. Now Benoy in his statement says that he had been to Bombay in connection with his film business. It has been already stated that he arrived at Bombay on 30th April 1933 and left Bombay on the next day when he was told by Dr. Naidu to ask Taranath to write to the Director of Haffkine Institute for permission to make his experiments in the laboratory of the Institute. On his arrival at Bombay on 30th April 1933 he took Ratan Salaria as his guide. Ratan Salaria in his examination says that Benoy told him that his

23. R. v. Murphy, (1873) 8 C & P 297.

24. Regina v. Frost (1839) 4 St Tr N S 85, 443=9 C & P 129.

business in Bombay was to obtain facilities for Taranath's plague cure. He further says that Benoy did not say a word to him about any film Company or asked him to guide him to any film Company. It was never suggested to Ratan Salaria in the course of his cross-examination that his first visit to Bombay was in connection with any film business or that he ever visited any film Company. On his second visit to Bombay he also told Ratan Salaria that the object of his visit was the same as on the last occasion. This time he tried to get plague culture surreptitiously from the Haffkine Institute through Dr. Nagrajan and Dr. Sathe. He no doubt denies this, but no reason was shown why these two witnesses from Bombay would give false evidence against Benoy. There is nothing to show that Taranath asked Benoy to see these two doctors.

On the other hand Taranath says that he asked him to try Arthur Road Hospital for facilities for his experiments there. There was no suggestion to Ratan Salaria that Benoy's second visit was in connection with some film business. Much reliance was placed by the learned advocate for Benoyendra on Ex. 33. This is a letter which was written by Benoy to Amar on 20th July 1933. In this letter Benoy stated that his trip to Bombay was in connection with the production of a film and the costs were paid by a Company to a rupee, and that there were letters, cheques and bills in connection with the matter. No evidence was adduced by Benoy to substantiate these statements in Ex. 33. There is nothing to show that such evidence was not available at the time of the trial. In the course of the trial Benoy did not suggest the name of any company or anything from which the prosecution could get any details of this business. Prosecution therefore was not in a position to bring any evidence to show that his story about film business was false. Benoy was spending money from the joint fund and in order to meet any objections from Amarendra he was giving a false explanation in Ex. 33 about his expenses at Bombay.

It may be noticed here that after the death of Amarendra, Benoyendra made attempts to tamper with the evidence. Benoy does not explain why he was going to Bombay with money on 18th

February 1934. The reason is obvious. He was going to Bombay because he knew that the best evidence about his complicity in the crime would come from Bombay. There are no materials or circumstances for a reasonable hypothesis that Benoyendra's visit to Bombay was in connection with any film business or any business other than the procurement of plague culture. The report (Ex. 26) of Dr. Santosh Kumar Gupta (P. W. 33), his evidence in Court and the evidence of Dr. Naidu (P. W. 68) prove that Amarendra died of plague. It was argued on behalf of the appellants that the report of Dr. Gupta should not be relied upon as he did not apply the agglutination test. The evidence of Dr. Naidu is that it is extremely difficult, almost impossible to get a homogeneous and even suspension without spontaneous clumping and that specific anti plague serum agglutinates precede tuberculosis reduntum and also some members of the Pasteurella group. There is therefore no substance in this contention. It had been already stated that on 26th November 1933, while Amarendra was proceeding across the Howrah Station Hall after passing through the no-exit gate, he shouted out that he had been pricked by somebody with a pin. On 29th November Dr. Nalini found the mark of a prick on the right deltoid, something like the mark of a hypodermic needle. Dr. Nalini refused to accept the defence suggestion that the mark which he saw was the mark of a flea or insect-bite. The evidence in this case excludes the defence suggestion that Amarendra was bitten by a rat-flea at the Howrah Station. I am satisfied from the evidence in this case that plague bacilli were injected into Amar's system by some man at the Howrah Station and that his death was caused by the injection of the sensus. Now what was the source of this plague culture? The evidence in this case shows:

(1) That the Haffkine Institute at Bombay is the only place in India where plague research and researches on cultured Sera and Vaccine are being carried on since 1896 (P. W. 68). (2) That the said Institute supplied cultures to Government Institutions and research Institutions, if approved by proper authority (P. W. 68). (3) That the said Institute does not supply plague culture to private bodies or persons (P. W. 68). (4) That

in 1932 the Haffkin Institute sent some plague culture to Dr. Ukil of Calcutta but the culture and the sub-culture were destroyed in 1932 when the sub-culture failed (Exs. 15, 15/1, Ex. 16 and the evidence of P. W. 41 and P. W. 43); (5) that in January or February 1933 four tubes of plague culture were supplied by the Haffkin Institute to the School of Tropical Medicine in Calcutta (P. W. 69); (6) that the Arthur Road Hospital at Bombay is the only place in Bombay where plague cases are treated and culture is made in that hospital only for the Haffkin Institute (P. W. 47); (7) that the said hospital does not supply plague cultures to any other person or Institute except the Haffkin (P. W. 47); (8) that at Kanbun Valley researches are going on with regard to several aspects of plague (P. W. 68); and (9) that there are plague hospitals in Poona, Hyderabad and Secunderabad (P. W. 68).

Now the evidence does not show that plague cultures are made or are available at Kanbun Valley or the plague hospitals in Poona, Hyderabad and Secunderabad. The evidence of P. W. 69 shows that out of the four sealed tubes of plague culture indented by the Tropical School in Calcutta, up to 2nd October 1934, three continued to be in the same condition as they were when they were received from Bombay. The accused Tara Nath could not get plague culture in Calcutta, in 1932 and 1933 and had to look to Bombay for the same. In July 1933 Benoyendra told Dr. Nagarajan (P. W. 46) that he could not get plague culture in the Calcutta School of Tropical Medicine. The Tropical School in Calcutta does not make plague cultures or stock them. Plague cultures are generally indented for that school from the Haffkin Institute for purposes of experiment. The inference therefore is legitimate that the other tube in the Tropical School was used for experiments in the school before 6th April 1933. Captain Pasricha (P. W. 69) also said that in no other place in Calcutta plague cultures are made or stocked. The culture which was the cause of Amar's death was not therefore procured from Calcutta. The attempts of Dr. Tara Nath in 1932 and that of Benoyendra in 1933 to obtain plague culture from Haffkin Institute failed. The evidence in this case does not suggest that it could have been obtained from the said Institute. In

July 1933 Benoyendra while at Bombay got the information from Dr. Nagarajan that plague cultures were available in Arthur Road Hospital at Bombay. Tara Nath on his arrival at Bombay got access to plague cultures which were alive. The evidence further shows that Tara Nath had means to remove some plague culture without the knowledge of the hospital authorities and carry the same to Calcutta.

There is evidence also to the effect that plague culture if purloined in July 1933 could be kept alive up to 26th November 1933. There is also evidence that from 1926 up to September 1934 only one doctor, i. e., Tara Nath from Bengal had gone from Calcutta and Bengal to Arthur Road Hospital. The only reasonable inference is that the culture which was injected into Amar's body was brought from the Arthur Road Hospital at Bombay. The evidence does not show that the man who injected plague culture into Amar's body had any opportunity of stealing culture from the said hospital. He must have therefore got it from some body else. Benoyendra was on bad terms with Amarendra. The evidence does not show that any one else had any motive for murdering Amarendra. Benoyendra and Tara Nath were close friends and associates. The activities of Benoyendra and Tara Nath at Bombay in July 1933 can be explained only on the reasonable hypothesis that they were acting in close concert to steal plague culture from Arthur Road Hospital. In pursuance of the preparation made by Benoyendra, Tara Nath on his arrival at Bombay obtained facilities for stealing plague bacilli from the said hospital. They could be carried to Calcutta and kept alive till 26th November 1933. The germ which was responsible for Amarendra's death was obtained from Arthur Road Hospital and the evidence shows that excepting Tara Nath no body else had any opportunity for purloining it from that hospital. The only legitimate inference therefore is that the plague culture which was the cause of Amarendra's death was procured from Arthur Road Hospital in pursuance of a conspiracy to murder Amarendra and was supplied to a person at present unknown who injected it into Amar's system and Amarendra was murdered in fact by the injection of that sepsis at the Howrah Station on 26th November 1933 and that

Benoyendra and Tara Nath were parties to that conspiracy.

R.M./R.K.

Sentence altered.

*** A. I. R. 1936 Calcutta 87**

D. N. MITTER AND PATTERSON, JJ.

Surendra Nath Roy—Plaintiff—Appellant.

v.

Kedar Nath Bose and others—Defendants—Respondents.

Appeal No. 49 of 1932, Decided on 13th December 1935, from original decree of Sub-Judge, 1st Court, Backerjganj, D/- 8th September 1931.

*** (a) Contract Act (1872), S. 2—Letter communicating willingness to sell property in reply to enquiry whether property is to be sold, amounts to offer.**

A letter communicating willingness to sell certain property for a certain sum in reply to a letter inquiring whether the property is to be sold amounts to an offer or proposal within the meaning of S. 2 and is not merely an invitation to an offer. [P 89 C 2]

*** (b) Contract Act (1872), S. 7—Letter making offer for sale of property, directing that purchaser should write about acceptance to certain person at certain address—Purchaser instead of writing, putting himself in communication with person concerned—There is no contravention of S. 7 as to render contract not binding on seller.**

Where a letter by an intending seller making an offer for the sale of certain property directs that the purchaser will have to write about the acceptance of the offer to a certain person at a particular address, the letter is to be read in a reasonable and a sensible manner and it does not exclude the case where the intending purchaser instead of writing to the person concerned puts himself into communication with him and where the intending purchaser does so, it cannot be said that there is any contravention of S. 7, Contract Act, as to render the contract not binding on intending seller

[P 91 C 1, 2]

(c) Contract—Construction—Ratification—Necessary ingredients—Act must have been done for and in name of principal—There must be proof of full knowledge of what those acts were or that principal intended to take upon himself responsibility for such acts whatever they were.

To constitute a binding adoption of acts a priori unauthorized, these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal and (2) there must be a full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were.

[P 92 C 1]

Where the supposed ratification relates to acts as to which there is no pretence of any a priori authority, where it is not a question

merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts whatever they were or however culpable they were. Ratification relates back to the time of inception of the transaction and has a complete retroactive efficacy. [P 92 C 1, 2]

(d) Appeal—Powers of appellate Court—Issue simple one—Appellate Court will not discard appreciation of evidence by trial Court—Trial Court not properly considering effect of documentary evidence—Appellate Court may draw conclusions of its own.

Where, the issue is a simple one, the appellate Court should not very lightly discard the appreciation of evidence made by the trial Court which had the opportunity of seeing witnesses, hearing them and watching their demeanour.

[P 93 C 1]

Where, however, the weight of the admitted documents in evidence or of the documents in the evidence which have been proved, is so great that the appellate Court is constrained to differ from the estimate of the evidence by the trial Judge who belittles the effect of documentary evidence, the appellate Court may draw conclusions of its own. [P 93 C 1]

Atul Chandra Gupta, Radhica Ranjan Guha, Probodh Chandra Kar and Satyendra Chandra Sen for *Iswar Chandra Chakravarty*—for Appellant.

Basak, Prem Ranjan Roy Chowdhury, Sen Gupta and Dwijendra K. Dutt—for Respondents.

D. N. Mitter, J.—This appeal arises out of a suit for specific performance of a contract to sell. The plaintiff is the purchaser in whose favour the contract has been entered into by defendant 1. The suit has been dismissed by the Subordinate Judge. Hence the present appeal by the plaintiff. The case of the plaintiff is that defendant 1, Kedar Nath Bose, who is now the owner of a portion of the house known as Raja Bahadur's Haveli purported to sell the portion which is still left with him for a sum of Rs. 7,000. The case is that the contract to sell was entered into between the present plaintiff and the son of Kedar Nath Bose, Kali Das who has been described throughout these proceedings as Felu whom Kedar Nath Bose empowered to deal in the matter of the sale. The plaintiff in pursuance of certain correspondence to which reference will be made hereafter sends his kinsman and nephew Rash Behary Roy to the residence of defendant 1 at Calcutta, and according to the direction of defendant 1, he (Rash Behary) on 30th January 1930, corresponding to the 16th

Magh 1336 B.S. having settled with Felu to purchase for Rs. 7,000, the price proposed by defendant 1, sent a wire to the plaintiff for sending the earnest money. Accordingly a sum of Rs. 100, was sent to Harendra, son of the plaintiff, on 31st January 1930 by telegraphic money order and Harendra and Rash Behary paid that sum of Rs. 100, to Felu as earnest money as directed by defendant 1, and Felu accepted the same. It is stated that defendant 1 is legally bound by the acceptance of his son who was given, if not an express at least an implied, power to deal with the matter of sale and accept any offer that would be made. The plaint then narrates certain circumstances on which the plaintiff submits that Kedar ratified the acts done by his son even if there was no express or implied authority by Kedar in the matter of sale. He has accordingly prayed for a decree for specific performance of the contract of 30th January 1930 directing the defendants to execute a Kobala of out and out sale in favour of the plaintiff free from incumbrances and to get it registered within the time to be fixed by the Court. There is an alternative prayer, namely, that in case the defendants failed to execute the Kobala within the time fixed by the Court, the Court would proceed to execute and register such a Kobala in favour of the plaintiff in that behalf. The suit impleaded not only defendant 1, the vendor, but also defendants 2 and 3 as it is said that they are purchasers subsequent to the contract, their purchase having been effected on 14th March 1930. It is stated in the plaint that the purchase of defendants 2 and 3 was with notice of the earlier contract in favour of the plaintiff. In consequence of defendants 2 and 3 having been impleaded the plaintiff has asked for a further declaration that the Kobala of 14th March 1930 corresponding to the 30th Falgoon 1336 B.S. executed by defendant 1 in the name of defendant 3 one Romola Datt Chowdhurani, wife of defendant 2, was not binding on the plaintiff and for a further declaration that no title had accrued to defendants 2 and 3 on the basis of the same. Defendant 4 is said to have been a lessee under defendants 2 and 3. But the suit as against him has been dismissed as will appear from an order in the order sheet.

The defences to the suit for specific performance of contract are (1) that there

was no completed contract on 30th January 1930 or on a subsequent date prior to the conveyance in favour of defendant 3 and that whatever talk there was between the plaintiff and defendant 1 or his son that talk did not pass beyond the stage of negotiation and could not constitute contract specifically enforceable and (2) that defendants 2 and 3 are purchasers without notice. It may be said in this connexion that these defendants have also set forth in their written defence a contract with an agent of defendant 1, namely Surendra Nath Bose who figures very largely in this case, entered into on 1st February 1930, alleging that the sale on 14th March was in pursuance of the contract of 1st February 1930 and even if it be held that there was a ratification of the agreement by Felu (son of defendant 1) on 7th February 1930, defendant 3's purchase should prevail in view of the earlier contract of 1st February 1930.

The Subordinate Judge has given effect to these defences and has dismissed the suit. The plaintiff has consequently preferred the present appeal and Mr. Atul Chandra Gupta for the appellant has contended before us that the Subordinate Judge should have held that the contract set up by the plaintiff dated 30th January was a valid contract with defendant 1 by which he agreed to sell the properties now in question. It is contended that he should have further held that Felu, the son of Kedar, was empowered by Kedar to accept any offer that Felu could get and that he did really accept the offer by receiving Rs. 100 by way of earnest money. It has been further argued that apart from the question of Felu's authority to accept the offer and to receive the earnest money the Subordinate Judge should have held that Kedar ratified the acceptance of the offer of the plaintiff by Felu. It has been further contended that in so far as the defendants' case with regard to the contract executed by the Am-mukhtear of the plaintiff, Surendra Nath Basu dated 1st February 1930 is concerned, the agreement entered into on that date was really an ante-dated agreement for defeating the rights of the plaintiff. In order to consider the soundness or otherwise of these contentions on which Mr. Atul Chandra Gupta proposes to rest the appeal on behalf of his client it is necessary to refer to

the oral and documentary evidence which has been given in this case on behalf of both the parties. In support of the contention of the appellant that there has been a valid contract between them, the plaintiff and defendant 1 on 30th January 1930, our attention has been drawn to two letters, namely, Ex. 1 dated 24th January 1930 and Ex. 3 dated 26th January 1930, which have been printed at pp. 7 and 8 of the second part of the paper-book respectively. It appears that on 24th January 1930, the present plaintiff wrote to defendant 1 to the following effect. It is only necessary to quote the material portion. The plaintiff writes thus:

The news for the present is that I hear that you would sell your house in Raja Bahadur's Haveli at Barisal and that some one would come here on 14th Magh and settle the terms thereof (i. e. 14th Magh corresponding to 28th January 1930). I spoke to my maternal uncle, Khitish Chandra Roy about this matter I am ready to purchase that house. I hope that the terms of sale may not be settled without informing me. On arrival at Barisal I may be enquired for at the house of my father-in-law, Biseswar Ghose. Or if you or Felu come to Barisal, please put up at our house. ———

This letter was received by defendant 1 on 26th January at about 6-30 p. m. or 7 p. m. and in answer to that Ex. 3 the postcard was written by Kedar Nath Bose which contains certain important statements :

Glad to receive your letter. I am going to attend the Kumbha Mela at Allahabad by to-night's train. Yes, I shall sell such portion of the Raja Bahadur's house that I now have. I have got an offer up to Rs. 6,500. I intend to have Rs. 7,000. If you are willing to have it, write to Felu to this address. There is no certainty as to when I shall return. As a matter of fact, nothing short of Rs. 6,500, the offer I have already got, will do ; be it whatever in excess. Two or three persons have offered that price. ———

It is contended on behalf of the appellant that this was an offer by Kedar Nath Bose to sell Raja Bahadur's Haveli or rather such portion of it as has not been sold, for a sum of Rs. 7,000. On the other hand it has been contended on behalf of the respondents that this was not an offer at all within the meaning of S. 2, Contract Act, but that was merely an invitation to an offer. We do not think that we should accede to this contention raised on behalf of the respondents for S. 2 (a) states this :

When one person signifies to another his willingness to do or to abstain from doing any-

thing, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

Kedar, defendant 1, was by this letter signifying his willingness to sell a portion of the Raja Bahadur's Haveli now in question for a sum of Rs. 7,000, and he was communicating his willingness to sell for Rs. 7,000 to the present plaintiff by this letter. We have therefore no hesitation in repelling the contention made both by the learned advocates for defendants 1, 2 and 3. This was really an offer or rather a proposal within the meaning of S. 2, Contract Act. It appears from the evidence that in pursuance of this letter which was received in Barisal on 28th January 1930 in the morning at about 7-30 A. M. which must have been delivered to the plaintiff say by 9 A. M. The plaintiff sends his son one Harendra and a relation Rash Behari, as has been mentioned in the plaint, to see Felu, the son of Kedar Nath Bose, defendant 1. The evidence is that Felu expressed his intention to accept the offer of Rs. 7,000 for the house and asked that earnest money should be paid. Evidence does not show that he named any sum for the earnest money.

But the evidence of Rash Behari is that he asked for a sum of Rs. 100 which came by telegraphic money order and this sum was paid to Felu. The Subordinate Judge has hesitated to believe this part of the case because no receipt for Rs. 100 had been produced. No doubt the non-production of any receipt is a weak part of the plaintiff's case, but an explanation has been given by the son as well as by Rash Behari that they did not out of a sense of delicacy ask for any receipt as both the plaintiff and defendant 1 are relations, and it is very likely that Harendra was merely handing over the earnest money of the small amount of Rs. 100 without asking for a receipt as he was not sufficiently experienced in worldly affairs. As such he did not perhaps choose to ask for any receipt from a relation of his. It has been said, and in our opinion rightly said, that the case of want of consideration for the non-production of the receipt of Rs. 100 has been unduly stressed. In support of this payment we have the evidence of Rash Behari. We have evidence also of the two pleaders Lal Mohan Chakravarty and Charu Chandra Roy who state that Surendra Nath Bose, the agent of defendant 1, admitted before them

the receipt of the earnest money of Rs. 100. I might just refer in this connexion to the evidence of these two witnesses which is printed at pp. 164 and 169 of the first part of the paper-book respectively. Charu Chunder Roy says this :

Surendra Nath Bose told me when the measurements took place that the price had been settled at Rs. 7,000. Surendra Bose told me near the shop of Srish Roy that Rs. 100 had been paid as earnest money!

Lal Mohan Chakravarty says this on the point :

Surendra Bose told Charu Babu that he would find the description of the property and the boundaries from Srish Babu's Kobala and asked Charu Babu to state in the draft that Rs. 7,000 had been fixed as the consideration and that out of that sum Rs. 100 had been received as earnest money.

Having regard to the evidence of these two pleaders to the fact that there was some payment of money by the plaintiff's son to defendant 1, we think we should not be justified in rejecting the oral evidence on the question that the sum had been paid more particularly as it appears from the telegraphic money order that a sum of Rs. 100 had been sent by the plaintiff and received by the plaintiff's son in Calcutta. It has been suggested on behalf of the respondents that the telegraphic money order to Rash Behari at Calcutta was sent for the purpose of creating evidence of the payment of the sums for use at a later date. The reason suggested for such a course is that when on the 14th Magh, corresponding to the 28th January, the plaintiff found that a contract was going to be entered into on the 1st February with defendants 2 and 3 and everything had been settled with reference to the contract of defendant 3 and defendant 2 this telegraphic money order was sent in order to create evidence in order to avail of the sum when occasion demanded. It is next contended on behalf of the appellant on this part of the case that the learned Subordinate Judge ought to have read the facts of this case in the light of the subsequent conduct of the parties some of which are evidenced by some of the letters proved in this case. With regard to Felu's authority it is said that some of the letters which passed between the plaintiff and Kedar Nath Bose, throw considerable light and support the case made in the plaint. We are referred in this connexion to the letter of 7th February 1930, which has been marked as Ex. 8, and printed at p. 29 of

the second part of the paper-book, written by Kedar Nath Bose to the plaintiff. This letter is admitted to have been written by defendant 1. Some of the passages in this letter have to be quoted in extenso, for they have been referred to for the purpose of showing that by this letter of 7-2-1930 there was ratification of the acts of Felu and that the letter is the evidence of the fact that Felu was given an implied authority to deal with the matter of sale. I will only quote the material portion. The letter runs thus :
Glad to receive your letter. I have returned from Kumbha only these 3 days since. I don't know what conversations there were with you. But when Sriman Felu has given his word, then action will be taken accordingly. The papers relating to that house are with my officer at home. Letter has been written to him to come with these papers. There is also a power of attorney in his name. He will be able to get it (Kobala) registered

Towards the end and in the last paragraph it is stated thus :

It is impossible for Sriman Felu to go to Barisal and get the document registered, because he is the cashier of a Bank and can on no account get leave. If you think it necessary to have it registered by me it will have to be registered at Calcutta. It involves an extra expenditure of Rs. 10 only. Consideration money will have to be paid to me here. No efforts will be spared to complete the transaction at an early date.

This letter or at any rate the passage which has just been quoted lends support to the case made by the plaintiff that Kedar gave authority to his son Felu to deal with the matter of contract of sale in question. At any rate this letter acknowledges the existence of such a contract. This letter also shows as has been contended for on behalf of the appellant that there has been in any event ratification of the act of Felu by defendant 1. Dealing first with the question of implied authority it appears clear from this letter that Felu was given authority to complete the transaction in connection with the sale of Raja Bahadur's Haveli. The words "but when Sriman Felu has given his word then action will be taken accordingly", can lead to but one inference that by the previous letter Ex. 3, the post card written by Kedar to the plaintiff, authority was given impliedly to Felu to deal with the contract or any offer in respect of the sale now in question. Having regard to what we have found, namely, that this letter of the 26th February Ex. 8, was followed by the coming up of Rash Behari to Calcutta with the son of the plaintiff Harendra, and by his conver-

sation with Felu about the earnest money of Rs. 100, we have no doubt in our mind that it was a valid and binding contract between the plaintiff and defendant 1's agent or son Felu with reference to the sale in question for a sum of Rs. 7,000.

The payment has been proved by the evidence to which reference has already been made including the evidence of the two pleaders of Barisal. The burden of proving this was undoubtedly on the plaintiff and he has discharged that burden by such evidence as he has given which we consider *prima facie* proof. It was open to the defendant to rebut the *prima facie* proof by production of the best evidence in the case. It might have been proved by the production of the Jama Kharach papers of defendant 1 that there was absence of any entry of the payment of Rs. 100. Notwithstanding the existence of these Jama Kharach books they were not produced; and an unfavourable inference has to be drawn in respect of this payment against defendant 1 having regard to the admissions made by his agent Surendra. It remains to consider with regard to the question of the contract an argument which has been advanced by Dr. Sen Gupta who has appeared for defendant 1 and which is founded on the provisions of S. 7 of the Contract Act. It is said that there has been no acceptance of the offer by defendant 1 seeing that the acceptance by the plaintiff was not made in the way indicated in the letter of defendant 1, Ex. 3, dated 26th January 1930. It is said by this letter that the only manner in which the acceptance of the offer could be made was by writing to Felu at the Calcutta address of defendant 1 and by no other means; and we are referred to S. 7, the material portion of which runs as follows:

In order to convert a proposal into a promise the acceptance must (1) be absolute and unqualified, (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted

The rest of the section is not material for our present purposes. We have to read this letter in a reasonable and in a sensible manner. When it is said in this letter that the intending purchaser will have to write to Felu it certainly did not exclude the case where the intending purchaser instead of writing to Felu put himself into communication with Felu and that is exactly what the intending purchaser in the present case did. We

do not therefore think that there has been any contravention of S. 7, Contract Act, in this case so as to render the contract not binding upon defendant 1. Assuming for the purpose of the argument that there was no implied authority in Felu to complete the transaction of sale or to accept any offer, which is made by the intending purchaser of Raja Bahadur's Haveli, we have no doubt on the correspondence, which we will presently set forth that there has been a ratification of the acts of Felu by defendant 1 and we have no doubt also, nor can there be any doubt, that defendant 1 has adopted the acts of Felu in this behalf as his own. This brings us to refer to the correspondence evidenced by the postcard, Ex. 8, dated 7th February 1930, where Kedar is writing to the present plaintiff this:

Glad to receive your letter. I have returned from Kumbha only these three days since. I don't know what conversations there were with you. But when Sriman Felu has given his word, then action will be taken accordingly. The papers relating to that house are with my officer at home. Letter has been written to him to come with these papers. There is a power of attorney in his name. He will be able to get it (Kobala) registered.

Then follows another passage which has already been quoted and which concludes by saying: "No effort will be spared to complete the transaction at an early date." In our view by this letter Kedar was adopting the acts of his son and was ratifying his acts in this behalf. It has however been argued on behalf of the respondents that there can be no ratification unless the person ratifying had full knowledge of the facts and our attention has been drawn to the provisions of Ss. 197 and 198, Contract Act. S. 197 runs as follows:

Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Section 198 is to the following effect: No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

It has been sought to be argued that when this letter of 7th February 1930 was written Felu was not in Calcutta and that therefore Kedar was writing this, having regard to what was represented to him in a letter written by the plaintiff Surendra Nath Roy of which this letter of 7th February 1930 is a reply. It is difficult to accede to this contention that Felu was not in Calcutta

at that time. The last paragraph of the letter which states that "it is impossible for Sriman Felu to go to Barisal" negatives the alleged fact that Felu was out of Calcutta. Besides, Felu works in a certain bank and the best evidence as to his absence from Calcutta on 7th February 1930 would have been the production of the bank attendance book. But even assuming that Felu was absent and that defendant 1 acted on what was represented to him in the letter, it appears clear that Kedar did not enquire into the matter as he should have done and in such circumstances it would be nonetheless a ratification of his acts and he should be taken to have knowledge of all the circumstances because he himself did not care to enquire. The rule of law in this behalf has been very lucidly stated in the decision which has been cited at the Bar in (1897) 1 Ch 213 (1). In the judgment of Lord Russell at p. 246 of the report the following relevant passage occurs:

To constitute a binding adoption of acts a priori unauthorized, these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were.

Then again at p. 247 of the report the learned Lord Chief Justice observes thus:

Where the supposed ratification relates to acts as to which there is no pretence of any priori authority, as in this case, where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's act whatever they were or however culpable they were.

It appears to us clear from a perusal of the letter of 7th February 1930, that Kedar was adopting in full the acts of Felu when he said that when Felu has given his word then action will be taken accordingly. He even went so far as to say that there would be no delay in completing the transaction which had been entered into by the son and that there would be no difficulty regarding the registration of the same. Then again ratification relates back to the time of the inception of the transaction and has a

complete retroactive efficacy: (see Story on Agency, Edn. 9, p. 244); that Kedar knew all the circumstances would appear from another letter dated 16th February 1930 which has been marked as Ex. (16) in the case and which is printed at p. 31 of the second part of the paper-book. It is true that this letter has not been admitted by him but according to the Subordinate Judge it was written by Kedar. We have examined the letter, the postcard in original and have compared it with the writing of Kedar in the other admitted letters and indeed Kedar has been forced to admit in cross-examination that the writing in the postcard resembles his hand-writing. The significant passage in this letter which proves ratification is this:

I hear that my son has given word to somebody. He is not here at present. He will come within a day or two. If he has given any final word, then I shall have to be bound by that. I do not concern myself with any affairs of the estate, nor I consider it necessary. I simply take my morning and evening meals and move about here and there. I can speak to him if you let me know the amount you are ready to pay, but then I shall not be able to do anything against his wishes.

This letter was addressed to another intending purchaser, one pleader who has given his evidence in this case, named Uma Kanta Kanjabilla. There has been some discussion as to the accuracy of the translation of this letter with reference to the expression "final word" in line about 25 of p. 31 of the second part of the paper-book. We have had the original read to us and we have no doubt that Kedar was speaking there in a legal language when he said: "If he has given any final word, then I shall have to be bound by that." Strenuous endeavour has been made both by Dr. Basak who appears on behalf of defendants 2 and 3 and Dr. Sen Gupta who appears for defendant 1 in persuading us to hold that the expressions "final word," "action will be taken accordingly" and the further expression "I shall have to be bound by that" are not words of legal obligation but are words expressive of moral obligation. But no question of moral obligation arises when Kedar was speaking about a contract for sale of a house in answer to an inquiry by Uma Kanta, an intending purchaser with regard to the completion of a legal transaction. In order to substantiate this contention on behalf of the defendants and in order to convert these

1. Marsh v. Manton, (1897) 1 Ch 213=66 L J Ch 128=45 T 209=75 L T 558.

words into moral obligation something else would have to be read into them which is not permissible. For these reasons we are of opinion that there has been a complete ratification of the acts of Felu by Kedar Nath Basu, defendant 1, and on this ground the contract must be sustained. It brings us now to consider the earlier contract of 1st February 1930 which has been set up on behalf of defendants 2 and 3. (His Lordship then discussed the evidence and proceeded). We are not surely unmindful of what has been repeatedly said by the Privy Council that where the issue is a simple one the appellate Court should not very lightly discard the appreciation of evidence made by the trial Court which had the opportunity of seeing the witnesses, hearing them and watching their demeanour, but in the present case the weight of the admitted documents in evidence, or the documents in evidence which have been proved, is so great that we are constrained to differ from the estimate of the evidence by the Subordinate Judge who has really belittled the effect of the documentary evidence and we have no hesitation in coming to the following conclusions in this case: (1) that Felu was given an implied authority by defendant 1 to enter into a contract in reference to the sale in respect of which the suit for specific performance had been instituted; (2) assuming in the alternative that he had no such authority, there has been ample ratification by defendant 1 of his contract by his letter of 7th February 1930; (3) that the payment of Rs. 100 was made by the plaintiff's son to Felu as alleged and that Felu accepted the money according to the directions of defendant 1 (4) that the alleged contract of 1st February 1930 was not really entered into on that date but at a much subsequent date after Surendra Bose had come to Calcutta and that the subsequent conduct of defendant 1 bears traces of the influence and very considerable influence of his agent.

On these conclusions we think that the decision of the Subordinate Judge must be set aside and the decree of the Subordinate Judge dismissing the suit must also be set aside and the plaintiff must be given a decree in terms of the prayers which he has set forth in the plaint which is to be found printed at p. 32 of the first part of the paper book. The

plaintiff will have costs both of this Court and also of the Court below. The costs are to be recovered from defendant 1 and defendants 2 and 3, in equal proportions. The plaintiff must bring into Court below the sum of Rs. 6,900 within a month from this date which event happening, the Court below will proceed to pass the decree in accordance with prayers Ka, Gha, Uma and Cha of the plaint. In the event of such payment being made the Court below shall proceed to execute a Kobala in favour of the plaintiff and have it registered within two weeks from the date of payment of the money and in that event also defendants 2 and 3 will be able to take out the whole amount of Rs. 6,900 as it has been conceded on behalf of defendant 1 that defendants 2 and 3 have paid the purchase money. The appeal is allowed with costs and the cross-objection is dismissed. No order is made as to costs of the cross-objection. Let the record be sent down as early as possible.

Patterson, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 93

R. C. MITTER, J.

Dinabandhu Gan — Plaintiff—Appellant.

v.

Makim Sardar and others — Respondents.

Appeal No. 17 of 1935, Decided on 5th December 1935, from appellate order of Dist. Judge, Khulna, D/- 5th October 1934.

Landlord and Tenant—Rights of tenants—Tenant is estopped from questioning title of person inducing him on land.

If a tenant is inducted on a land by a person, the tenant cannot question the title of that person who has so inducted him on the land. The tenant is thus estopped from raising the question that the person letting him into possession is merely a benamidar: 8 Cal 288; 11 Cal 519; 1917 Cal 498; 28 Mad 526; 34 Bom 329 and 1915 P C 96, *Rel. on*; 31 Mad 461 and 26 MLJ 597, *Dissent.*; *Case law discussed.*

[P 95 C 1]

Mukherji and *Apurba Dhone Mukherji* —for Appellant.

N. Mukherji, Narendra Nath Guha and *Upendra Kumar Ray* for Deputy Registrar—for Respondents.

Judgment.—The plaintiff who is appellant before me, instituted a suit to recover four anna share of the rent from

defendant 1, Makim Sardar, who is respondent 1 before me. His case is that the remaining defendants Chandra Kumar Gan and others who are respondents 2 to 6 are the landlords of the remaining twelve anna share. The plaintiff came to Court with the case that he, Barada Prosad Gan, Chandra Kumar Gan and Jogendra Kumar Gan inducted defendant 1 as tenant on the land and that thereafter defendant 1 executed in favour of himself, the aforesaid Barada, Chandra Kumar and Jogendra a Kabuliat on 21st September 1909. Chandra Kumar and Jogendra are pro forma defendants in this suit and are respondents 2 and 3 in this appeal. Barada has no interest in the property, and it is admitted that his interest in the property has passed to the pro forma defendants. The defence that was taken was as follows: The defendant 1, said that the plaintiff was the benamidar of one Sarada Prosad Gan, whose son is Jatindra Gan, who now represents the interest of Sarada, that the defendant paid a portion of the rent claimed in the suit to the authorised agent of the plaintiff and the pro forma defendants, and that the remaining portion of the rent claimed in this suit to Jatindra who is the real owner according to this defendant. In this state of the pleadings a preliminary issue was raised as to whether defendant 1 could urge in this suit that Dinabandhu, the plaintiff, is not the real owner, and is the benamidar of Sarada and thereafter of Jatindra. Other issues were also raised one of them being: Is the defendant's plea of payment true? The learned Munsif decided all the issues in favour of the plaintiff and decreed the suit. In deciding the preliminary issue he held that defendant 1 could not raise the question in this case as to whether the plaintiff was the benamidar or the real owner in respect of the four anna share of the property claimed by him. The learned Munsif did not consider the question of benami.

He gives his reasons for not going into the said question. He says that in the Kabuliat as well as in the previous Amalnama by which the principal defendant was inducted on the land, the name of the plaintiff and not the name of his brother Sarada appeared, that is to say, defendant 1 had been inducted on the land by the plaintiff and therefore he held that he is estopped from questioning

the plaintiff's right to receive rent. An appeal was taken to the learned District Judge. The learned District Judge has not considered the question as to whether the plaintiff inducted defendant 1 on the land as his tenant. He says that simply because a kabuliat has been executed in favour of the plaintiff, the defendant cannot be held to be estopped from denying the plaintiff's title and setting up the case that the plaintiff is the benamidar of Jatindra Gan to whom he paid a part of the rent claimed in the suit. The learned District Judge incidentally refers to the case of 31 Mad 461 (1), and holds that the principle of estoppel as formulated in S. 116, Evidence Act, can have no possible application when the defendant comes to Court with the case that the plaintiff suing him is the benamidar of a third party. I have to examine the correctness of the said decision. Having taken the said view the learned District Judge directed the learned Munsif to decide the two points on taking further evidence, viz., whether any payment was really made by defendant 1 to Jatindra or his Gomasta, and (2) whether Jatindra Gan was the real owner and the plaintiff a benamidar. In my judgment the learned District Judge was not right in remitting the two aforesaid points for decision by the Munsif, without recording a finding as to whether defendant 1 has been inducted on the land as tenant by the plaintiff. On that point the learned Munsif has recorded a finding and if the finding of the learned Munsif is correct, I am clearly of opinion that the learned District Judge was wrong in remitting the aforesaid two points for further consideration. If however the learned Munsif is wrong in his finding that the plaintiff inducted defendant 1 on the land, of course the learned Judge was right in asking the learned Munsif to record a finding on the two points aforesaid.

In any view of the case whatever may be the finding on the aforesaid questions, a further defence of defendant 1, viz., that he had paid a portion of the rent claimed to an authorized agent of the plaintiff and his co-sharers is to be considered. That point was considered by the learned Munsif who gave an adverse decision against the defendant. The

1. Kuppu Konan v. Thirugnama Sammandam Pillai, (1908) 31 Mad 461.

said point was also not considered by the District Judge.

In support of the learned Judge's view on the question of estoppel, Mr. Mukherji for the respondent has placed before me a number of decisions of this Court and also of the Madras High Court. The principal decisions on which he relies are as follows: 16 W R 186 (2), 20 W R 352 (3), 31 Mad 461 (1), 26 Mad L J 597 (4) and 55 Cal 1013 (5). In my judgment none of the cases except the two cases of the Madras High Court support the contention that even if a tenant has been inducted upon the land by the plaintiff, the tenant is not estopped from raising the question that the plaintiff is a benamidar of some one to whom he has paid the rent. In my view the matter is well settled, that if a tenant is inducted on the land by a person, the tenant cannot question the title of that person who has so inducted him upon the land. This position was stated in clear terms in 8 Cal 238 (6) and 11 Cal 519 (7). The cases where a tenant can be allowed to raise a question as to the title of the landlord are also noticed in the said judgments. The principle is laid down in clear terms in 24 C L J 103 (8). At p. 11 Sir Asutosh Mukerjee puts the matter in this form. Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel, first possession, secondly, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues. That this was unquestionably the law in this country before the Evidence Act was passed is clear from a long line of decisions. The doctrine was expressly formulated in 1863 Marshall 377 (9); 8 Bom

2. Donzelle v. Kedar Nath, (1871) 16 W R 186.

3. Kedar Nath v. Mrs. Donzelle, (1873) 20 W R 352.

4. Muthusamy Aiyar v. Solai Konan, 1915 Mad 48=25 I C 679=26 M L J 597.

5. Jogendra Lal v. Mohesh Chandra, 1929 Cal 22=112 I C 172=55 Cal 1013=47 C L J 387=32 C W N 559.

6. Lodai Mollah v. Kally Das, (1882) 8 Cal 238=10 C L R 581.

7. Lal Mohamed v. Kallanus, (1885) 11 Cal 519.

8. Bhaiganta Bewa v. Himmat Bidyakar, 1917 Cal 498=35 I C 7=24 C L J 103=20 C W N 1835.

9. Mohesh Chandra Biswas v. Gooroo Persad Bose, (1863) Marshall 377=2 Hay 473.

H C R 175 (10) and was impliedly recognized in 1866 B L R Sup. Vol. 588 (11), 7 W R 25 (12), 14 W R 85 (13) and 7 B L R 723 foot-note (14). We have further the weighty opinion of Sir Subramanya Ayyar, C. J., expressed in 28 Mad 526 (15), that the law has not in this respect, been altered by the Evidence Act and that now, as before, a tenant who had been let into possession was estopped from denying the landlord's title without first surrendering possession: see also 34 Bom 329 (16).

Subrawardy, J., in 41 C L J 341 (17) held that a tenant is not estopped from questioning the derivative title of the plaintiff who is suing him, the title being derived from a person who had inducted the tenant upon the land. The matter has been settled by the decision of their Lordships of the Judicial Committee in the case of 19 C W N 1207 (18), where the view of their Lordships is expressed thus:

Section 116, Evidence Act, is perfectly clear on the point and rests on the principle well established by many English cases: a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlord.

This is also the view which has been enunciated in 55 Cal 1013 (5), by Mukerjee, J. He says that a tenant is estopped from questioning the title of his landlord who had inducted him upon the land, during the continuance of the tenancy, but the doctrine of estoppel does not extend after the discontinuance of the tenancy, that is to say, it is open to the tenant to question the title of the landlord who had inducted him, if the tenancy is terminated and possession surrendered; and the tenancy may be terminated in

10. Vasudeb Daji v. Babaji Kami, (1871) 8 Bom H C R 175

11. Bani Madhub Ghose v. Thakoor Doss Mundul, (1866) Beng L R Sup Vol 588=6 W R Act 10, R. 71.

12. Gouree Doss Byragee v. Jugurnath Roy, (1867) 7 W R 25.

13. Messrs. Burn & Co. v. Rusho Mayee Dossee, (1870) 14 W R 85.

14. Jainarain Bose v. Kadambini Dasi, (1871) 7 Beng L R 723n.

15. Muthunanjan v. Suina Samavaiyan, (1905) 28 Mad 526=15 M L J 419.

16. Trimbak Ramchandra Pandit v. Gulam Zilani Waiker, (1910) 34 Bom 329=5 I C 965.

17. Indra Narain Manna v. Sarbasova Dasi, 1925 Cal 743=87 I C 930=41 C L J 341.

18. Mt. Bilas Kumrar v. Desraj Ranjit Sing, 1915 P C 96=30 I C 299=42 I A 202=37 All 557=19 C W N 1207 (P C).

any of the ways noticed in the said judgment, that is to say, where it has been determined either by having run its prescribed course or by act of parties as for instance, by reason of notice to quit served, or forfeiture, or by an act of law, that is to say, the tenant is dispossessed by a person claiming and having a title paramount. The cases cited by Mr. Mukherji for respondent, namely, 16 W R 186 (2) and 20 W R 352 (3), do not support him. The case in 20 W R 352 (3) is same as the case in 16 W R 186 (2), at a later stage. In those two cases the defendant had executed a kabuliat in favour of one Mt. Anusul Burkut who granted a Patni to the plaintiff, and on the basis of this Patni the plaintiff claimed sixteen anna rent from the defendant. The defence was that Mt. Anusul was the benamidar of her husband Golam Hossain and that on the death of the husband Golam Hossein, Anusul inherited one anna share only, the other shares being inherited by her co-widow and other heirs of Golam Hossein. The lower Courts held that the defendant was bound by the kabuliat and could not challenge the title of Mt. Anusul and urge that she was a Benamidar of her husband. There was no allegation in that case that Mt. Anusul had inducted the defendant on the land. All that is laid down in that case is that in India, the English doctrine of estoppel by deed ought not to be applied. This position is made clear in the judgment of Paul, J.; the passage is to be found at p. 189 of 16 W R 186 (2), and is made clearer by Phear, J., when the case came up again before the High Court. The judgment is reported in 20 W R 352 (3). I shall quote a relevant passage from Paul, J.'s judgment and which is as follows :

The question was a simple question to try upon the evidence, but instead of doing so, the Judge disposed of the substantial case put forward by the defendant by adjudicating in the plaintiff's favour upon the question of estoppel raised by him, and applying the technical doctrine of estoppel obtaining under the English law; the Judge considered that he could not look behind the kabuliat which was admitted by the defendant, inasmuch as a tenant could not deny his landlord's title. My learned colleague has pointed how this mode of treatment amounts to a begging of the whole question, I do not propose to discuss here the doctrine of estoppel, but as this subject is so often used in arguments and in grounds of appeal before this Court, I wish to make a few remarks with reference to it. In England where the usage denoted by benami transaction is wholly un-

known, it is supposed and therefore assumed that all deeds and conveyances truly represent the title of parties set forth in them. Deeds are called solemn instruments. They are executed after considerable deliberation and under the guidance and with the advice of able legal advisers. In England, and in fact wherever the English law prevails and English institutions exist, it is right to suppose that what is stated in deeds and other similar documents represents the true state of things, and consequently parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statements wholly regardless of the truth for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents and to apply the technical doctrine of estoppel in the manner in which that doctrine is applied in cases governed by English law.

This passage to my mind makes it clear that the learned Judges of this Court in the case of 16 W R 186 (2), were only considering the application of the English doctrine of estoppel by deed to this country and all they laid down is that having regard to the dissimilarity of conditions prevailing in India, the English doctrine of estoppel by deed ought not to be extended to India. The learned Judges remitted the case to the lower appellate Court for decision on its merits, viz., whether Mt. Anusul Burkut was the benamidar of her husband, and if she was what was the extent of her share. In case she was a benamidar, the plaintiff by his Putni Potta would only get the share of rent which Anusul inherited from her husband who was dead at the time of the suit. On remand the learned District Judge recorded a finding that Mt. Anusul was the benamidar of her husband and her share was one anna because she had a co-widow. The matter again came on appeal before this Court. The point that was considered in this case was whether Mt. Anusul Burkut was the benamidar of her husband and what was her share. The last question depended on the question as to who were the other heirs. In their judgment their Lordships said that the appeal was argued as a regular appeal. At p. 353 of 20 W R 352 (3), Phear, J., said :

The case then came up to the High Court by way of special appeal, and it was there held that the trial in the lower appellate Court had been incomplete and unsatisfactory. Paul, J., pointed out very clearly that the English doctrine of estoppel had been imperfectly apprehended in the Courts below, and altogether

wrongly applied. If it had been admitted or proved that the defendant *was let into possession of the leased property by Anusul Burkut, then, probably in this country, as well as in England, the principle would come into play that a man shall not, during his possession of premises leased to him, be allowed to dispute the title of the person who put him into possession.* No doubt in this case the kabuliat, as being a document signed by the defendant, furnishes strong evidence against him of any material facts stated in it. But it is we think almost impossible, and certainly it would be very inequitable, that there should be anything in this country of the nature of the *old English doctrine of estoppel by deed.*

I have italicised the relevant passages in this judgment. The learned Judges who had to deal with the same case at a second stage explained the judgment of Boyley, and Paul, JJ., in 16 W R 186 (2). As I have pointed out above, the cases since then have uniformly laid down that the doctrine of estoppel operates where the tenant has been let into possession by the person whose title the tenant questions. In the two cases of the Madras High Court, which have been referred to me, it has been held that S. 116, Evidence Act, prevents a tenant to question the title of the real owner, but does not prevent him from raising the question when the person who had inducted him on the land is the benamidar of the other. I do not quite follow this decision. If *A* puts *B* into possession, it is well settled that *B* cannot question the title of *A*. If *B* is allowed to plead and prove that *A* is a benamidar, then *B* is allowed to question the title of *A*, because after all a benamidar, represents the shell and not the substance of ownership. If *B* says that *A* is a benamidar, he says that *A* has no beneficial interest in the property. For this reason, I do not feel impressed with the judgments of the Madras High Court. I do hold that the doctrine of estoppel operates in such a case also. It also prevents the tenant from urging that the man who has let him into possession is a benamidar.

In this view of the matter, I do hold that the learned Judge was not right in making an order which he made without determining the question on the evidence on the record as to whether defendant 1 had been inducted upon the land by the plaintiff. There is a recital in the kabuliat, and there is other evidence on the record. Those pieces of evidence must be considered by the learned District

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Judge and he must come to a finding that the defendant 1 had been let into possession by the plaintiff he would not allow the defendant to challenge the title of the plaintiff and prove that he is the benamidar of Sarada and Jotindra. If he comes to the conclusion that the defendant had not been let into possession by the plaintiff, it will be open to defendant 1 to raise the question of benami, and in that case the two issues framed by the learned District Judge for the decision by the learned Munsif will have to be gone into by the learned Munsif, on the evidence on the record as well as on the evidence which the parties may choose to adduce. In any event, whatever may be the finding of the learned District Judge on the aforesaid point the further defence of defendant 1 that he had made payments to an authorized Gomosta of the plaintiff must be gone into.

I accordingly set aside the order of the learned District Judge and remand the case to him in order that the appeal before him may be disposed of in the light of the observations which I made above. The costs of this appeal will abide the result, hearing fee two gold mohurs.

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Case remanded.

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R. C. MITTER, J.

Sm. Tusliman Bibi—Plaintiff—Appellant.

v.

Abdul Latif Mia—Defendant—Respondent.

Appeal No. 1638 of 1933, Decided on 6th December 1935, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 24th April 1933.

Civil P. C. (1908), S. 20 (c)—Suit on contract can be instituted in Court having territorial jurisdiction over place where contract has to be performed—Place of performance is that where creditor resides—Suit for prompt dower instituted by Mahomedan wife in Court within whose jurisdiction she resides—Court has jurisdiction to entertain suit.

A suit on a contract can be instituted in the Court which has territorial jurisdiction over the place where the contract has to be performed. On the principle that when the creditor is residing in the realm, the debtor must follow the creditor unless there is a different contract between them, the place of performance must be taken to be the place where the creditor resides. The only limitation to the principle is that the creditor must reside within the realm

The above principle of English law is applicable in India. [P 98 C 2; P 99 C 1]

Where therefore a suit for prompt dower by a Mahomedan wife against her husband is instituted in the Court, within whose jurisdiction the wife resides, the place of performance must be taken to be the place where the plaintiff resides and the Court has jurisdiction to entertain the suit: 3 M H C R 384; 22 W R 79; 1926 All 477; 1927 P C 156; 30 Bom 167 and 1933 Bom 179, Rel. on; 7 Bom L R 993, Not foll. [P 98 C 2; P 100 C 1]

A. S. M. Akram—for Appellant.

Radhika Ranjan Guha—for Respondent.

Judgment.—The plaintiff whose suit has been dismissed by the learned Additional District Judge of 24 Parganas on the ground that the Munsiff of Baraset, in whose Court it was instituted had no territorial jurisdiction to entertain it, has preferred this appeal. Her claim is for prompt dower money from her husband. The plaint, as originally filed on 24th August 1931, gave the place of residence of the defendant as Bishanpura in the district of Balia. By an amendment dated 1st December 1931, the defendant's present place of residence was stated to be Shibpur in the district of Howrah. After reciting her claim, in para. 3 of the plaint, as originally filed, the plaintiff stated that she was residing in Bijpore within the jurisdiction of the Baraset Court, and it is on this fact alone she stated that that Court had jurisdiction to entertain her suit. By an amendment allowed by the Court certain additions were made in para. 3 of the plaint. The substance of these additions is that the defendant came to Bijpore where the plaintiff was residing with her father, and on a demand being made for the prompt dower the defendant promised at Bijpore to pay up shortly, but he thereafter failed to keep his promise even after repeated demands. The plaintiff accordingly has stated in her plaint, as finally amended, that the Baraset Court has jurisdiction to entertain the suit as the plaintiff resides within the jurisdiction and also because of the said promise by the defendant. Both the Courts below have held that the plaintiff's story that the defendant went to Bijpore and made a promise there to pay up is false. This finding is binding on me in second appeal and accordingly one of the grounds on which the plaintiff attempted to give jurisdiction to the Baraset Court can no longer be invoked by her.

There remains the other ground, namely whether the Baraset Court had jurisdiction to entertain the suit on the ground that the plaintiff is residing permanently within its jurisdiction. Mr. Akram has urged before me that he comes under S. 20, Cl. (c), Civil P. C., as a part of the cause of action must be taken to have arisen at Bijpore, as that place must be taken as the place of performance that is, the money due to the plaintiff ought to have been paid there. There cannot be any doubt that a suit on a contract can be instituted in the Court which has territorial jurisdiction over the place where the contract has to be performed. This is accepted law in India since the decision of Holloway, J. in 3 Mad H C R 384 (1), where the said learned Judge after going into the matter in great detail made the following observations :

The place at which the obligation is to be performed is its seat and the place of jurisdiction.

The matter was also examined exhaustively by Markby, J., from the jurist's point of view in 22 W R 79 (2), who also came to the same conclusion. Mr. Akram's next contention is that the place of performance must be taken to be Bijpore, the place where the plaintiff is residing, on the principle that when the creditor is residing in the realm the debtor must follow the creditor and pay him, unless there is a different contract between them. For supporting his argument he has cited two cases only, namely, 48 All 310 (3) and 54 I A 265 (4). This argument has to be considered carefully. The facts established are the following: (i) the marriage between the plaintiff and the defendant was celebrated at Bishanpura in the district of Balia, in the United Provinces of Agra and Oudh; (ii) that the dower, whatever its amount may be was settled at the time and place of marriage; (iii) that the defendant is at present residing within the jurisdiction of the Howrah Court; (iv) that there was no express promise to pay the prompt dower at Bishanpura or at any other place, nor can a promise to pay at a particular

1. DeSouza v. Coles, (1866) 3 M H C R 384.
2. Gopee Kisto Gossamee v. Nil Comul Bannerjee, (1874) 22 W R 79=13 Beng L R 461.
3. Gokul Dass v. Nathu, 1926 All 477=92 I C 492=48 All 310=24 A L J 291.
4. Soniram Jeetmull v. R. D. Tata and Co., 1927 P C 156=102 I C 610=54 I A 265=5 Rang 451 (P C).

place be inferred from the circumstances and (v) that the plaintiff at the date of the suit was residing at Bijpore which is within the jurisdiction of the Baraset Court. There cannot be any doubt according to the principles of English law that under these circumstances the obligation of the debtor is to seek out the creditor and pay him, that is to say, the place of residence of the plaintiff is to be taken as the place of performance. In the case of "The Elder" Bowen, L. J., observed thus :

The general rule is that where no place of payment is specified either expressly, or by implication, the debtor must seek his creditor. In 8 Ex 689 (5), it was held that a covenant for payment of rent when no particular place of payment is mentioned is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid and pay or tender him the money. In the judgment, in that case, the conclusion to the same effect, arrived at, on the authorities, by Parke, B., in 2 M & W 223 (6), is relied upon. Most of the cases are collected in 13 C B N S 286 (7), which is very instructive on the subject.

The only limitation to this principle of English law is that the creditor must reside within the realm. 53 I A 58 (8). The question is whether this principle is applicable in India. So far as I am aware the Courts of this country from early times have considered the said principle to be so applicable and there are decisions or observations of Judges of nearly all the High Courts. Bihari, J., recognised the applicability of the said rule in Bengal: 22 W R 79 (2) at 85. Tyabji, J., recognised its applicability in Bombay: 30 Bom 167 (9) at pp. 170-171. Mukerji, J., applied it in 48 All 310 (3). White, C. J. and Miller, J., would have applied it in Madras, but for Cl. (3) of Explan. III to S. 16, Civil P. C. of 1882. That explanation reads as follows :

In suits arising out of contract the cause of action arises within the meaning of the section at any of the following places, namely: (i) the place where the contract is made; (ii) the place where the contract was to be performed, or the performance thereof completed; (iii) the place,

where, in performance of the contract any money to which the suit relates was expressly or impliedly payable.

It was held in that case that Cl. (3) of the explanation meant that the money was payable

according to the terms of the contract, which are expressed or can be inferred on a construction of the language or from the circumstances, and the presumption of law that the payment is to be made at the creditor's residence on which the cases proceed, in the absence of a contract, cannot be invoked. Explan. 3 has, however, been omitted from the Civil Procedure Code of 1908. The observations of Sir Lawrence Jenkins, C. J. in a later case which came up in Bombay, however, tend to show that S. 49, Contract Act is exhaustive and has modified the aforesaid rule of English Common Law: 7 Bom L R 993 (10). In 54 I A 265 (4), Lord Sumner, however, threw great doubts on the observations of Sir Lawrence Jenkins, C. J. and pointed out that in the case, where there is no place of performance fixed by agreement, and the debtor does not apply to the creditor to fix a reasonable place for performance, there would be no place for performance at all and the debtor would be enabled to better his position by himself being in default, that is by omitting to apply to the creditor for fixing the place of performance, where if he had so applied the reasonable certainty is that the place of performance would have been fixed at the creditor's place of residence. Lord Sumner finally said at p. 271 of the report that :

In this state of the authorities (he noticed Tyabji, J.'s judgment in 30 Bom 167 (9)) it is not possible to accede to the present contention that S. 49, Contract Act, gets rid of inferences, that should justly be drawn from the terms of the contract itself and the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him.

As I understand, the judgment of Lord Sumner has disapproved of the observations of Sir Lawrence Jenkins, C. J., in 7 Bom L R 993 (10) and has approved of Tyabji J.'s observations at pp. 170-171 in 30 Bom 167 (9). Lord Sumner's judgment was considered by the Bombay High Court in the case of 57 Bom 306 (11)

10. Puttappa v. Virabhadrapa, (1905) 7 Bom L R 993.

11. Champak Lal Mohan Lal v. Nectar Tea Co., 1933 Bom 179=143 I C 335=57, Bom 306=35 Bom L R 163.

5. Haldane v. Johnson, (1853) 8 Ex 689=17 Jur 937=22 L J Ex 264.

6. Poole v. Tunbridge, (1837) 2 M & W 223=5 D P C 468=6 L J Ex 74=1 Jur 23.

7. Fessard v. Magnier, (1865) 18 C B N S 286=34 L J C P 126=13 W R 388=11 L T 635.

8. Bansilal Abirchand v. Ghulam Mahbub Khan, 1925 P C 290=92 I C 760=53 Cal 88=53 I A 58 (P C).

9. Moti Lal v. Surajmal, (1906) 30 Bom 167=6 Bom L R 1038.

where Rangnekar, J., has put the same interpretation on it as I am putting upon it. In my judgment the point I have to consider has been settled by the judgment pronounced in 54 I A 265 (4) and I am bound to give effect to Mr. Akram's contention. I hold that the Baraset Court has jurisdiction to entertain the plaintiff's suit. The learned Munsiff considered the merits of the plaintiff's case and had held that her claim for prompt dower had been satisfied before the institution of the suit, but the lower appellate Court has not considered it. For that purpose there must be a remand. The appeal is accordingly allowed, the decree of the lower appellate Court is hereby set aside and the case remanded to that Court for a decision on the merits. As the plaintiff has succeeded on the point of jurisdiction which was the only point fought out here and in the lower appellate Court, she must have her costs of the lower appellate Court (except pleader's fees) as also costs of this Court. Further costs to abide the final result of the suit. The prayer for leave to appeal under S. 15, Letters Patent, is refused.

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*Appeal allowed.***A. I. R. 1936 Calcutta 100**

R. C. MITTER, J.

Rai Satyendra Nath Bhadra Bahadur and another — Principal defendants — Appellants.

v.

Charu Sankar Roy Chowdhuri and others—Respondents.

Appeal No. 411 of 1933, Decided on 10th May 1935, from Sub-Judge, Second Court, Faridpur, D/- 25th November 1932.

Landlord and Tenant—Tenancy—Nature of—Tenancy for residential purposes—Origin of tenancy unknown—In absence of series of transfers and their recognition by landlord Court should not infer that tenancy was in its origin of permanent character.

In a suit by the landlords for a declaration that the defendants were *ticca* tenants, the only things which were proved by the tenants and in respect of which there was no explanation on the part of the landlords were that the tenancy was for residential purposes, that its origin was unknown, that the rent had not been varied at any time, and that there had been one or possibly two transfers:

Held: that these circumstances did not lead to the inference that the tenancy was in its origin of a permanent character. [P 101 C 2]

S. C. Basak and Bhupendra Nath Roy Chowdhury—for Appellants.

Atul Ch. Gupta and Jitendra Kumar Sen Gupta and Deb Lal Sen—for Respondents.

Judgment.—In this case the defendants-appellants are admittedly the tenants of the plaintiffs-respondents in respect of a plot of land in the town of Faridpore. The defendants attempted to raise pucca buildings on the lands in suit whereupon the plaintiffs instituted the suit on 16th January 1931 for a declaration that the defendants were *ticca* tenants on the lands, they had no right to construct pucca buildings and for an injunction to restrain them from continuing the building operations and for a mandatory injunction for removal of the structures already raised before the suit. The substantial defence of the defendants was that the tenancy was a permanent one. In the Court of first instance they succeeded and the learned Munsif held that the tenancy was a permanent one. He accordingly made a decree in part, making a declaration in the plaintiffs' favour that they had title to the suit lands but inasmuch as he found that the tenancy was a permanent one the prayer for mandatory and perpetual injunction was disallowed. The plaintiffs preferred an appeal to the learned District Judge of Faridpore which was heard by the Subordinate Judge, Second Court, of that place.

The learned Subordinate Judge has come to the conclusion that the evidence led by the defendants is not sufficient to support the claim to a permanent tenancy. It is admitted that the land had been let out for residential purposes before the Transfer of Property Act came into force and that its origin is unknown. It has been proved that on one occasion it passed by succession and that it was twice sold and the transferees were recognized as tenants. There are no pucca old structures on the land except that there are two privies with pucca plinths and there is a tank in existence. It may also be taken to be established that the rent has remained unvaried, namely Rs. 5 a month, and that the land values have risen in the town of Faridpore and are still rising, the evidence being that the land values having gone high some time in the year 1910. These are the facts which have been proved by the

defendants; on the part of the landlords these facts have been proved, namely that in the deeds of transfer—one has been proved only in the case—there is no assertion by the transferor that his tenancy was a permanent one; secondly that although the land values in the town of Faridpore have gone up since the year 1910 there was a large body of co-sharer landlords amongst whom there was no agreement whatsoever, so much so, that even rent was not realized since the year 1901, that only in the year 1913 or so, as a result of a partition and other transactions, the number of co-sharers was reduced, and since the year 1913 when the co-sharers were reasonable in number the claim to a permanency by the defendant's ancestor and by the defendants had all along been resisted. It has not been proved also that the tank was excavated by the tenants. This evidence adduced on behalf of the landlords has been accepted by the learned Subordinate Judge, that is to say the learned Subordinate Judge has given an adequate explanation relating to their inaction in raising the rent up to the year 1913. They have also proved that whenever attempts were made by the defendants or their predecessors since the year 1913 to claim a permanent right in the land those attempts had been resisted and their claim denied.

The evidence led by the landlords as to the effect of the recognition of one of the transferees also, in my judgment, affords a sufficient explanation because when there was no assertion in the sale-deed by the transferor to a permanent right in the land a recognition of the transferee under those circumstances would not be of much evidentiary value for the purpose of supporting a claim to permanency. I still go further and hold that unless there be a series of transfers of a tenancy for residential purposes of which the origin is unknown and a series of recognitions, the Court would not be right in inferring that the tenancy was in its origin of a permanent character. If there be one transfer or one or two transfers only and a recognition by the landlords of the transferee that fact may be attributable to other circumstances than to the fact that the landlord recognized the transferee feeling that he was under the obligation to recognise him on the footing that the tenancy was a

permanent tenancy. There would be far little scope for drawing an inference in favour of the tenants where there are only one or two transfers only and where in the deeds of transfer no assertion is made by the tenant that his tenancy is of a permanent nature. Having regard to this evidence the only things which have been proved by the tenants and in respect of which there is no explanation on behalf of the landlords are these: (1) that the tenancy was for residential purposes; (2) that its origin is unknown; (3) that the rent has not been varied at any time; and (4) that there have been one or possibly two transfers. These circumstances in my judgment do not lead to the inference that the tenancy was in its origin of a permanent character. For these reasons, I uphold the finding of the learned Subordinate Judge that the defendants have failed to prove that their tenancy is of a permanent nature. That being so, I hold that the decree passed by the learned Subordinate Judge in this case is the correct decree and the appeal must be dismissed with costs. The application for leave to appeal is rejected.

R.M./R.K.

Appeal dismissed.

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GUHA AND BARTLEY, JJ.

Narain Chandra Biswas and others—Appellants.

v.

Emperor—Opposite Party.

Appeals Nos. 424 and 425 of 1935, Decided on 11th December 1935.

(a) Criminal Trial—Confession—Confessional and exculpatory statements should be taken into consideration along with other evidence.

The confessional statements and exculpatory statements of accused have to be taken into consideration along with the other evidence in the case. [P 103 C 2]

(b) Criminal Trial—Appeal—New plea—Contention that certain statements are inadmissible by reason of their being not statements as contemplated by S. 164, Criminal P. C., raised for first time before High Court will not be entertained.

The High Court will not give effect to a contention that certain statements by the accused are not admissible in evidence by reason of their not being statements as contemplated by S. 164, Criminal P. C., when such contention is raised for the first time before it. [P 103 C 2]

(c) Criminal Trial—Conspiracy—Accomplice—Conspiracy having for its object subversion of British rule in India by armed revolt—Persons, merely having knowledge of crime and merely acting as tools of

leaders of conspiracy but not taking part in perpetration of crime should not be regarded as accomplices—Court should ascertain what credit is to be attached to such witnesses — Rule applicable to accomplices should not be applied to their case.

For establishing a charge of conspiracy having for its object the subversion of British rule in India by armed revolt, evidence has to be taken of persons who may have knowledge of secret organisations but who have not taken part in the perpetration of a crime, persons to whom overt acts can be attributed. It would not be right to regard a person who is cognisant of a crime or who has made no attempt to prevent it or who did not disclose its commission as an accomplice and to apply to his case the same rule as applies to accomplices. The function of the Court is to ascertain what is the degree of credit to be attached to the evidence coming from witness of the above description, regard being had to all the circumstances and facts of the case and not to class such witnesses as accomplices or practically accomplices.

[P 104 C 1]

Evidence of witnesses who are aware of the conspiracy and of the objects of the same, and who were merely tools in the hands of the leaders of the conspiracy for certain time, and had nothing to do with the control and possession of firearms, the main charge against the accused person, should not be viewed with absolute suspicion.

[P 104 C 2]

(d) Criminal Trial—Accomplice—Witness not concerned with crime—His participation, limited to knowledge that crime is to be committed—He cannot be regarded accomplice—Person to be accomplice must participate in crime committed by accused.

Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime; as it is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether a person is or is not an accomplice therefore depends upon the facts in each particular case considered in connexion with the nature of the crime; and persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged. All persons coming technically within the category of accomplices cannot be treated as on precisely the same footing.

[P 104 C 2]

S. K. Bose, Manmatha Nath Das, Priyanath Bhattacharji and Sudhangsu Bh. Sen—for Appellants.

Khundkar and Nirmal Kumar Das Gupta—for the Crown.

Judgment.—The appellants, seven in number, were tried by a special Magistrate at Rangpur, appointed by the Local Government, under S. 24, Bengal Act 12 of 1932, for commission of offences under the Indian Arms Act, and under S. 120-B, I. P. C., and on conviction,

sentenced to various terms of rigorous imprisonment. All the appellants were charged with offences of the following description. That they between June 1933, and December 1934 at Gaibandha agreed with one another and with others, to have in their possession or under their control revolvers, pistols and guns in contravention of S. 14 and S. 15, Arms Act, and thereby committed offence punishable under S. 19 (f), S. 19-A, Arms Act, read with S. 120-B, I. P. C. The appellants Nagendra Mohan Mustafi and Paresh Chandra Choudhury were charged separately for possession and control of a revolver, Ex. 11 in the case, in a manner indicating an intention that such control and possession might not be known to any public servant, and thereby committed an offence punishable under S. 20, Arms Act. Nagendra Mohan Mustafi and Paresh Chandra Choudhury were each of them sentenced to rigorous imprisonment for 7 years under S. 120-B, I. P. C., read with S. 19 (f), S. 19-A, Arms Act, and 5 years' rigorous imprisonment under S. 20, Arms Act, the sentences running concurrently. Jogesh Chandra Das was sentenced to rigorous imprisonment for 7 years under S. 120-B, I. P. C. read with S. 19 (f), S. 19-A Arms Act. Narain Chandra Biswas and Satyendra Nath Chaki were sentenced to 6 years rigorous imprisonment each under S. 120-B Penal Code read with S. 19 (f), S. 19-A, Arms Act. Bejoy Kumar Nandi and Binoy Kumar Tarafdar were each of them sentenced to rigorous imprisonment for 5 years, under S. 120-B I. P. C., read with S. 19 (f), S. 19-A, Arms Act.

The case against the accused persons placed on their trial was that they belonged to the Yugantar Party—a revolutionary organisation having for its object the subversion of British rule in India by armed revolt, that they along with others conspired to procure arms like revolvers, pistols and guns, that they used to meet at places to settle their line of action. The case for the prosecution was that in order to purchase arms, money used to be raised by thefts and subscriptions by members of the party; and evidence was led to establish that members were advised to steal ornaments from their own houses; that these ornaments when melted the sale-proceeds of the gold were used for purchase of revolutionary literature and revolvers. Evidence of overt acts was given to estab-

lish how Nagendra Mohan Mustafi purchased books in Calcutta and sent them to Gaibandha; it was also sought to be proved by evidence, that Nagen had possession and control of the revolver (Ex. 2); he made it over to Paresh; it was then kept in a vacant house. There was also evidence led by the prosecution to show that Jogesh and Benoy went to Naogaon with a revolver and a pistol (Exs. 3 and 4) and that Durga Burman was sent to Naogaon to bring back the revolver and the pistol (Exs. 3 and 4) from one Probhas Pramanik; the revolver and the pistol were brought to Gaibandha according to arrangement made. The evidence for the prosecution sought to connect all or some or any of the individual accused with the acts of the conspirators mentioned above, the object of the conspiracy being, as mentioned already, the overthrow of the British rule in India by armed revolution.

The evidence in the case consisted of : (1) the evidence of witnesses mentioned in the judgment of the Magistrate, as "accomplice witnesses" or witnesses in the position of accomplices. (2) The evidence afforded by what has been described by the Magistrate as confessions of three of the accused persons, Nagen, Jogesh and Paresh, which were retracted and the other two statements of Satyendra and Benoy self-exculpatory in nature. (3) The evidence of independent witnesses. All this evidence related to the association of all or some of the accused persons at four secret meetings, their agreement to collect money by thefts or otherwise, purchase of revolutionary literature, and for acquisition of arms. The confessional statements recorded by a Magistrate under S. 164, Criminal P. C., though retracted, support the conviction of the accused persons who made them. As to their voluntariness there is no manner of doubt; and taken along with the other evidence in the case, they establish the guilt of the accused persons. The self-exculpatory statements made by Satyendra and Benoy lend support to the evidence for the prosecution, so far as they go, against the accused persons other than those two who made those statements to save themselves. The three confessional statements by Nagen, Jogesh and Paresh, contain some discrepancy and divergency; but there is ample evidence to support one or other of the ac-

counts given in detail by the confessing accused. The confessional statements as also the exculpatory statements have to be taken into consideration along with the other evidence in the case; and, in our opinion, they lend support to the other evidence in the case. The case before us is not one in which a confession by an accused person is evidence in the case independent of other evidence; the confessional statements are only pieces of evidence which, taken along with other evidence, support the case for the prosecution; and we have considered the statements under S. 164, Criminal P. C., confessional or exculpatory in nature, from that standpoint. It was contended before us that the confessional statements were not admissible in evidence at all.

The grounds taken in the petition of appeal to this Court were that the confessional statements were not admissible in evidence inasmuch as they were not voluntary and not recorded according to law. These grounds are wholly unsustainable, as we have, on the materials before us, no doubt about their voluntariness and as to their having been recorded in the manner prescribed by law. It was urged before us however that the statements as recorded were not such as could be held to be admissible in evidence having been recorded under S. 164, Criminal P. C. Although great stress was laid on this point no materials were brought to our notice on which it could possibly be held that the statements in question were not recorded in the course of an investigation under Ch. 14 of the Code; and we are unable to give effect to the contention sought to be raised before us for the first time, relating to the inadmissibility of the same in evidence for the reason that they were not statements as contemplated by S. 164, Criminal P. C. In our judgment no question could arise as to their admissibility in evidence, and they were rightly taken into consideration by the Court below, along with the other evidence in the case. The confessional statements support the case for the prosecution, as to existence of conspiracy as to overt acts of the members of the conspiracy, of the possession of fire arms for the purpose of attainment of the aims and objects of the conspiracy. The confessional statements made by Nagen, Jogesh and Paresh support the conviction

of the persons who made them; they support, in spite of some divergencies as between the different confessions, the other evidence led by the prosecution for establishing the offence charged against all the persons placed on their trial. The statements of Satyendra and Benoy, it may be noticed here, though exculpatory in nature, lend support to the case against the accused.

The next class of evidence in the case comes from a large number of witnesses who have been mentioned in the judgment of the Magistrate as accomplices or persons in the position of accomplices. At the outset it may be stated that for establishing a charge of conspiracy of the nature we are concerned with in the case before us, evidence has to be taken into consideration of persons who may have knowledge of secret organizations, but who have not taken part in the perpetration of a crime, persons to whom no overt acts, so far as the main charge was concerned, could be attributed. As it has been said, it would not be right to regard a person who happens to be cognisant of a crime, or who has made no attempt to prevent it, or who did not disclose its commission as accomplice, and to apply to his case the same rule as applies to evidence of accomplices. Most of the witnesses who have been classed as accomplices by the Magistrate in this case were connected with the offence charged against the accused in this way only, that some of them read books which the accused were circulating in furtherance of their object; the witnesses were for a time in sympathy with the idea of revolutionary activities; but no overt acts could be attributed to them generally so far as possession of firearms, which was the main charge in the case, excepting this, that some of them contributed to the fund raised for purchase of firearms and revolutionary literature. In a case of the present description therefore the function of the Court was to ascertain what was the degree of credit to be attached to the evidence coming from witnesses of the above description, regard being had to all the facts and circumstances of the case, and not to class witnesses as accomplices or practically accomplices, as it is sometimes done: see 38 C W N 777 (1).

It may further be noticed that where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime, as it is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether therefore a person is or is not an accomplice depends upon the facts in each particular case considered in connexion with the nature of the crime; and persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged. All persons coming technically within the category of accomplices cannot also be treated as on precisely the same footing. In the light of the above rules which are well settled, and on careful consideration of the evidence of witnesses described in the case before us by the trying Magistrate as accomplices, we are not in a position to hold that they were accomplices whose evidence required corroboration on all material particulars from what is called independent evidence. In our judgment the evidence of witnesses who were aware of the conspiracy, and of the objects of the same, and who were merely tools in the hands of the leaders of the conspiracy for a certain time, and had nothing to do with the control and possession of firearms, the main charge against the accused persons, cannot be viewed with such suspicion as has been suggested. The evidence given by these witnesses contain in some instances improbabilities in some matters of detail, and discrepancies also; but all the same that evidence appears to us, on a close examination, to be reliable on the whole, and cannot be discarded for any valid reason. The evidence coming from at least 15 witnesses, who have been described as accomplices, prove the existence of a conspiracy, prove the holding of meetings by the members of the conspiracy for furtherance of their aims and objects, and establish the position that there were overt acts done by the individual members of the conspiracy, which included thefts for the purpose of collection of funds for the purchase of revolutionary literature and firearms.

In addition to the evidence of witnesses described as accomplices or more or less

1. *Hafjuddi v. Emperor*, 1934 Cal 678=1934 Cr C 1045=151 I C 486=35 Cr L J 1357=38 C W N 777 (S B).

accomplices, there is the evidence of witnesses mentioned as independent witnesses—examined on the side of the prosecution to corroborate the evidence of the former. The evidence coming from these witnesses appears to us to be wholly trustworthy and reliable, and that evidence establishes facts and circumstances which support the main body of evidence coming from witnesses who cannot, in our judgment, as indicated already, be placed in the category of accomplices so far as the offences charged against the accused persons were concerned, for the reasons stated. The evidence before the Court, as it stands, coming from the different classes of witnesses—witnesses who were aware of the conspiracy of which the accused were members, and who could only be said to have participated in some of the acts of the conspirators up to a certain point of time only, and who on that account could not be held to be at a disadvantage so far as reliability and competency as witnesses to prove the existence of the conspiracy, the aims and objects of the members of the conspiracy and the overt acts so far as those members were concerned, including the control of possession of firearms which was the subject of the charges against the accused persons—the evidence on the record, which we have examined for ourselves, taken as a whole, establish the existence of a revolutionary organization having its object the subversion of the British Rule by armed revolution.

The association of the seven accused persons with others as members of a criminal conspiracy for the purpose of spreading revolutionary ideas, the raising of funds by any means possible—by subscription among members, and by thefts etc., for purchase of revolutionary literature and firearms, the holding of meetings by members of the conspiracy at different times for spreading and advancing the aims and objects of the conspiracy, and for deciding upon overt acts of the conspiracy, the control and possession of the revolver Ex. 2 in the case, by members of the conspiracy generally, and by the accused persons individually, the possession of the revolver and pistol Exs. 3 and 4 and of the sending of these firearms to Naogaon and of the bringing back of those firearms to Gaibanda—the above are the main heads on which evidence was directed in the case before us.

That evidence has been carefully examined by the trying Magistrate; and on an examination of the same, we are unable to take any view different from those indicated by the Magistrate in his exhaustive judgment. In points of evidence relating to matters of detail, there are at places some inconsistency or discrepancy. In the case of throwing away of some books connected with the criminal conspiracy of which the accused were members, there is some apparent improbability. We are not however inclined to think that any of these inconsistencies, discrepancies or improbabilities, in minor matters of detail, affect the main case for the prosecution, which has been amply proved by reliable evidence. The cases against the individual accused persons have been dealt with by the Magistrate; and we do not think that anything could be usefully added to what has been stated by the Magistrate in his judgment. Nagen, Jogesh and Paresh were mainly concerned in the control and possession of firearms Exs. 2, 3 and 4 in the case. Benoy Tarafdar's connexion with the possession of the firearms Exs. 2, 3 and 4 has also been proved; he and Jogesh went to Naogaon with the revolver and the pistol Exs. 3 and 4. Narain Biswas's association with the ringleaders was clearly established so far as possession of firearms was concerned.

The complicity of the two accused persons, Satyendra Nath Chaki and Bijoy Kumar Nandy, has also been established so far as the offences charged against them were concerned; but it appears that they played minor parts as members of the criminal conspiracy to possess firearms for revolutionary purposes. In the case of Satyendra, the Magistrate has come to the conclusion that he was apparently in the conspiracy, and nothing more. The finding on evidence in the case of the other accused, Bejoy on evidence, is that he agreed with Nagen, Paresh, Jogesh and Satyen and others to possess revolvers, etc., in contravention of Ss. 14 and 15, Arms Act. On the evidence as it stands it appears to us that nothing more than that could be found against these two persons. In our judgment, the sentences passed on Satyendra Chaki and Bejoy Kumar Nandy should be reduced to rigorous imprisonment for four years in the case of each of them, their convictions being upheld. With

the above modification of the sentences passed on the appellants Satyendra Chaki and Bejoy Kumar Nandy, the appeals are dismissed.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 106

D. N. MITTER AND PATTERSON, JJ.

Nirmal Chandra Das and others—Defendants—Appellants.

v.

Mohitosh Das and others — Respondents.

Appeal No. 83 of 1931, Decided on 27th November 1935, from original decree of Addl. Sub-Judge, Krishnagar, D/- 21st January 1931.

(a) Hindu Law — Widow— Surrender—No deed necessary.

Surrender under Hindu law does not require a deed. [P 109 C 1]

(b) Hindu Law — Religious endowment—Shebait—Property held in common by persons in capacity of shebait—Rule regarding exclusive possession of co-sharer in joint properties applies.

The rule with regard to exclusive possession of a co-sharer in joint properties, to the exclusion of other co-sharers also applies to property which is held in common by persons in their capacity as shebait. [P 109 C 2]

(c) Adverse Possession—Co-sharer—Possession of co-sharer is not adverse unless there is ouster or assertion of hostile title.

Possession can never be considered adverse if it can be referred to a lawful title. In order to succeed on the ground of ouster the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. [P 109 C 2]

There can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster, i. e., after there is an assertion of hostile title by one co-sharer against the others and to the knowledge of the latter: *Corea v. Appuhamy*, (1912) A C 230; *Muttunayagam v. Brito*, (1918) A C 895; 1931 P C 48; 1934 Cal 644 and 1918 P C 1, *Rel. on.* [P 110 C 1]

(d) Adverse Possession—Co-sharer—Ouster—Mere non-payment of rents and profits for long time, does not give rise to inference of ouster—There must be indication that taking of profits amounts to denial of right of other co-sharers—Obiter.

Obiter.—Mere non-participation of rents and profits of joint property by a co-sharer for a very long period would not be sufficient to give rise to the inference of ouster. When along with non-participation of rents and profits for a considerable length of time other circumstances concur, an inference of exclusion or adverse possession under hostile title might be drawn. [P 110 C 2; P 111 C 1]

The Court must be satisfied that the taking of the profits is an indication of the denial of rights in the other co-sharers to receive them. Mere long and uninterrupted possession without more, by a co-sharer is not sufficient to constitute adverse possession: 29 Bom 300 and *Culley v. Doed Taylerson* (1840) A and E 1008, *Ref*; 1919 P C 44, *Expl.* [P 111 C 1]

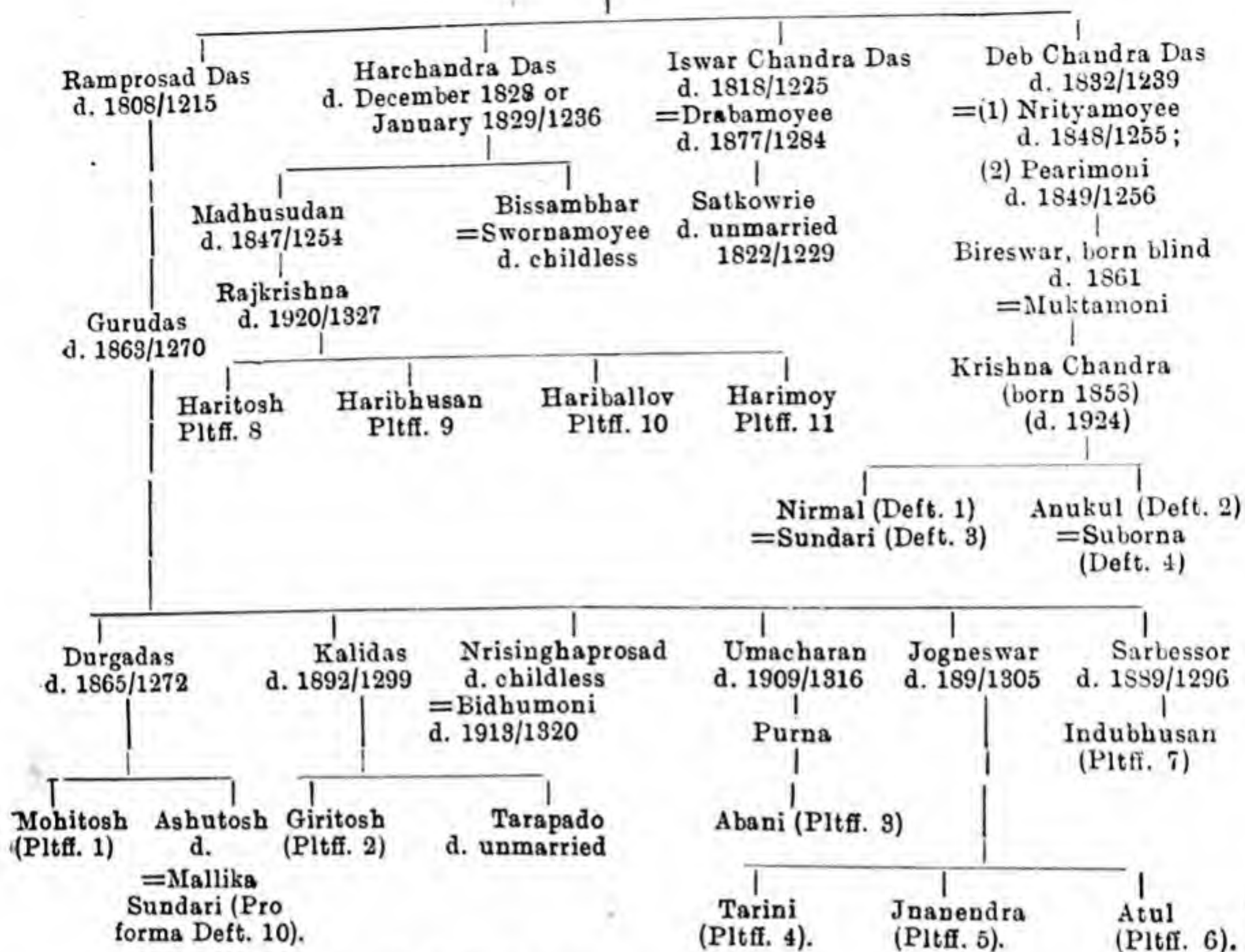
Debendra Nath Bagchi and Kumud-bandhu Bagchi—for Appellants.

Bireswar Bagchi and Surajit Chandra Lahiri—for Respondents.

D. N. Mitter, J.—The history of this litigation which has culminated in this appeal carries us back to the year 1242 B. S., corresponding to 1835. The suit is for a declaration of title and for recovery of possession of some six rooms as part of 12 temples of God Shiva in Navadwip. The case made in the plaint which is pretty long is that the ancestor of some of the plaintiffs, one Gurudas, was the possessor of 16 annas share of the land on which these 12 temples are built in succession to their predecessor, in their own right, and in the right acquired by adverse possession against others for long over 12 years, as shebait of Sri Sri Iswar Dwadasha Shiva Thakurs and as heirs of their ancestors. After setting forth in their plaint the numerous events that happened including devolution of rights and interests on the death of the different members of the family who are named in the genealogical tree to which we will presently refer, the plaintiffs alleged that they have been dispossessed, as a result of certain proceedings under S. 103, Ben. Ten. Act, from these six rooms by the defendants. The relationship between the parties to the suit are shown in the genealogical tree which is appended below (*See next page*).

It appears from the said tree that the plaintiffs and the defendants to the present suit derived their descent from their common ancestor, one Asananda Das. Both in the Court below and before us the accuracy of the genealogical tree both in respect of the several descendants of Asananda as also in respect of the dates of the death of the numerous members of the family, have been admitted. It appears from the said tree that Asananda died leaving behind him four sons, Ram Prosad Das, Har Chandra Das, Iswar Chandra Das and Deb Chandra Das. Ram Prosad died in 1808 leaving behind him his only son Guru Das who

ASANANDA DAS



was the ancestor of plaintiffs 1, 2, 3, 4, 5, 6 and 7. Hara Chandra Das, the second son of Asananda died in 1828 leaving behind him two sons Madhusudhan and Biswambhar. Biswambhar died childless and Madhusudhan left behind a son Raj Krishna. Raj Krishna had four sons whose names occur in the tree as Haritosh, Hari Bhusan, Hariballav and Harimoy, plaintiffs 8 to 11. Iswar, the third son of Asananda died in 1818 leaving behind him a widow Drabamoyee and a son. Satkowri died unmarried in 1822 leaving behind him his mother Drabamoyee who died in 1877. Deb Chandra Das the youngest son of Asananda, died in 1832 leaving behind him his two widows Nrityamoyee who died in 1848 and Pearimoni who died in 1849. Deb Chandra Das had a son Biresswar through his wife Pearimoni who was born blind and Biresswar died in 1861, leaving behind him his son Krishna Chandra who is the father of defendants 1 and 2 and the father-in-law of defendants 3 and 4.

It is necessary here to recount a certain circumstance which would show that defendants 1 and 2 did not inherit the 4

annas share of Deb Chandra Das because Biresswar was born blind and the 4 annas share of Deb Chandra did not therefore descend to Biresswar. There was a litigation between Biresswar and Guru Das and as a result of the Full Bench decision of this Court which is reported in 2 Beng L R 103 (1), it was held that Guru Das did succeed to the 4 annas share of Deb Chandra Das's estate. The next event of importance to which reference need be made is with reference to the 4 annas share of Iswar Chandra Das which after his death devolved on his son Satkowri and after Satkowri's death in 1882 devolved on his mother Drabamoyee and continued in Drabamoyee till the time of her death in 1877. The case made in the plaint is that Guru Das erected these 12 temples so far back as in the year 1242 on joint lands. He dedicated these temples to god Shiva. The inscription on the tablet was in his name and he possessed these debuttar properties exclusively in his own right

1. Kalidas Das v. Krishan Chandra Das, (1869)
2 Beng L R 103=11 W R 11 (FB).

and as a cosharer being excluded from any interest in the debuttar properties. Question has arisen whether this was a dedication of the completest kind or it was merely an incomplete debuttar in the sense that it was a secular property charged with ancestral worship. The Subordinate Judge has taken the latter view, viz., that it was an incomplete debuttar. According to him it was a nominal debuttar being really secular property charged with ancestral worship. We will have to say something on this later. To continue the history as given by the plaintiffs it was stated that Guru Das excluded all other cosharers from the very beginning. But later it was admitted that Raj Krishna was taken in Guru Das's family, and therefore the heirs of Raj Krishna, plaintiffs 8 to 11, have got some interest in the debuttar properties.

The next event of importance to which reference may be made is the partition suit which was instituted on the Original Side of this Court in 1873. The decree in that suit for partition, as well as the order in that suit, which was disposed of in 1882 are printed at pp. 30 and 18 respectively of part 2 of the paper-book and have been marked as Ex. H and Ex. 30 respectively in the case. It does appear from these proceedings that the properties now in dispute were excluded from the suit for partition and that for a very good reason, for it appears that whatever the nature of the debuttar properties were, whether they were absolute debuttar or secular properties charged with worship, they could not form the subject matter of partition. In any event the properties were not included in the partition suit. The plaintiffs assert that Guru Das really acquired exclusive title in 1831 and since then on the basis of exclusive title has dedicated these properties to god Shiva, and that no one else amongst the cosharers has anything to do with debuttar properties. As has been said already latterly there was some litigation in connection with Deva Sheba which resulted in certain proceedings under S. 9, Specific Relief Act, in which the present plaintiffs succeeded. But that was followed by the Bengal Tenancy Act proceedings in which defendants succeeded with the result that the defendants were able to raise three rooms and get possession of three Shiva lingas out of the twelve. Hence the present

suit. The defence which is as long as the plaintiff substantially falls under three heads. It is first contended that there has been no adverse possession for more than the statutory period of the right to hold these lands as shebaita so as to defeat or bar the defendants' right with regard to the rooms which have been erected and which form part of the Shiva Mandirs which are the subject-matter of the suit.

The second ground is that the suit is not maintainable in its present form seeing that Mallika Sundari, who is in the line of Guru Das being the wife of Durga Das's son Ashutosh, who has been described as pro forma defendant 10, has not joined as plaintiff and it is said that the present suit by some of the shebaita, who have been arranged in the category of plaintiff, is not maintainable. It has been contended further as the last ground that the plaintiffs are not entitled to mesne profits. It has been urged that in calculating mesne profits the defendants should have a set off of Rs. 500 which have been spent by the defendants for executing the repairs in the rooms in question. The Subordinate Judge, after framing numerous issues which arise on the allegations in the pleadings, has rested his decision in favour of the plaintiffs on the ground that the right of Krishan, the father of defendants 1 and 2, to the Shebaitship has been extinguished by adverse possession for more than 12 years. In other words he has held that there has been a complete ouster for a very long period of time so as to exclude the rights of Krishan and necessarily the rights of defendants 1 and 2 to the Shebaitship. He has held also that the plea as to the maintainability of the suit must fail as Mallika Sundari has relinquished her right; and as the right which she has relinquished does not purport to be more than Rs. 100 no registered document is necessary to effect a complete extinguishment of right in favour of the next reversionary heir or heirs. On the question of mesne profits he has given a decree for the sum of Rs. 1,138 on this footing that for 3 years preceding the institution of the suit the total amount of rent due to the plaintiffs but taken by Krishan or his successors was Rs. 1,264-8-0. Deducting 10 per cent as collection charges and incidental expenses Rs. 1,138

represents the amount of mesne profits due for the period to the plaintiffs.

He has apparently held that being defeated in S. 9 case, the defendants were in wrongful possession of the four rooms in question and has consequently not taken into account the sum of Rs. 500 which the defendants are alleged to have spent for the repairs of these rooms in question during the pendency of the case under S. 9, Specific Relief Act. It is against this decision that the present appeal has been brought by the defendants and the three heads of defences which have been already indicated have been raised before us and they really form the three grounds on which Mr. Debendra Nath Bagchi, who appears for the appellants, has proposed to rest this appeal. We will take first the plea that the suit is not maintainable in its present form. It appears that the view taken by the Subordinate Judge is that there was no necessity for a registered deed for the purpose of effecting a surrender of the rights of a Hindu widow in her deceased husband's estate in favour of the next reversioner where the value of the rights surrendered is less than Rs. 100. Apart from that it appears that a petition was put in the suit on 19th January 1931 (which is to be found printed at p. 81 of the first part of the paper book) where Mallika Sundari states that she had relinquished the twelve temples and the property appurtenant thereto and the Shiba and Puja of the deities in question in favour of her husband's younger brother Mohitosh Das, plaintiff 1, and that he is to be in ownership and possession of the said property. She states further in the said petition that she has no objection to the plaintiff's getting a decree in full for 16 annas. Surrender under Hindu Law does not require a deed and by this petition Mallika Sundari has surrendered all her rights in her deceased husband's estate in favour of the next reversioner. There is therefore no substance in this ground based on the non-maintainability of the suit in the present form.

The real question on which the controversy has centred in the present appeal is as to whether the plaintiffs on whom undoubtedly the burden lay of showing that Krishan's right had been extinguished by adverse possession have discharged that burden effectively. Plain-

tiffs have given direct evidence of the exclusion of Krishan from Shebaitship shortly after the death of Drabamoyee which happened in 1877. It is no doubt the case of the plaintiff that Drabamoyee did not share in the worship and did not act as Sebait so long as she was alive after the death of her son Satkowrie in 1822. We can state at once that there is hardly any evidence which we can trust to show that Drabamoyee was excluded from Shebaitship. But there is direct evidence as to the exclusion of Krishan and his successor after the death of Drabamoyee in 1877 from Shebaitship. (His Lordship then discussed the evidence and proceeded.) From these circumstances, as also the direct evidence, we have no doubt that the only conclusion that we can come to is that there has been ouster of Krishan from the year 1878 from this shebaitship.

The rule with regard to exclusive possession of a co-sharer in joint properties to the exclusion of other co-sharers applies also to property which is held in common by persons in their capacity as shebait. The rule with regard to what constitutes an ouster of a co-sharer from joint property is well settled by the decision of their Lordships of the Judicial Committee of the Privy Council in a case which went from Ceylon. Lord Macnaughten in delivering the judgment of the Judicial Committee pointed out that possession is never considered adverse if it can be referred to a lawful title as was laid by Vice-Chancellor Wood in (1855) 2 K & J 79 (2). See 1912 A C 230 (3). In order to succeed on the ground of ouster the person setting up ouster was bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of twelve years. The case is reported in 1912 A C 230 (3). At p. 236 of the said report Lord Macnaughten said this:

The two learned Judges in the Court of appeal did not adopt in its entirety the suggestion of the trial Judge. They both held that Iseris entered as sole heir, and that his title has been adverse ever since he entered. They held that he entered as 'sole heir', apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of the co-owners. It was not possi-

2. Thomas v. Thomas (1855) 2 K & J 79=4 W R 135=25 L J Ch 159=1 Jour N S 1160.

3. Corea v. Appuhamy, 1912 A C 230=81 L J P C 151=105 L T 836.

ble for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.

In a case from India, this case of 1912 A C 230 (3), was cited by their Lordships of the Judicial Committee of the Privy Council and their Lordships pointed out in that case :

Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to ascertain adverse claims against other interested members. If possession may be either lawful or unlawful, in the absence of evidence it must be assumed to be the former. The fact, therefore that this village of Bhagsar has been occupied for many years by the defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence.

The same view has been taken in a later case which was cited at the bar. We refer to the case of 58 I A 106 (4). After referring to the case of (1912) A C 230 (3), their Lordships say this :

In that case however what was decided by the Board was that the possession would not be adverse until ouster.

All the cases on this question of ouster or exclusion from joint property were reviewed quite recently in a decision to which I was a party in the case of 61 Cal 377 (5), where reference was made also to another case of their Lordships of the Judicial Committee, namely the case of (1918) A C 895 (6). It is pointed out in this last mentioned case that the true rule which is deducible from these authorities is that there can be no adverse possession by one cosharer as against others until there is ouster or exclusion and that the possession of a cosharer becomes adverse to another cosharer from the moment when there is an ouster, i.e., after there is an assertion of a hostile title by one cosharer against the other and to the knowledge of the latter. In the case before us having regard to our finding that Krishan asserted his right in 1877-78 and failed, there can be no doubt that his right to the endowment had been extinguished by reason of ouster by the branch of Guru Das's heirs. On behalf of the respondents Mr. Bireswar Bagchi,

has raised a very broad contention that non-participation of rent and profits of rent paying property or want of actual possession of properties which are being possessed by one cosharer for a very long period would constitute ouster even if there is no direct evidence of exclusion. In support of this proposition he has drawn our attention to a certain observation of their Lordships of the Judicial Committee of the Privy Council in 46 I A 285 (7). The passage relied upon is to be found at p. 292 of the report. Their Lordships point out this :

The limits of the rule were defined in 11 A & E 1008 (8) as follows : Generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because of the possession of the other and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant, tenant in common, has not been in the participation of the rents and profits for a considerable length of time, and *other circumstances concur*, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster, and, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety.

This case does not support the broad proposition formulated that dispossession or non-possession for a considerable length of time is sufficient to give rise to an inference of ouster. The words which have been italicised, namely, *other circumstances concur* are of very great materiality. It is somewhat dangerous doctrine to propose that mere non-participation of rents and profits of joint property by a cosharer for a very long period would be sufficient to give rise to the inference of ouster. It would indeed be very dangerous to lay down such a proposition as a correct proposition in law. It often happens that one member of a joint Dayabhaga family lives at Calcutta and another member works under Government at Simla Hills for a period of 30 or 40 years, the member in Calcutta being joint in property with the member in Simla Hills. It may be that circumstances do not permit the other member at Simla Hills to come to Calcutta and to live for a day in his Calcutta house and to realise rents and

4. Govind Rao v. Raja Bai, 1931 P C 48=130 I C 673=58 I A 106=27 N L R 113 (P C).

5. Jagadeesh Chandra Banerji v. Taiyab Sardar, 1934 Cal 644=151 I C 464=61 Cal 377.

6. Muthunayagam v. Brito, (1918) A C 895=87 L J P C 146.

7. Varada Pillai v. Jeevarathammal, 1919 P C 44=53 I C 901=46 I A 285=43 Mad 244 (PC).

8. Culley v. Doed Taylerson, (1840) 11 A & E. 1008=3 P & D 539=9 L J Q B 288.

profits of some joint properties or to associate himself in the worship of the family deity. It is difficult to hold that mere non-participation in the profits of joint property bars the rights of the members living at Simla Hills to the advantage of the member living in Bengal. It is for that reason that their Lordships are careful enough to say that when along with non-participation of rents and profits for a considerable length of time other circumstances concur, an inference of exclusion or adverse possession under hostile title, might be drawn. Reference was made in this connection to a decision of Sir Lawrence Jenkins when he was the Chief Justice of Bombay in 29 Bom 300 (9). That was a case which came before the learned Chief Justice in second appeal and the finding was that the tenant in common was continuously for a long period in possession of the joint property without any claim or demand by any person claiming under the other tenant-in-common and it was held that this is an evidence from which an actual ouster of the other tenants-in-common may be presumed. In support of this proposition Sir Lawrence Jenkins was citing the following passage from the decision in the case of 11 A & E 1008 (8) to which reference may be made. The passage is this :

No doubt exclusive receipt of profits continuously for a long period may point to an ouster, but the Court must be satisfied that such taking of profits is an indication of a denial of rights in the other co-tenant to receive them. That is a very important statement and it shows that the mere fact of exclusive receipt of profits continuously for a long period would not be sufficient to prove ouster.

The Court must be satisfied that the taking of profits is an indication of a denial of rights in the other co-tenants to receive them. Besides it is to be noticed that this decision was prior to the decision of the case of 28 C L J 437 (10). The decision in *Hardit Singh's case* (10) was by a committee of which Sir Lawrence Jenkins was himself a member, and the passage which is quoted above shows that long and uninterrupted possession without more by one co-sharer is not sufficient to constitute adverse possession. Having regard to our finding it is not necessary

for us to determine the correctness or otherwise of the broad principle formulated by the learned advocate for the respondent. As this point was raised, some time was taken up in discussing the question in regard to the proposition so enunciated. As we have already stated, before the death of Drabamoyee the respondents made out no case of ouster, but an attempt has been made to make out a case of ouster from the period subsequent to her death. In our opinion continuous dispossession subsequent to that period does make out a case of ouster for more than the statutory period. It remains now to consider the third ground of mesne profits. It has been sought to be argued on behalf of the appellants that in computing mesne profits the Court below should have taken into account the sum of Rs. 500, which was spent by the appellant for the repairs of the rooms out of the rents collected. There is no doubt on the evidence on behalf of the appellants that the sum of Rs. 500, was spent. But there is no documentary evidence to support the case made by the defendants. One would have expected that accounts would be forthcoming to show what the actual amount spent was. It is stated by the defendants that the accounts are with their vendee. In the absence of the best piece of evidence which could have been produced in order to show what the actual amount spent was, we see no reason to dissent from the decision of the Subordinate Judge in this part of the case.

It is hardly likely that after the disposal of the suit under S. 9 the defendants would proceed to spend a large sum in the repairs of house of the rooms which they were in possession of. We think, therefore, that the decree for mesne profits for Rs. 1,264-8 less the collection charges has been rightly given by the Subordinate Judge. All the grounds in appeal fail. It remains now to consider the question of costs. It appears that the plaintiffs founded their case both on their original title by inheritance as well as on adverse possession or ouster. So far as the first part of the case is concerned they have failed. Evidence was directed also towards that part of the case and in these circumstances we think that they failed on the principal issue of title by inheritance. So the proper order to make as to costs is that the plaintiffs should get half their costs throughout.

9. Gangadhar v. Parashram Bhal Chandra, (1905) 29 Bom 300=7 Bom L R 252.

10. Hardi tSingh v. Gurmukh Singh, 1918 P C 1 =47 I C 626=64 P R 1918=28 C L J 437 (P O).

To this extent the decree of the Subordinate Judge with regard to costs is varied.

Patterson, J. I agree.

R.M./R.K. Order accordingly.

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M. C. GHOSE, J.

Sashi Bhusan Ghose and others—Appellants.

v.

Bhupendra Nath Pal and others—Respondents.

Appeal No. 1238 of 1933, Decided on 2nd December 1935, from appellate decree of Addl. Dist. Judge, Hooghly, D/- 23rd March 1933.

(a) Charge—Charge created by decree—Subsequent purchaser is bound irrespective of whether he had notice or not.

Where a charge is created by a decree, no question of notice arises and a subsequent purchaser will be bound irrespective of whether such person had notice of the charge or not : 39 C W N 725, *Foll.* [P 113 C 2]

(b) Civil P. C. (1908), O. 21, R. 52, O. 38, R. 10—Attachment before judgment in force—Another decree-holder putting to sale property in execution of his decree and purchasing it, failing to give notice according to O. 21, R. 52 to Court previously attaching property before judgment—Property again sold in execution of decree, in which it was attached before judgment—Decree-holder previously purchasing property is not entitled to damages from decree-holder in subsequent decree.

An attachment before judgment, is made in the interest of the decree-holder subsequently obtaining decree in the suit, in order to prevent the judgment-debtor from disposing of the property before the judgment and does not operate against any other creditor of the judgment-debtor. [P 113 C 2 ; P 114 C 1]

Where however a creditor putting property to sale in execution of his decree and purchasing it, while an attachment before judgment is in force, omits to give notice according to O. 21, R. 52 to the Court attaching the property before judgment, and the property is again sold in execution of the decree in that suit, the decree-holder purchasing the property and omitting to give notice under O. 21, R. 52, is not entitled to any damages against the other decree-holder, as the decree-holder by omitting to take action under O. 21, R. 52 prejudices the other decree-holder. [P 114 C 1]

(c) Civil P. C. (1908), O. 21, R. 52, O. 38, R. 10—A putting to sale property of X in execution of decree and purchasing it himself—A depositing certain sum and setting off balance against decree—Deposit withdrawn by X—Property sold again in execution of decree in favour of C—Amount realised distributed rateably among B, C and D, decree-holders—Suit by A against X, B, C and D for recovery of property or for damages—B

found to have charge created on property by his decree—A found not to have served notice under O. 21, R. 52 to Court attaching property before judgment at instance of C—B and C held not liable to pay damages—X held liable to refund amount withdrawn by him—D and X held liable to pay balance of loss sustained by A.

A, a decree-holder holding an ex parte decree against X in a suit for recovery of money, put the property of judgment-debtor X to sale and purchased it himself and deposited a certain sum of money in cash, debiting the balance against the amount of the decree in his favour. The deposit was withdrawn by the judgment-debtor X. Subsequently the same property was sold in execution of other decree in favour of C, and put to sale, and the amount realized was rateably distributed among B, C and D, the creditors of the judgment-debtors. A instituted a suit against X, B, C and D, claiming either the property or damages for loss of the same. It was found that B had a charge created on the property by his decree and that A had omitted to give notice of his attachment to the Court attaching the property before judgment at instance of C :

Held : that B and C were not liable to pay any damages to A. [P 114 C 1]

Held also : that X was liable to refund the amount withdrawn by him and the loss suffered by A was to be paid in equal shares by D and X. [P 114 C 1]

Bijan Kumar Mukherjee and Baidya Nath Banerjee—for Appellants.

Atul Chandra Gupta, Pramatha Nath Mitra for Radhabinode Pal, Khitindra Kumar Mitter, Syamapada Majumdar and Upendra Nath Pal—for Respondents.

Judgment.—This suit was instituted by the plaintiffs against six defendants stating that they had wrongfully deprived them of certain bricks which they had bought in a Court execution sale, that the bricks should be returned to them or in the alternative that they should be given adequate compensation for the loss of the bricks. The facts in short are these: Defendant 6 was a manufacturer of bricks. He became involved in debts and could not pay them off. Many suits were instituted against him in the year 1928. The first suit was instituted by defendants 3 and 4 on 19th April 1928 in the Court of the Subordinate Judge of Hooghly. That suit was decreed on 21st May for Rs. 1,830 and further that of the two kilns of bricks, the kiln No. 10 should remain subject to a first charge for the decree. The second suit was instituted by the plaintiffs on 23rd May 1928 in the Court of the Munsif of Serampore. This suit was decreed

ex parte on 26th July for Rs. 830. The third suit was instituted by defendant 2 on 16th June 1928 in the third Court of the Subordinate Judge, Hooghly. On 20th June the defendant attached the two kilns of bricks before judgment. While the charge on kiln No. 10, at the instance of defendants 3 and 4 was subsisting and the attachment of the two kilns by defendant 2 was subsisting on 27th July 1928, the plaintiffs applied for execution of their decree and on 5th September 1928 the two kilns of bricks were sold by the Munsif of Serampore and the plaintiffs purchased the same for Rs. 1,000 of which they deposited Rs. 158-11-0 only in cash and debited the balance against their decree. This Rs. 158-11-0, deposited by them in Court, was withdrawn and taken away by defendant 6. Meantime defendant 2 applied in the Court of the Subordinate Judge, Third Court, Hooghly, for execution of his decree. The two kilns were attached and the sale proclamation was issued. The plaintiffs appeared in that Court and made an objection on the ground that they had already purchased the two kilns. This application was dismissed and the two kilns of bricks were sold in auction in the Court, of the Subordinate Judge, 3rd Court on 9th October 1928, and they were sold for a sum of Rs. 3,585 to defendant 1 and the money was distributed rateably to defendants 2, 3, 4 and 5 who were creditors, the plaintiffs not having applied for rateable distribution.

Then on 11th October 1928, plaintiffs instituted the present suit claiming either the bricks or damages for loss of the same. The Subordinate Judge who tried the suit held that while the other four creditors obtained decrees on sale of goods to the debtor defendant, the plaintiffs had only a promissory note whereupon they obtained an ex parte decree and the very day after they obtained a decree they applied for execution and in the sale proclamation they understated the number of bricks and purchased them at an inadequate price of Rs. 1,000 and then allowed without objection defendant 6 to take away the balance of Rupees 158-11-0 from the Court. Thereupon, the first Court held that the decree was not bona fide, but it was a collusive and fraudulent one and upon that finding the trial Court dismissed the suit. In appeal,

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the appellate Court held that the decree obtained by the plaintiffs was not collusive or fraudulent. Then the Court proceeded to try the different issues raised by the different defendants and rejected them all and decreed the suit for Rs. 1,000 against defendants 2, 3, 4 and 5 dismissing the suit against defendants 1 and 6.

As to the dismissal of the suit against defendant 1 who was the purchaser at the second sale both Courts held that he was a bona fide purchaser who purchased for a fair value and he is not liable to anyone. The Court of appeal does not state why the suit was dismissed against defendant 6. It is urged that in any event he should refund to the plaintiff Rs. 158-11-0 which he had withdrawn from the Court. The argument appears valid. The main argument on behalf of defendants 3 and 4 is that they, by the Court's decree of 21st May 1928, obtained the first charge on kiln No. 10 which was sold for Rs. 2,505 and out of those sale proceeds defendants 3 and 4 obtained Rs. 1,830 for their share as a first charge on that kiln. It is urged on the other side that the plaintiffs had no knowledge of the charge made by defendants 3 and 4 and therefore they are not bound by the same. But where a charge is created by a decree, no question of notice arises and a subsequent purchaser will be bound, irrespective of whether such purchaser has notice of the charge or not: see the case of 39 C W N 725 (1).

I am of opinion, this plea of defendants 3 and 4 is good and the suit must be dismissed against them with costs. In my opinion, the plaintiffs are entitled to get the sum of Rs. 1,000 which they lost by the re-sale of the bricks. The question is who should pay the damages to them. As stated above, Rs. 158-11-0 will be paid by defendant 6. It is argued on behalf of defendant 2 that the attachment before judgment which they had obtained in the Court of the Subordinate Judge, 3rd Court, Hooghly, was in force when the plaintiffs had the bricks sold in the Court of the Munsif of Serampore and therefore that sale cannot prevail against the prior attachment. This argument does not appear sound. The attachment previous to the sale was made in the interest of the decree holder in order

1. Hemlata Debi v. Bhowani Charan Ray, (1934) 39 C W N 725.

to prevent the judgment-debtor from disposing of the property before the sale. It does not operate against any other creditor of the judgment-debtor.

It is urged however that the sale made by the plaintiffs was a surreptitious sale inasmuch as they did not comply with the provisions of O. 21, R. 52, Civil P. C., which provides :

Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property may be held subject to the further orders of the Court from which the notice is issued.

Here, the Court of the Subordinate Judge of Hooghly had already attached the property. It was the duty of the plaintiffs to send a notice to that Court that the property would be sold subject to their decree. They did not take any action under this rule. The question is, what is the effect of the omission. The Court of appeal below has held that the omission was unintentional, that the plaintiffs did not know nor did the Nazir of the Munsif's Court know that these bricks had been previously attached by the order of the Subordinate Judge, 3rd Court, Hooghly. Assuming that they did not know, the question is whether it was due to their culpable negligence. It is to be presumed that Judges and public officers have regularly performed their duty. In this case the decree-holders had duly paid for the attachment in the Court of the Subordinate Judge. It is to be presumed that the public officer whose duty it was to attach the property had in fact done so and the plaintiffs or the Nazir of the Munsif of Serampore, if they had been properly vigilant, would have found out the matter and it was their culpable negligence which made them ignorant of the previous attachment and by omitting to take action under O. 21, R. 52, the plaintiffs have in fact prejudiced the case of the other creditors. Whether such omission makes the sale void or voidable the creditors who were prejudiced by this omission are entitled to a relief from this Court. Defendant 2, in my opinion, was prejudiced by the plaintiffs' omission to take action under O. 21 R. 52 of the Code and the plaintiffs are not entitled to get any damages from him. There remain only two defendants, namely defendants 5 and 6. As already stated, Rs. 158-11-0 will be paid by defendant 6. The balance sum of Rs. 1,000

will be paid in equal shares by defendant 5 and defendant 6. The plaintiffs will pay costs of defendants 1, 2, 3 and 4 and they will get their costs from defendants 5 and 6 throughout.

R.M./R.K.

Order accordingly.

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MCNAIR, J.

Moti Lal Daga and others.

v.

Susil Kumar Mukherjee and others.

Suit No. 420 of 1932, Decided on 27th August 1935.

Mortgage—Suit on — Suit by prior mortgagee—Subsequent mortgagee of same property and also of other independent property made party—He is not entitled to get other property included in his own mortgage sold in execution of decree—He must have recourse to independent suit.

A subsequent mortgagee of same property and also of other independent property who is made party to a prior mortgagee's suit cannot in that suit obtain a decree for sale of the independent property. The subsequent mortgagee is made a party to the suit in order that he might have an opportunity to redeem or that he might have his mortgage money or part of it out of the surplus sale proceeds after the satisfaction of the prior mortgage. But if the subsequent mortgagee seeks to obtain sale of some other property which is included in his own mortgage, he must have recourse to an independent suit: 37 Cal 907 and 1932 Cal 126, *Rel. on*; 22 Cal 100 and 24 Cal 190, *not Foll.* [P 115 C 1, 2; P 116 C 1]

H. K. Bose—for Defendants.

Judgment.—A question has been referred to me by the learned Master which arose on the solving of the final decrees in two similar mortgage suits. The circumstances were as follows. Property comprised in a mortgage was subsequently mortgaged together with other properties to a second mortgagee. The prior mortgagee sued on his mortgage and made the subsequent mortgagee a party to his suit. A preliminary decree was made and the property, the subject-matter of the original mortgage, was sold and was insufficient to satisfy the prior mortgagee's claim. The question arises on the drawing up of the final decree whether in this decree the second mortgagee is entitled to an order for sale of the remaining property in satisfaction of his mortgage. I have had the benefit of hearing arguments from counsel for the mortgagor and the second mortgagee. For the second mortgagee, reliance is

placed on the case of 22 Cal 100 (1), where Sale, J., held that it had been the practice on the original side of this Court for a long series of years and certainly since the decision of Pontifex, J., in 1879 in the case of 5 Cal 101 (2), that where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgages to make a decree directing an account on the footing of each of the mortgages and fixing one period of redemption for all the defendants.

That practice the learned Judge said in 1894 is now too well settled to be disturbed. In 24 Cal 190 (3), the same learned Judge three years later made a similar order in favour of a third mortgagee and held that the remaining properties which were outside the jurisdiction might be sold at the instance of the defendant. In 1910 Pugh, J., in 37 Cal 907 (4), held that this practice on the original side was based on and in conformity with the English practice but that it did not conform to the provisions of the Transfer of Property Act, which had been incorporated into Order 34, Civil P. C. He held that since 1908 the original side practice was bound to conform to the practice in the mofussil and on the appellate side, where the view had always been held that the subsequent mortgagees were only made parties to the suit in order that they might have an opportunity to redeem and to receive their mortgage money out of the surplus sale proceeds after satisfaction of the first mortgage. That judgment, if I may say so with respect, is clear and well reasoned and the learned Judge on p. 911 of the report calls attention to the difficulty that might arise if there were a prior or a subsequent mortgagee or assignee of the property excluded from the plaintiff's but included in the second mortgagee's mortgage. Such a person would not be a proper party to the plaintiff's suit, yet the property could not be sold except in his presence and after decree had been made with respect to his interests.

It is noteworthy that in that case the

1. Kishory Mohan Roy v. Kally Churn Ghosh, (1895) 22 Cal 100.
2. Aubindro Bhoosan Chatterjee v. Chunno Lal Johurry, (1879) 5 Cal 101.
3. Kissory Mohun Roy v. Kally Churn Ghosh, (1897) 24 Cal 190=1 C W N 156.
4. Sarat Chandra Roy Choudhury v. Nahapiet, (1910) 37 Cal 907=8 I C 1142.

first mortgagee's security was Calcutta property, whereas the second mortgagee had a mortgage over the Calcutta property and also over properties in the mofussil and the learned Judge held that the second mortgagee was only entitled to be paid out of the balance of any sale proceeds of the Calcutta property and could not in any event proceed in that suit against the mofussil property. This decision was obviously opposed to the decision of Sale, J., in 24 Cal 190 (3), but Pugh, J., based his decision not on this ground but on the wider ground that the provisions of S. 85, T. P. Act, had been incorporated in the Code and that the procedure on the original side of this Court which had hitherto prevailed had now become obsolete. The practice referred to and approved by Sale, J., had the obvious advantage of entitling all matters between the mortgagor and the various mortgagees to be adjusted in a single suit, but it also had the obvious disadvantage which was noted by Pugh, J., and to which I have already referred, viz., that there is no provision to safeguard the rights of other encumbrances of the property mortgaged to the second mortgagee.

The question was again dealt with in a recent decision of this Court. 59 Cal 117 (5) at p. 124, where the learned Judges, Mukherji and Guha, JJ., referred to some of the decisions, I have mentioned and reiterated that whatever might be the English practice and the practice on the original side of the Court the procedure in the mofussil was different and the second mortgagee was merely made a party to the suit in order that he might have his mortgage money or part of it out of the surplus sale proceeds after satisfaction of the first mortgage but that in order to obtain the sale of some other property included in his own mortgage he must have recourse to a separate suit. In my view the judgment of Pugh, J., is correct and the former practice of the original side approved by Sale, J., became obsolete so soon as the relevant provisions of the Transfer of Property Act were incorporated in the Civil Procedure Code. A subsequent mortgagee of independent property who is made a party to the prior mortgagee's suit cannot in that

5. Kalipada Mukherji v. Basanta Kumar Datta, 1932 Cal 126=138 I C 177=59 Cal 117=35 C W N 877.

suit obtain a decree for sale of the independent property. These are my views in regard to the practice. In the particular cases before me preliminary decrees were made on 6th December 1932 and 15th December 1925 respectively. In each of these decrees an order was made for the sale not only of the property subject to the plaintiff's mortgage but also of the property mortgaged to the defendant puisne mortgagee. It is not now open to question whether those decrees were or were not in proper form. They have been made and the puisne mortgagees are entitled to have the remaining mortgaged properties sold. The final decrees for sale will be settled and passed as drawn by the learned Master.

R.M./R.K.

Order accordingly.

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D. N. MITTER AND PATTERSON, JJ.

Durga Prosad Barhai—Defendant—Appellant.

v.

Jewdhari Sing and others—Respondents.

Appeal No. 304 of 1932, Decided on 17th January 1935, from original decree of Sub-Judge, Darjeeling, D/- 15th February 1932.

(a) Hindu Law—Succession by survivorship—Letters of administration cannot be granted—Even if granted sanction for alienation is not necessary.

No letters of administration can be granted in respect of the estate of the deceased person who was a member of a joint Mitakshara family along with other co-parceners; and even if a co-parcener obtains them he need not take the sanction for alienation: 1920 Pat 343 and 12 Bom 621, Ref. [P 118 C 2]

(b) Hindu Law — Alienation — Manager—Purchase after bona fide enquiry and sale justified by legal necessity—Whole sale must be upheld even if part of consideration is not applied to legal necessities.

Where joint family property is sold by the manager of the family for legal necessity, but the whole of the price is not proved to have been applied to purposes of necessity, and the sale is challenged on that ground by the other members of the family, if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due enquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied to purposes of necessity would not invalidate the sale, the purchaser not being bound to see to the application of the price. If the above conditions are satisfied the sale must be held unconditionally, whether the part not proved

to have been applied to purposes of necessity is considerable or not: *Case law referred.*

[P 121 C 1]

(c) Hindu Law — Alienation — Manager—Mortgage by — Necessity for borrowing at high rate of interest must be proved—Security ample—Court can reduce interest.

Those who support a mortgage of joint family property made by the manager must prove not only that there was necessity to borrow the principal but that it was not unreasonable to borrow at some such high rate, and upon some such terms, as are provided by the mortgage. If the rate of interest is exorbitantly high, although the security is ample, the Court can properly infer that it was unnecessarily high, and can make a mortgage decree allowing a reduced rate: 1919 P C 12, Rel. on. [P 122 C 2]

Rama Prosad Mukhopadhyaya and Dharendra Krishna Roy—for Appellant.

Amarendra Nath Bose, Panchanan Ghose, Sourindra Narayan Ghose and Durgadas Roy—for Respondents.

D. N. Mitter, J.—This is an appeal by the defendant and arises out of a preliminary decree in a suit on mortgage commenced by the plaintiff. The decree is dated 15th February 1932. The suit was to enforce a mortgage executed by one Jadu Nath Sarma, who is said to be the Karta of a joint Mitakshara family, on 26th May 1922. Jadunath hypothecated by this document the immoveable properties belonging to the joint family. In order to understand the position of Jadunath with reference to the family it is necessary to state the following facts: One Bhagoo Mistri had three brothers namely Gakul, Nimchand and Fulchand. There was some sort of a partition between Gakul, Nimchand and Fulchand, and Bhagoo got in his share the properties some of which have been mortgaged by the document on which the present suit has been brought. Bhagoo died leaving behind him surviving his son Kali Charan who died on 9th February 1918. Kali Charan had a son Raghunath who died at the age of 42 but during the lifetime of Kali Charan. Kali Charan died on the date already mentioned leaving him surviving Jadu Nath and Durga Prosad, two of his grandsons by his son Raghunath. The relationship between the plaintiff and some of the pro forma defendants to the suit may be shown as follows: Chatter Singh had five sons Jewdhari, plaintiff 1 in the present suit, Deo Narayan, whose son is Bharat Singh, defendant 2, Ramdhiyan Singh whose son is Sadhusaran Singh, plaintiff 2, Ramnarayan, and Sewsagar, whose son is

Ambika Singh, plaintiff 3 to the suit. The allegations of the plaintiffs in the plaint are that for the purpose of meeting the expenses of the joint family which consisted of Jadunath himself and his infant brother Durga Prosad, who was born in August 1909, a sum of rupees twelve thousand (Rs. 12000) was borrowed on 26th May 1922, by Jadu Nath as the Karta of the joint family. It may be mentioned that the mother of Durga Prasad, Musammatt Daho Kuar, was also a member of the family at the time of the execution of the mortgage. The amount advanced on the mortgage was Rs. 12,000 (rupees twelve thousand) and the mortgage is said to have been executed by Jadunath Sarma for self and as the natural guardian of Durga Prosad, the defendant appellant.

The interest claimed was Re. 1-8-0 per mensem, that is 18 per cent per annum with nine-monthly rests if the sum be not paid within the period of nine months. The due date of the mortgage was 26th May 1924. The properties mortgaged are given in Schs. A and B to the plaint. Plaintiffs stated that the amount due at the date of the suit on the bond including interest would be about Rs. 54,000 (rupees fifty-four thousand) and that the plaintiffs were giving up a sum of Rs. 9,000 (rupees nine thousand) out of the interest and claimed Rs. 45,000 (rupees forty-five thousand). Plaintiffs accordingly asked for the usual decree for sale, the mortgage being in the nature of a simple mortgage. Several defences were taken in the suit. It was stated that Jadunath was not the karta of the joint family consisting of Jadunath and Durga Prosad. It was also said that the previous debts were neither genuine nor real nor were incurred for family necessity, and that there was no justifying necessity when the mortgage was executed so as to make the alienation binding on the joint family property. A further defence was taken, namely that as Jadunath obtained letters of administration of the estate of Kalicharan, after Kalicharan's death in 1918, the mortgage was not binding on the minor as no sanction was obtained from the probate Court sanctioning the alienation in question. A very important statement is made in the written statement to the effect that a short time before the execution of this mortgage Jadunath, with the permission of the District

Delegate of Darjeeling, sold to Abdul Rahim of Calcutta a very good portion of the ancestral properties for Rs. 50,000 (rupees fifty thousand) as administrator, karta and natural guardian of the defendant, and after paying the debts, recited in the deed of conveyance in favour of Abdur Rahim, a very large sum of money, namely Rs. 22,253 (rupees twenty-two thousand two hundred and fifty-three) remained in his hands and there was absolutely no necessity to borrow those twelve thousand rupees from the plaintiffs on 26th May 1922; and it is said that there was no justifying cause for the transfer by way of mortgage.

It was also alleged in the written defence of the defendants that Jadunath was a man of dissolute habits, and that he became early addicted to wine and women and began to spend his time in debauchery. It was also said that the high rate of interest mentioned in the bond could not be justified even if there was legal necessity for the borrowing. In other words the plea taken was that even if there was any justification for the borrowing of Rs. 12,000 there was no justifying necessity for borrowing on high rate of interest, namely 18 per cent per annum, with nine-monthly rests. It is also said that the interest was hard and unconscionable. The Subordinate Judge rejected all these defences and decreed the suit in full. Against this decree the present appeal has been brought by the defendant and several grounds which were based on the defences taken in the Court below and which have been already mentioned, were urged before us in support of the appeal. It was contended in the first place that Jadunath was not really the karta of the joint family consisting of himself and his brother and the mother of Durga Prosad, and that therefore the mortgage could not bind the joint family properties. It was said in support of this argument that Jadunath assumed the role of karta for the time when he was executing the mortgage in question. The Subordinate Judge has, however, relied on the oral evidence adduced in this case and has come to the conclusion that Jadunath was acting as the karta. (His Lordship after agreeing with the lower Court proceeded). We are therefore of opinion that this contention that Jadunath was not acting as a Karta of the joint family must fail. The second contention which is raised on

behalf of the appellant is that Jadunath obtained letters of administration of the estate of Kali Charan and having obtained the letters of administration he could not execute a valid mortgage so as to bind the joint family estate without obtaining the sanction of the District Judge. The question really turns on the construction which is to be put on the provisions of S. 211 (2), Succession Act. That clause runs as follows:

When the deceased was a Hindu, Mahomedan, Buddhist, Sikh or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

It may be taken for the purposes of this case that Kali Charan and his two grandsons Jadunath and the present appellant formed members of the joint Mitakshara family and the properties which form the subject matter of the mortgage were the ancestral properties in the hands of Jadunath and Durga Prosad after Kali Charan's death. After Kali Charan's death in the absence of a son the properties would pass by survivorship to Jadunath and Durga Prosad, and there would be according to the provisions of S. 211 (2) no property of the deceased person Kali Charan in respect of which letters of administration could be granted. At the moment of the death of Kali Charan no property of his vested in the executor, the right of survivorship taking precedence over any other right; and that therefore when Kali Charan died the right in the joint family properties passed by survivorship to their two infant grandsons and nothing became vested in the executor, or the administrator notwithstanding the grant of letters of administration. This view is supported by the decision to which we were referred in the cases of 7 Rang 39 (1), 5 Pat L J 107 (2) and 12 Bom 621 (3). We are referred by Mr. Mukerji who appears for the appellant to a decision in 9 C W N 923 (4), but Mr. Mukerji, after examining the case frankly admitted that that was a case where the property was not the property of a member of a Mitakshara family

but of one governed by the Dayabhag School of Hindu Law. So that that case has no application and we need not consider it.

The argument of the appellant with regard to this point was that even if the probate Court had no jurisdiction to grant letters of administration the point of the want of jurisdiction cannot be taken in a collateral proceeding but that the order granting letters of administration should have been set aside by a proper proceeding, and we are referred to the provisions of S. 263, Succession Act, and in particular to illustration (1) to that Section. That illustration is to the following effect: "The Court by which the grant was made had no jurisdiction." S. 263 states that the grant of probate or letters of administration may be revoked or annulled for just cause; and it is said that even where there is an error of jurisdiction the letters of administration should have been revoked for just cause which includes according to the illustration the case where probate Court has no jurisdiction. At the same time we are confronted by the well known principle established by a series of decisions of their Lordships of the Judicial Committee that if proceedings are taken by a Court without jurisdiction no further proceedings are necessary to set the same aside or to nullify the effect of such proceedings. We may refer in this connection to the decisions of their Lordships of the Judicial Committee in the case of 32 Cal 296 (5). But apart from this question being viewed from this standpoint it appears by reason of S. 211 (2), that no letters of administration can be granted in respect of the estate of the deceased person who was a member of a joint Mitakshara family along with other co-parceners. It was therefore not necessary to obtain the sanction of the District Judge in order to render the mortgage in question valid and binding on the joint family estate. This contention of the appellant therefore also fails.

The third contention in this appeal is that as the debts, for paying which the mortgage Ex. 1, dated 26th May 1922 was executed, were not such debts as were incurred for family purposes, the

1. T. R. Gopalaswamy Pillai v. Minakshi Ammal, 1929 Rang 99=115 I C 905=7 Rang 39.

2. Debendra v. Surendra, 1920 Pat 343=54 I C 807=5 Pat L J 107.

3. Bai Harkar v. Manik Lal, (1888) 12 Bom 621.

4. Ranjit Singh v. Amullya Prosad Ghose, (1905) 9 C W N 923.

5. Khairajmal v. Dain, (1905) 32 Cal 296=32 I A 23=8 Sar 734 (P O).

mortgage cannot bind the family properties. It was further said that there is no reliable evidence of bona fide enquiry by the plaintiffs mortgagees as to the existence of necessity, and it is contended that having regard to the well established principle, regarding the limits of the authority of Karta of a Mitakshara joint family to bind the joint family properties by sale or mortgage, the mortgage in question, should be held to be not binding on the family properties and the suit to enforce the mortgage security must fail. Before proceeding to deal with the question raised by the ground as to the existence of legal necessity or as to the existence of an inquiry into the legal necessity, it is necessary just to set forth the law in this behalf which has been summarized in the decision of their Lordships of the Judicial Committee in the case of 51 I A 129 (6). At p. 139 after reviewing the numerous authorities both of Indian Courts and also of their Lordships of the Judicial Committee of the Privy Council their Lordships say this :

Their Lordships may sum up the propositions which they would wish to lay down as the result of these authorities as follows:

We will cite here only proposition (1) for that is material for the purposes of the present case. The proposition (1) runs as follows :

The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for the purposes of necessity.

It is not disputed, and it cannot be disputed, that the burden of proving the necessity for the debts and that there has been a bona fide inquiry by the lender is on the lender i. e., the plaintiffs mortgagees in the present case. We have to consider how far they have been able to discharge that burden with reference to the present mortgage. In considering this question there is a circumstance of very great importance in this case which has to be kept in view, namely that just a few days prior to the execution of the present mortgage, portions of the family properties were sold to one Abdur Rahim for a sum of Rs. 50,000 (rupees fifty thousand), and having regard to this circumstance the burden is indeed very heavy on the plaintiffs mortgagees to establish the existence of legal necessity seeing that

the family was put in possession of a considerable sum of money, namely, Rs. 50,000 (rupees fifty thousand) a few days before the transaction which is challenged by the defendant in the present case. The Subordinate Judge is of opinion that the plaintiffs did make sufficient inquiry with regard to how the sum of Rs. 50,000 (rupees fifty thousand) was spent for family purposes and that therefore the mortgagees have discharged the onus of showing this: that after due inquiry they were satisfied that so far as Rupees 50,000 (rupees fifty-thousand) were concerned nothing remained out of that sum so as to justify the borrowing on the present mortgage. (His Lordship after discussing evidence proceeded). On this evidence we are not prepared to disagree with the finding of the Subordinate Judge that as a matter of fact the sum of Rupees 50,000 was spent. The question however still remains as to whether the lender should have made a proper inquiry with reference to Rs. 50,000 as to whether these debts which were liquidated by the consideration money of Rahim's kobala were incurred for family purposes. On this part of the case this witness Bhuban states this :

I do not remember if I made any inquiry as to whether these debts were incurred entirely for the benefit of the minor Durga Prosad or for family necessity, but I knew Jadunath to be acting as Karta of the family. I was acting on instructions from Jadunath as his pleader; it was not a personal question. I did not think it necessary to inquire minutely as a lender regarding family necessity and benefit of the minor etc.

Again this witness at p. 64 states this with reference to the sum of Rs. 12,000 (rupees twelve thousand) which form the subject matter of the present mortgage, and this statement throws a flood of light on the question as to whether there was a due inquiry with reference to the legal necessity in respect of the sum borrowed on the mortgage, namely in respect of Rs. 12,000. The statement is this :

As I was not a lender it was not necessary for me to enquire whether these debts were incurred for family necessity or for benefit of the minor Durga Prosad. I spoke to several creditors who at my request gave up some portion of their dues, but I cannot say how much this amounted to.

This statement shows at once that no enquiry was made with reference to the existence of the legal necessity for borrowing the sums advanced on the mort-

6. Brij Narain v. Mangla Prosad, 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

gage in question. We would hold therefore that there was no bona fide enquiry made with regard to the existence of legal necessity for the mortgage loan of Rs. 12,000 but, would hold at the same time in agreement with the Subordinate Judge that it has been shown in the account that the sum of Rs. 50,000 obtained from Abdur Rahim had, as a matter of fact, been actually spent. In this view it remains to examine whether there was legal necessity in respect of each of the items which go to make up the consideration for the mortgage and which went together to make up the sum of Rs. 12,000. (His Lordship after considering the evidence regarding the legal necessity of each item of advance proceeded.

The result therefore is that we hold that out of the sum of Rs. 12,000 which is borrowed on this mortgage there was justifying necessity for Rs 7092-0-9 and that there was no such necessity for the balance of that sum. It has been argued for the respondents that even on the view which we have taken, the mortgage transaction should be upheld in its entirety. It is argued that as it has been found that there was legal necessity for a substantial portion of Rs. 12,000 the presumption should be that there was legal necessity for the rest also and in support of this contention reliance has been placed on a number of decisions both of this Court and also of their Lordships of the Judicial Committee of the Privy Council. The leading decision on this point is the recent decision of their Lordships of the Judicial Committee of the Privy Council in 54 I A 79 (7). At the outset and before considering the contention of the respondents it becomes necessary to state the law as expounded by their Lordships in this case. The case in which the observations were made depended on the following facts : there was a sale of a joint property governed by the Mitakshara School of the Hindu law and it was proved that the purchaser had made due enquiry as to the necessity for the sale. Out of a fund of Rs. 3,500, Rs. 3,000 had been applied to purposes of necessity and that the price was adequate. The High Court made a decree setting aside the sale conditionally upon Rs. 3,000 being

repaid to the purchaser. In this state of facts their Lordships of the Judicial Committee held that the decree was contrary to all principle and authority and that the suit should be dismissed Lord Salvesson in delivering the judgment of their Lordships made the following significant observation which is to be found at p. 88 of the report :

This is in line with the series of decisions already referred to, in which it was held that where the purchaser acts in good faith and after due inquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale.

There are two very important considerations which have to be kept in view in construing what their Lordships have said in the case. Before the contention of the respondent can be upheld, it must be shown that in a case of sale where the purchaser acts in good faith and after due enquiry and is able to show that the sale is justified by legal necessity, he is under no obligation to enquire into the application of that surplus. Two conditions, namely the existence of a bona fide enquiry and the existence of evidence to show that the sale itself was justified by legal necessity, must co-exist in order to attract the application of this rule to a particular case. This decision does not give countenance to the position contended for by the respondents that as soon as it is shown that there was a legal necessity for a part, the whole transaction must be upheld although the purchaser had failed to show that this was legal necessity for the remainder. But this position cannot be maintained because it appears from the clear exposition of the law in the passage to which we have referred that their Lordships of the Judicial Committee hold that the two elements must co-exist in order to attract the principle to the case, namely (1) that the purchaser has made a bona fide enquiry and (2) that the sale is justified by legal necessity.

If the contention of the respondents is given effect to, it would lead to somewhat difficult position. To take one illustration: suppose in a sale for Rs. 51,000 evidence is given to show that there was legal necessity say for Rs. 10,000, then according to the contention of the respondents the sale must be upheld

although the purchaser has failed to give evidence as to the existence of legal necessity for a substantial portion of the consideration. This could not have been intended by the decision which we are just considering. It seems to us that their Lordships were laying down the rule in the circumstances that where there has been a bona fide enquiry by the purchaser as to the existence of legal necessity and if the entire consideration is not applied to the necessary purposes the purchaser is not bound to enquire as to the application of the money and is protected if he has made an enquiry only as to the existence of legal necessity. The true position laid down by this decision has been formulated by Sir Dinshah Mulla in his treatise on the Principles of Hindu Law in Art. 245 while dealing with purchase money or money raised on mortgage applied by manager in part only to purposes of legal necessity. He says this :

Cases frequently arise in which joint family property is sold by the manager of the family for legal necessity, but the whole of the price is not proved to have been applied to purposes of necessity, and the sale is challenged on that ground by the other members of the family. In such cases if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due enquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied to purposes of necessity would not invalidate the sale, the purchaser not being bound to see to the application of the price. If the above conditions are satisfied the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of necessity is considerable or not.

That seems to be the correct way of reading the decision of their Lordships of the Judicial Committee in the case with which we are now dealing. In 54 I A 79 (7), a reference has been made of the case of 6 M I A 393 (8). There also as in the present case, the point emphasized was that the validity of the sale in cases of this kind would not depend upon the proof of the application of the sale price. The reason is that the bona fide purchaser for value is not bound to see to the application of the price paid by him. If it were otherwise he would himself have to enter into the management and direct and control the actual applica-

tion of the money. In these circumstances it has been held in cases for which legal necessity has been established for a portion of the consideration that the mere fact that a consideration of the price of Rs. 712 out of Rs. 5,300, as in 27 C W N 365 (9) or of Rs. 2,000 out of Rs. 18,400 as in the case of 53 I A 204 (10) or of Rs. 38,400 out of Rs. 43,500 as in 54 I A 211 (11), is not proved to have been applied, for legal necessity is not a ground in law for setting aside the sale.

The true gist of the decisions is that there must be a bona fide enquiry by the purchaser and (if the doctrine is to apply to cases of mortgage) there must be bona fide enquiry by the lenders in order to attract the principle in 54 I A 79 (7). The other authorities which follow the decision of 54 I A 79 (7) are on the same lines. Reference has been made to the decisions of the Judicial Committee which follow this and which are 54 I A 211 (11), 32 C W N 257 (12) 61 I A 150 (13). The application of the principle, as has already been stated, must depend on the co-existence of the two elements of bona fide enquiry and the existence of necessity for a part of the consideration. There have been cases before the Judicial Committee where in the case of sale a conditional order of repayment of the portion for which there was no legal necessity was made and in this connexion we might refer to the decisions in the cases of 34 I A 72 (14) and in 35 I A 48 (15). At p. 57 of the latter report it will appear that the conveyances were not held good, but the decree for possession in that case was made conditional because it was found that the payment made by the particular respondent of portions of the consideration money were

9. Medai Dalui v. Nainar Tevan, 1922 P C 307=74 I C 604=27 C W N 265 (P C).

10. Masit Ullah v. Damodar Prasad, 1926 P C 105=98 I C 1031=53 I A 204=48 All 518 (P C).

11. Niamat Rai v. Din Dayal, 1927 P C 121=101 I C 373=54 I A 211=8 Lah 597 (P C).

12. Gouri Shankar v. Jiwan Singh, 1927 P C 246=107 I C 4=32 C W N 257 (P C).

13. Jagannath v. Shrinath, 1934 P C 55=147 I C 903=61 I A 150=56 All 123=59 C L J 167 (P C).

14. Deputy Commissioner of Kheri v. Khanjan Singh, (1907) 29 All 331=34 I A 72=4 A L J 232 (P C).

15. Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu, (1908) 35 Cal 420=35 I A 48=12 C W N 393.

8. Hunooman Persaud Pandey v. Babooee Munraj Koonwaree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).

advanced for legitimate necessities. We are therefore of opinion that the contention of the respondents must fail having regard to our finding that it has not been established on evidence that there was a bona fide enquiry by the lender in the present case.

It is not necessary to express our opinion finally upon the question which has been raised in the course of the argument that the principle laid down in 54 I A 79 (7), can only apply to cases of sale and not to cases of mortgage. There is a divergence of judicial opinion on the point. The Lucknow Chief Court would seem to hold that this principle would apply to cases of sale and should not be attracted to cases of mortgage. The reason given by that Court is that it is not always possible for the father or the manager of a family to sell that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding; while in the case of a mortgage he can borrow the precise amount which is required to meet the family necessity and if he mortgages for more money than is required, the sons cannot be made liable for the sum in excess of the family necessity. See the decision of the case of 4 Luck 107 (16). On the other hand the Patna High Court would seem to hold that the case of mortgage stands on the same footing as the case of sale; and the rule laid down in 54 I A 79 (7) which was a case of sale applies also to mortgage. See the decision in 8 Pat 558 (17). In the view which we have taken that this principle has no application because the bona fide enquiry required is absent, in the present case it is not necessary to express any opinion on the divergence of opinion between the Patna High Court decisions and the Oudh Chief Court decision.

The next question we have to consider is as to whether there was any necessity for borrowing the sum, for which we have found legal necessity to exist, at the high rate of interest, namely 18 per cent with nine monthly rests. The question has to be viewed in the light of what has been observed by their Lordships of the Judi-

cial Committee in 46 I A 145 (18). In that case their Lordships lay down that those who support a mortgage of joint family property made by the manager must prove not only that there was necessity to borrow the principal but that it was not unreasonable to borrow at some such high rate, and upon some such terms as are provided by the mortgage. Their Lordships further lay down that if the rate of interest is exorbitantly high although the security is ample, the Court can properly infer that it was unnecessarily high, and can make a mortgage decree allowing a reduced rate.

On behalf of the respondents our attention has been drawn to a number of transactions between Jadunath and Kalicharan and other creditors in which the interests varied from 9 per cent per annum with yearly rests to 15 per cent per annum with yearly rests, and in some cases with half-yearly rests. We have been referred to Ex. J at p. 127 of the second part of the paper book, Ex. 4 at p. 1, lines 35 to 45 of the second part of the paper book, Ex. A (c), which is typed in the supplementary paper-book when the interest is at the rate of 21 per cent per annum, Ex. A at p. 82 of the second part of the paper-book where the interest is at the rate of 15¹/₂ per cent per annum with half-yearly rests and some promissory notes for small sums of money ranging between Rs. 187 to Rs. 1,775 in which the interest varies from 18 per cent to 36 per cent per annum simple. Considering the facts that in this case the security is ample and that there was a long delay made in bringing the suit, we think that simple interest at the rate of 18 per cent per annum would be amply sufficient to compensate the mortgagee for the interest which he should get on the principal amount of the mortgage. As we have said that there was a real necessity for payment for the two transactions evidenced by Ex. 4, at p. 3 of the second part of the paper-book and Ex. A at p. 82 of the second part of the paper-book that there were many debts due to Bhagban Ram and Narsingh Pandey and it does not appear that there was such a high pressure from these two creditors as would justify those high rates of interest at which the sums were borrowed. The

16. Jai Indra Bahadur Singh v. Khairati Lal, 1923 Oudh 465=113 I C 489=4 Luck 107=5 O W N 836.

17. Hitendra Narayan Singh v. Sukhdeb Prosad Jha, 1929 Pat 558=115 I C 886=8 Pat 558=10 P L T

18. Nazir Begum v. Raghunath Singh, 1919 P C 12=50 I C 434=46 I A 145=41 All 571 (P C).

only evidence with reference to these two transactions is to be found at p. 44 of the first part of the paper-book, which is the evidence of one Jangi Ram who is the gomastha of the firm of Bhaban Ram Goga Ram. He says this :

The interest in Ex. 4 was 9 per cent per annum But I know that repeated demands were made by the maliks for the money at the time that Daroga Bazar was sold. Demands were made at our shop where Jadunath and Mahabir Prosad used to come.

It does not appear that demands had been made through Court till the institution of this suit, so as to justify the borrowing at a high rate. In these circumstances the decree of the Subordinate Judge must be varied by granting the usual mortgage decree for a sum of Rupees 7,692-0-9 with simple interest at the rate of 18 per cent per annum up to the date of three months from now. If the mortgage money be not paid with interest thereon by that date the mortgaged properties will be sold. The costs will be costs in proportion throughout. After the date fixed for redemption the interest will run at the rate of 6 (six) per cent per annum until realization. Liberty is given to the appellant to mention to this Court about the continuance of the receiver even after the decree is signed in this case.

Patterson, J.—I agree.

M.N. *Decree varied.*

A. I. R. 1936 Calcutta 123

MUKERJI, AG. C. J. AND S. K. GHOSE, J.
Aparna Prosad Chunder—Plaintiff—Appellant.

v.

Chairman, Garulia Municipality, and another—Defendants—Respondents.

Letters Patent Appeal No. 10 of 1935, Decided on 17th December 1935, against judgment of R. C. Mitter, J., D/- 5th March 1935.

Bengal Municipal Act (1932), S. 18 (1), Cls. (1 and 2)—Cls. 1 and 2 are disjunctive, i. e., action under one clause alone can be taken.

In sub-s. (1) of S. 18, Cls. (1) and (2) are to be read not conjunctively but disjunctively; in other words when the Local Government takes action under Cl. (1) of sub-s. (1) it is not at the same time bound to take action under Cl. (2).

[P 123 C 2]

Bijan Kumar Mukherji and Phani Bhusan Chakravarty—for Appellant.

Atul Chunder Gupta and Uma Sankar Sarkar—for Respondents.

S.K. Ghose, J.—This is a Letters Patent appeal from a decision of R. C. Mitter, J., and it raises a question with regard to the interpretation of S. 18, Bengal Municipal Act 1932. The question is whether in sub-s. (1) of S. 18, Cls. (1) and (2) are to be read conjunctively or disjunctively; in other words, whether when the Local Government takes action under Cl. (1) of sub-s. (1) it is at the same time bound to take action under Cl. (2). Mitter, J., agreeing with the trial Court and disagreeing with the first appellate Court, has held that the clauses are to be read disjunctively. That view is challenged in this Letters Patent appeal.

The appeal arises out of a suit for a declaration that the preparation of the electoral roll of the Garulia Municipality was contrary to the provisions of S. 18. It appears that the plaintiff has been entered as a voter in a certain ward of this Municipality. By Notification No. 7017-M of 14th December 1933 the Local Government acting under sub-s. (1) of S. 18 increased the number of Commissioners from 10 to 12 and by a further notification of the same date it fixed the number of appointed Commissioners at five with the object of securing proper representation of the jute and cotton industries therein. It appears further that by a separate notification the Local Government in the exercise of its power under sub-s. (2) of S. 24 directed the preparation of electoral roll in Form A, and accordingly the electoral roll was prepared. It included the names of all voters connected with the jute and cotton industries as well as of those not so connected. The contention of the plaintiff-appellant is that as the Government increased the number of appointed Commissioners to five under Cl. (1) it was bound to direct the preparation of a special electoral roll of non-industrial voters under Cl. (2), and that such electoral roll not being prepared the election could not proceed on the basis of the general electoral roll. This is a point which was argued before Mitter, J., and having perused his judgment and listened to the arguments on both sides, we may say at once that we are in entire agreement with the opinion of our learned brother. The points may be briefly indicated: It is noteworthy that the word "may" occurring in the first part of sub-s. (1) of S. 18 governs Cl. (1) as also Cl. (2) in

other words, it is optional with the Local Government to take action under Cl. (1) and it is also optional with the Local Government to take action under Cl. (2). There is nothing to indicate that, where Government does take action under Cl. (1) it is bound to proceed to take action under Cl. (2), as Mitter, J., has pointed out. If the contrary had been the intention of the legislature one would expect the words "and shall" to occur before the first word "provide" in Cl. (2).

The second point is that the third provision, which is in the words "and the Local Government may further provide for election by general electorates in any portion of such Municipality", applies not merely to Cl. (2), but also to Cl. (1). This is confirmed not only by the position of the clause I have quoted, but also by the re-appearance of the word "may" going to show that it is an independent provision which applies not to only one of the two clauses aforesaid, but to both of them. Therefore it follows that if the Government chooses to take action under Cl. (1) it may further provide for election by general electorates, and it may also do the same thing if it chooses to take action under Cl. (2) or if it chooses to take action under both the clauses. There has been some argument as to the word "portion." It has been contended for the appellant that the expression "portion of such municipality" does not refer to a local area; but this is inconsistent with the definition of the word "municipality" occurring in S. 3, sub-s. (34) which shows that the word means "any place in which this Act, or any part thereof, is in force."

The next point is that Cl. (1) of sub-s. (1) of S. 18 contains two separate provisions under either of which action can be taken namely, first, that the Government may increase the number of appointed Commissioners beyond the proportion mentioned in S. 16 and secondly that the Government may constitute industrial constituencies. The learned advocate for the appellant in this Court appeared to us to argue that Cl. (2) would be a necessary corollary to Cl. (1) because if industrial constituencies were formed it would be necessary also to form electoral constituencies for the representation of inhabitants who were not directly connected with industries. This argument may have some force; but, on

the other hand, where action is taken on the first part of Cl. (1), i. e. where the only action taken is to increase the number of appointed Commissioners, as has been done in the present case, it is difficult to see how the argument on the basis of the corollary applies. The Government may only increase the number of appointed Commissioners and it may further provide for election by a general electorate and that may amount to the representation of all the inhabitants. There has been some argument about double representation as Mitter, J. has pointed out. That is a question of policy but it may be pointed out that double representation is not so objectionable as non-representation.

Then it is pointed out that the electoral roll was not specifically prepared under S. 18, sub-s. (3), and it is contended that it is a self-contained section. It is apparent that S. 18 is an exception to S. 16. In terms it is so; and it does provide a self-contained rule for the preparation of electoral rolls under certain circumstances. But, as Mitter, J. has pointed out, the circumstances may be such that the same set of rules framed by the Local Government will apply to S. 16 or to S. 18. In the present case rules have been actually framed under S. 24, sub-s. (2) and there is no reference either to S. 16, sub-s. (1) or to S. 18, sub-s. (2). The argument therefore has no force. There is no reason why we should take a view of S. 18 different from that taken by Mitter, J. The appeal will, therefore, be dismissed with costs.

Mukerji, Ag. C. J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1936 Calcutta 124

NASIM ALI, J.

Osman and another—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 157 and 158 of 1935, Decided on 3rd April 1935.

(a) Criminal trial—Order of Civil Court determining rights—Criminal Court cannot re-adjudicate.

In the face of the order of the civil Court determining the rights it is not open to the criminal Court to adjudicate upon them again.

[P 125 C 1]

(b) Criminal trial—Trespass—Owner getting actual possession of lands under O. 21,

R. 35, Civil P. C.—Person dispossessed cannot remove crops though grown by him.

After the real owner gets actual possession of the lands through the civil Courts under Bengal Tenancy Act, S. 26 (f) read with O. 21, R. 35, Civil P. C. the person dispossessed becomes a trespasser and cannot remove the crops though grown by him. [P 125 C 1]

S. C. Talukdar and Kiran Mohan Sarkar—for Petitioners.

Madan Mohan Malhotra — for the Crown.

Order.— It appears from the records of the two cases that the right, title and interest of the petitioner Osman in revision case 157 and that of the petitioner Badsha in the other revision case in the disputed plots were extinguished by the auction sales at which Khanda Sundari Debi purchased them. The trying Magistrate has found that the complainant in the two cases grew the crops which were removed by the accused petitioner. The learned Sessions Judge has not reversed the findings of the trying Magistrate. Even if it be assumed that the accused grew the crops, they, being trespassers, had no right to remove them after the real owner got actual possession of the lands through the civil Court in pursuance of the orders of the civil Court under Cl. 6 (iii), S. 26-F, Ben. Ten. Act read with O. 21, R. 35, Civil P. C. The writs of possession issued by the civil Court clearly show that possession of the whole of the disputed lands was delivered to Debendra Chandra Lahiri, one of the co-sharer landlords without any objection from the other co-sharer landlords. In the face of the order of the civil Court it is not open to the criminal Court to adjudicate upon the rights of the landlords as between themselves. The petitioners were therefore rightly convicted. The rules are accordingly discharged.

M.N.

Rules discharged.

A. I. R. 1936 Calcutta 125

GUHA AND BARTLEY, JJ.

Rakhal Das Chattopadhyaya and another—Defendants 4 and 5—Appellants.

v.

Indubala Basu and others — Respondents.

Appeals Nos. 1064 and 1659 of 1934, and R. 1232 (S) of 1934, Decided on 10th January 1935, against appellate decrees of Addl. Dist. Judge, 24-Parganas, D/-5th and 6th April 1934.

Registration Act (1908), S. 17—Memorandum evidencing completed transaction and not bargain of equitable mortgage need not be registered.

Memorandum which is a part of the transaction evidencing an equitable mortgage by deposit of title deeds and is only the record of a completed transaction and does not constitute a bargain as to the deposit of title deeds does not require registration. [P 126 C 2]

Sarat Chandra Basak, Rajendra Bhushan Bakshi, Panchanan Ghosal, (in No. 1064), *Rajendra Chandra Guha, Bepin Chandra Bose and Mahendra K. Ghose* (in No. 1659)—for Appellants.

Abinash Chandra Ghose, Jatis Chandra Guha (in No. 1064), and *Rajendra Bhushan Bakshi* (in No. 1659)—for Respondents.

Judgment.— The plaintiff in the suit out of which this appeal has arisen, prayed for the enforcement of an equitable mortgage. The plaintiff's case was that defendants 1 and 2 executed a hand-note in her favour on 30th March 1932 and on the same date deposited title deeds of certain properties as security for the loan on the hand-note, thus creating an equitable mortgage in her favour. A memorandum was said to have been executed by the defendants 1 and 2 evidencing the fact of the deposit of title deeds. The case of the plaintiffs was that the memorandum executed by the defendants 1 and 2 had somehow passed into the hands of defendants 4 and 5 who it was alleged had succeeded in obtaining a collusive mortgage bond executed by defendants 1, 2 and 3 in their favour on 16th December 1932. It is necessary to mention in this connexion that the properties covered by the title deeds deposited by defendants 1 and 2 on 30th March 1932, were the same as those hypothecated by the three defendants 1, 2 and 3 in the mortgage deed executed by them in favour of defendants 4 and 5 on 30th March 1932. The claim of the plaintiff in the suit was at first resisted by defendants 1, 2, 4 and 5 in the suit: but in view of the events that subsequently happened, it is not necessary for the purpose of this appeal to consider the case of the defendants other than defendants 4 and 5. These defendants asserted that a mortgage by defendant 1 of an undivided share of property belonging to a joint family governed by the Mitakshara school of Hindu Law was invalid in law; further that there was

partition amongst defendants 1 and 3 (husband and wife) and their co-sharers, by virtue of which defendant 3 (the wife) acquired interest jointly with defendant 1 in respect of one of the items of property of which the title deeds were deposited with the plaintiff, on 30th March 1932. As to the nature of the transaction in favour of the plaintiff, it was pleaded in defence by defendants 4 and 5 that the memo referred to by the plaintiff in her plaint, did not and could not constitute and create any equitable mortgage; that it was inadmissible for want of registration, and further that as the memo constituted the bargain between the parties, no oral evidence of the transaction was admissible under the law. The case for the defence was that the memo. had been suppressed by the plaintiff with an object, and a false statement was purposely made that it had passed into the hands of the defendants. The contesting defendants asserted that the mortgage in their favour executed by defendants 1, 2 and 3 on 16th December 1932 was a valid mortgage, and should prevail over the equitable mortgage by defendants 1 and 2 in favour of the plaintiff and alleged to have been created on 30th March 1932. The Court of first instance dismissed the plaint as against the defendants 4 and 5. On appeal by the plaintiff, the learned Additional District Judge, 24 Parganas, reversed the decision of the trial Court, and passed a preliminary decree in favour of the plaintiff on the footing of an equitable mortgage created in her favour by the defendants 1 and 2, directing the sale of the mortgaged properties specified in the plaint, on failure to pay the mortgage debt within the period of grace allowed by the Court. The defendants 4 and 5 appealed to this Court. The questions raised in support of this appeal on evidence in the case, and on the findings arrived at by the Courts below, were many and various, in view of the different matters in controversy between the parties concerned: the plaintiff on the one hand and the contesting defendants 4 and 5, the appellants in this Court, on the other. The main points, however, which arise for consideration are two in number; and we proceed to deal with them.

1. In view of the pleadings of the parties, the memorandum the contents of which were proved by evidence and re-

gard being had to the conclusions arrived at by the Court of appeal below on materials placed before the Court, we are definitely of opinion that the memorandum which was a part of the transaction evidencing an equitable mortgage by deposit of title deeds, was only the record of a completed transaction, and did not constitute a bargain as to the deposit of title deeds. The memorandum as such did not require registration, and the learned Judge in the Court of appeal below was right in holding that oral evidence as to the deposit of title deeds was admissible in evidence. Evidence was rightly admitted on this part of the case; and the conclusions on evidence arrived at by the Judge have to be accepted by us. There was, in the above view of the case before us, an equitable mortgage created by defendants 1 and 2 in favour of the plaintiff. On 30th March 1932, by deposit of title deeds; and the mortgage thus created was operative to the extent of the interests in the properties to which, the mortgagors, defendants 1 and 2, had title, and to that extent only. The mortgagee could not claim any title higher than the one the mortgagors had in the different items of property covered by the title deeds deposited with the plaintiff.

2. The question that arises for consideration next, is whether the plaintiff could be allowed to have a mortgage decree against property which was owned by defendants 1 and 3 jointly, by virtue of a partition between the members of a joint family governed by the Mitakshara School of Hindu law. The fact of the partition was clearly established, and has been found by the Court of appeal below. On the terms of the partition deed Ex. B, in the case, it was beyond controversy, and it was definitely held by the trial Court, that the property which was the subject of the equitable mortgage by defendant 1 was allotted on partition to the defendants 1 and 3 jointly, their share having been left undefined and undetermined. Defendant 3 was not a mortgagor so far as the equitable mortgage in suit was concerned. On the materials on the record and on the conclusions arrived at by the trial Court referred to above, which have not been reversed by the Court of appeal below, the plaintiff was not entitled to get a mortgage decree in respect of pro-

perties Ka, Kha and Ga of the plaintiff, so as to bind the interest of defendant 3 who was no party to this equitable mortgage in favour of the plaintiff; the decree as passed by the Court of appeal below cannot therefore be upheld. In the above view of the case before us, and as a result of the decision arrived at by us, as indicated above, this appeal must be allowed, and we direct accordingly. The decree passed by the learned Additional District Judge, in the Court of appeal below, is varied to this extent, that in default of payment of the decretal amount with interest at the rate mentioned in the handnote executed by the defendants 1 and 2 in the plaintiff's favour on 30th March 1932, and thereafter at 6 per cent per annum until realization, the right, title and interest of defendants 1 and 2 in the mortgaged property specified in the plaintiff will be sold for realization of the decretal debt, and that the right, title and interest of defendant 3 in the mortgaged property existing at the time of the mortgage in favour of defendants 4 and 5 on 16th December 1932 will not be affected by such a sale. In the circumstances of the case we make no order as to costs. The parties are to bear their own costs throughout the litigation including the costs in this appeal.

M.N. *Appeal allowed.*

A. I. R. 1936 Calcutta 127

R. C. MITTER, J.

Indra Chandra Bag & Ors.—Appellants.

v.

Hiralal Rong & Ors.—Respondents.

Appeal No. 1825 of 1933, Decided on 12th December 1935.

(a) **Promissory Note—Insufficiently stamped—Promissory note inadmissible in evidence—Plaintiff can sue on implied promise to pay, which is independent of promissory note.**

If a promissory note is not admissible in evidence on account of it being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of promissory note. It is not necessary that there should be an independent express contract prior to the execution of such a promissory note. The fact that the money has been lent implies a promise to repay it, and the plaintiff in such a case has a cause of action on the implied promise, which is independent of the promissory note: 39 C W N 1235 and S. A. No. 1483 of 1933, *Foll.* [P 128 C 1]

(b) **Bengal Money Lenders Act (7 of 1933), S. 3—S 3 merely raises presumption that rate of interest exceeding 25 per cent is excessive—It does not forbid Court to grant in**

any circumstance interest at rate more than 25 per cent, in case of loan given before passing of Act—Lender can rebut presumption by evidence.

Section 3 only raises a presumption that a rate of interest exceeding 25 per cent is excessive and that the transaction was harsh and unconscionable and is substantially unfair. It does not say that if any loan before the passing of the Act was given, the Court shall not in any circumstances allow interest at a rate more than 25 per cent per month, if the loan is unsecured. The section raises a presumption of fact which the lender can by evidence rebut.

[P 128 C 2]

(c) **Second Appeal—Question of law—Suit for recovery of money—Point that claim for interest should be limited to 25 per cent by reason of S. 3, Bengal Money Lenders Act, is not pure question of law.**

A point that the claim for interest in a suit for recovery of money, should be limited to 25 per cent. by reason of provisions of S. 3, Bengal Money Lenders Act, is not a pure question of law because it involves the determination of a question of fact to be decided in evidence which may be led by the creditor to rebut the presumption arising under S. 3 and cannot be allowed to be raised for the first time in second appeal. [P 128 C 2]

(d) **Bengal Money Lenders Act (7 of 1933) S. 3—Whether S. 3 applies to case where decision of trial Court was given before passing of Act—Quaere.**

Quaere—Whether the provisions of S. 3, Bengal Money Lenders Act can be applied to a case where the decision of the trial Court was given before the Act came into force: 39 C W N 1213, *Ref.* [P 128 C 2]

G. C. Sen, Dwijendra Krishna Dutt and Biswa Nath Naskar—for Appellants.

A. N. Bose, Ramendra Mohan Mazumdar and Abinash Chandra Ghose—for Respondents.

Judgment.—The appeal is on behalf of defendants 3, 4 and 8 in a suit instituted by the plaintiff to recover from them and other defendants a sum of Rs. 800. The Court of first instance passed a decree against the other defendants but dismissed the suit against defendants 3, 4 and 8; but the lower appellate Court has modified that decree and has given a decree to the plaintiff against all the defendants, hence this appeal by defendants 3, 4 and 8. The plaintiff came to Court with a case that the defendants borrowed from him a sum of Rs. 400 on 31st January 1930. On that date the defendants executed a promissory note in favour of the plaintiff, but the said promissory note being insufficiently stamped has not been admitted in evidence. The plaintiff accordingly based this case on the original consideration. The Court of appeal below has

found that a sum of Rs. 400 was in fact taken as a loan by all the defendants from the plaintiff. This finding has been arrived at by the lower appellate Court independently of the promissory note as the lower appellate Court has expressly stated at line 10, p. 5 of the paper-book. Mr. Sen on behalf of the appellant has raised two points before me, namely, (1) that the promissory note being out of the way, the plaintiff cannot sue inasmuch as the advance of the money and the execution of the promissory note were contemporaneous; and (2) that the Court below ought not to have granted interest at a rate more than 25 per cent, the stipulation in the promissory note being at the rate of 75 per cent per annum. Regarding the first point I do not find any substance in it. It has been laid down in this Court that if a promissory note is inadmissible in evidence on account of it being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of promissory note.

It is not necessary that there should be an independent express contract prior to the execution of such a promissory note. The fact that the money has been lent implies a promise to repay it, and the plaintiff in such a case has a cause of action on the implied promise which is independent of the promissory note. This is the view which has been taken in 39 C W N 1235 (1), and that is also the effect of my judgment pronounced in Second Appeal No. 1483 of 1933 (2), delivered on 16th August 1935. For this reason I overrule the first contention of Mr. Sen. In support of his second contention Mr. Sen relies on the provisions of S. 3, Bengal Money Lenders Act of 1933. Before dealing with this point, it is necessary to state the following facts: the plaintiff's dues at the date of the suit came up to Rs. 1,150 on a calculation of the interest at the rate of Rs. 75 per cent per annum, but he gave up his claim for Rs. 350 and he limited his claim to a sum of Rs. 800 only, that is to say Rs. 400 on account of principal and Rs. 400 on account of interest. The loan was taken before the Bengal Money Lenders Act came into

force. The judgments of both the Courts below were pronounced before the said Act came into force. Accordingly there is no indication of this point in any of the judgments for the obvious reason that it was not raised in the Courts below and could not have been raised because the Act came into force after the judgments. Mr. Sen urges that the claim for interest ought to be limited to 25 per cent per annum. I am unable to give effect to his contention for this reason that even if S. 3, Bengal Money Lenders Act, is applicable to the facts of this case, which I doubt very much, because S. 3 only raises a presumption that a rate of interest exceeding 25 per cent. is excessive and the transaction was harsh and unconscionable and is substantially unfair. That section does not say that if any loan before the passing of the Bengal Money Lenders Act was given, the Court shall not in any circumstance allow interest at a rate more than 25 per cent per annum if the loan is unsecured. This section raises a presumption of fact which the lender can by evidence rebut. The point therefore which is raised for the first time, is not a pure question of law because it involves the determination of a question of fact to be decided on evidence which may be led by the creditor to rebut the said presumption. This the plaintiff had no opportunity to do. For this reason I am unable to allow Mr. Sen to urge this point here.

I also very much doubt whether the provisions of S. 3 can be applied to a case where the decision of the trial Court was given before the Bengal Money Lenders Act came into force. This is the view taken with regard to S. 4, Bengal Money Lenders Act, by a Division Bench of this Court in 39 C W N 1213 (3), and I am of opinion that the reason given in that judgment for not applying the provisions of S. 4 to a case where the loan had been incurred before the Act came into force, and the decision of the trial Court was given before the Act came into force, is equally applicable to a case where the provisions of S. 3 are involved. For these reasons I hold that the decree passed by the lower appellate Court is correct and this appeal must be dismissed with costs.

R.M./R.K. *Appeal dismissed.*

1. East Bengal Commercial Bank Ltd. v. Surendra Narayan Laha, (1935) 39 C W N 1235.

2. Mohatabuddin Mia v. Mahammad Najir Joddar, Second Appeal No. 1483 of 1933, decided on 16th August 1935.

3. Brojendra Kumar Dutt Roy v. Sushil Chandra Chakraborty, (1935) 39 C W N 1213.

A. I. R. 1936 Calcutta 129

R. C. MITTER, J.

Nanda Kumar Pande—Auction-purchaser—Petitioner.

v.

Sourendra Nath Ghose and another—Opposite Parties.

Civil Rule No. 1304 of 1935, Decided on 6th January 1936, from order of Sub-Judge, Jessore, D/- 6th September 1935.

Waiver—Benefit to sole person can be waived but not when it is for protection of another or based on public policy—Deposit inadequate—Zamindar cannot waive it by giving consent.

As a general rule it is no doubt true that a person can waive a benefit intended solely for him, and it would make no difference whether such benefit is conferred on him by contract or by statute. It is equally well settled that if such a provision made in a statute, though for his benefit, is also intended for the benefit of or protection of the interest of others or is based on public policy, there can be no scope for the application of the principle of waiver. By a sale of a patni under the regulation the auction purchaser acquires very valuable rights. Hence there is no scope for the application of the principle of waiver in applying S. 14-A of the Patni Regulation and the mere statement by the zamindar that he has no objection to set aside the sale will not cure the illegality of shortage of deposit. [P 130 C 1, 2]

Mukherjee and Kshetra Nath Chatterjee for Kshitindra Kumar Mitter—for Petitioner.*Panchanon Ghose and Joygopal Ghose*—for Opposite Parties.

Order.—The petitioner before me is the auction-purchaser of a patni sold under the provisions of Regn. 8 of 1819. The only question involved in this rule is whether the learned Subordinate Judge, to whom a reference was made by the Collector under S. 14-A, Cl. 5, of the Patni Regulation, was justified in setting aside the sale under the provisions of S. 14-A of the said regulation. The opposite party 1 who was the patnidar defaulted in paying the patni rent for the year 1341 B. S. The Mukherjees who are the zamindars, through their manager, their estate being under the charge of the Court of Wards, applied to the Collector for sale under the Regulation on 16th April 1935. In the said application the claim made on behalf of the zamindars was laid at Rs. 527-15-5 gds. On 15th May 1935 the Collector held the sale and at that sale the petitioner purchased the patni. On 13th June 1935 the defaulting patnidar deposited the sum of Rs. 560-15-5

gds. in the Collectorate for enabling him to set aside the sale under the provisions of S. 14-A of the said Regulation. The auction-purchaser having opposed his prayer the Collector made a reference to the learned Subordinate Judge.

It is admitted that the deposit made by the defaulting patnidar has fallen short by a certain amount, namely the amount due on account of interest from the date of the sale to the date of deposit. Having regard to my decision in the case of 39 C W N 516 (1) which has since been approved by a Division Bench in Civil Revision No. 934 of 1934 decided on 24th May 1935, it is conceded by the opposite party 1, that the above mentioned shortage in the amount deposited would ordinarily be fatal to his prayer for setting aside the sale, but it is contended on his behalf that as the zamindar has consented to the sale being set aside, it should be held otherwise. To be more precise the argument is that the deposit required under Cl. (b) of S. 14-A being intended for the benefit of the zamindar it is open to the zamindar to waive the requirements of the said clause, and as in fact he has waived the same by giving his consent to the sale being set aside, the Court should ignore the deficiency in the amount deposited. On the application which was made on 13th June 1935 by the defaulting patnidar to the Collector for setting aside an authorized agent of the zamindars made an endorsement to the following effect: "I have no objection to the sale being set aside. D. N. Roy Chaudhury, R. A. for zamindars."

The learned Subordinate Judge distinguished 39 C W N 516 (1), on the ground that the zamindar had not in that case "consented in writing" to the sale being set aside. No doubt in that case the zamindar had not consented in writing, but in this Court his advocate had in fact said that he had no objection to the sale being set aside. The learned Subordinate Judge has dealt with the case before him in the following way. I quote the words:

It is true that the interest up to date of deposit (from the date of sale) has not been deposited. But this amount was required to be paid for payment to the zamindar. If the zamindar says that he got the amount either expressly or impliedly I think that the non-payment of the amount in Court would not

1. Jotindra Mohan Chaudhury v. Bridhi Deyee Bibi, (1935) 39 C W N 516.

matter. If it had been deposited, the zamindar would have taken it. If the zamindar says that he has got it that is enough compliance with the provisions of S. 14-A of the Patni Regulation. The zamindar by giving his consent to the sale being set aside said in substance that all payments required to be made for setting aside of the sale have been made.

This is the ratio on which the learned Subordinate Judge purports to make his order by which he has set aside the sale. I do not quite follow the learned Subordinate Judge. Whether the receipt of payment out of Court by the zamindar from the defaulting patnidar within thirty days of the sale of any amount covered by Cl. (b), S. 14-A would dispense with the deposit of the same in the Collectorate is a question which need not be considered in this case. All I say for the present is that for the consideration of the said question the marked difference between that clause and sub-s. 1, Cl. (b), O. 21, R. 89, Civil P. C., will have to be considered. But in this case before me there is no allegation or proof that any amount was paid by the defaulting patnidar to the zamindar amicably i. e., out of Court, within thirty days of the sale. In such circumstances and where the auction-purchaser is a stranger, even if the zamindar were to say expressly that "all payments required to be made for the setting aside of the sale have been made" the Court or the Collector, as the case may be, would not be right in setting aside the sale, if in fact the money deposited in the Collectorate or the money paid to the zamindar amicably plus the money deposited, fall short of the amounts required to be put in under S. 14-A. I am here assuming that payment to the zamindar amicably of the money required to be deposited under Cl. (b), S. 14-A is a sufficient compliance. The auction-purchaser had acquired a valuable right by his purchase and in my judgment the views of the zamindar on the question of law or the question of rights of the auction-purchaser—it amounts to that—ought not to influence the decision of the Court in favour of the defaulting patnidar.

This leads me to the question of waiver raised before me. As a general rule it is no doubt true that a person can waive a benefit intended solely for him, and it would make no difference whether such benefit is conferred on him by contract or by statute. It is equally well settled that if such a provision made in a statute

though for his benefit, is also intended for the benefit of or protection of the interest of others or is based on public policy, there can be no scope for the application of the principle of waiver. By a sale of a patni under the regulation the auction-purchaser acquires very valuable rights. Before the introduction of S. 14-A in the Regulation by the recent amendment the rights acquired by him could not have been challenged except in the manner provided for in S. 14. S. 14-A by providing another mode for setting aside a sale has to a certain extent encroached upon the rights which he enjoyed before. That section can be looked at from another point of view also. The limitations prescribed in that section, e. g., the time for deposit and the amount also, are intended for the protection of his interest. In this view of the matter I do hold that there is no scope for the application of the principle of waiver. On the facts also I hold that no case of waiver by the zamindar has been established. The zamindar's authorized agent simply stated that the zamindars had no objection to the sale being set aside. The zamindars have not admittedly received payment of the interest on the arrears from the date of sale to the date of deposit, and there is nothing on the record to show that they have given up their claim to such interest.

The rule is accordingly made absolute, the order of the learned Subordinate Judge is set aside and the sale confirmed. As the case is a hard one for opposite party 1, I direct the parties to bear their respective costs throughout.

M.N./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 130

MCNAIR, J.

Abdul Alim—Defendant—Appellant.

v.

Abdul Sattar—Plaintiff—Respondent.

Appeal No. 1192 of 1932, Decided on 5th April 1935, from appellate decree of Sub-Judge, Third Court, Comilla, D/- 29th February 1932.

Transfer of Property Act (1882), S. 54—Unregistered kobala, purporting to transfer immoveable property of value of less than Rs. 100, is admissible in evidence for collateral purpose of showing nature of possession, although it does not confer title.

The reference in S. 49, Registration Act, is not applicable to the provisions of S. 54, T. P.

Act. S. 49 does not make a document purporting to transfer a tangible immoveable property of value of less than Rs. 100 inadmissible in evidence. [P 131 C 2]

An unregistered kobala purporting to transfer immoveable property of value of less than Rs. 100 does not come within the terms of S. 17, Registration Act, and the provisions of S. 49 of the Act do not apply to such a case. Such a document therefore although it does not confer title, is admissible in evidence for the collateral purposes of showing the nature of possession: 1921 *Mad* 337 and 1928 *All* 726, *Foll.*; 1929 *P C* 269, *Disting.* [P 131 C 2]

Syed Farhat Ali—for Appellant.

Sudhir K. Kastgir—for Respondent.

Judgment.—This is an appeal from a decision of the Court of the Subordinate Judge, 3rd Court, Tipperah, allowing an appeal from the Court of the Munsif Kasba, which dismissed the plaintiff's suit. The question for determination is the title to a plot of land which originally belonged to Jainuddin and which the plaintiff bought from his three sons in Magh 1335 B. S. The defendant claims it on the ground that Jainuddin's widow and son mortgaged the land to him and put him in possession in lieu of paying interest, and finally sold it to him in 1320 B. S. The kobala by which this sale was effected was not registered and the learned Munsif in the trial Court held that it was inadmissible in evidence as a title deed, but could be admitted to show the nature and character of the defendant's possession since its date.

He held further that the plaintiff had not proved that his vendors had been in possession within 12 years of the date of the kobala and that the defendant had been in adverse possession for more than 12 years. The lower appellate Court found that there was no transfer of possession and therefore no sale to the defendant and that was conceded by his pleader in the trial Court. It was held however that the unregistered kobala could not be used to prove adverse possession, and that in the absence of such proof the plaintiff's title prevailed.

The property in dispute is tangible immoveable property of a value less than Rs. 100 and a sale can be effected under the provisions of S. 54, para. 3, T. P. Act, either by a registered instrument or by delivery of the property. S. 4, T. P. Act, provides that this paragraph shall be read as "supplemental to" the Registration Act, and the question has arisen

whether an instrument of sale of tangible immoveable property of a value less than Rs. 100 must be treated as being compulsorily registrable as coming within the provisions of S. 17, Registration Act.

A Full Bench of the Madras High Court in 44 *Mad* 55 (1) and a Full Bench of the Allahabad High Court in 50 *All* 986 (2), have held that however illogical it may seem the words used do not incorporate the provision of the Transfer of Property Act into S. 17, Registration Act, and the result is that the reference in S. 49, Registration Act, cannot be deemed to be applicable to the provisions of S. 54, Transfer of Property Act, and S. 49 does not make such a document inadmissible in evidence.

Section 54, T. P. Act, does however provide that the transfer must be made either by a registered instrument or by delivery of possession. The kobala is not registered and therefore cannot confer title, but on the authority of the above cases it would be admissible for the collateral purpose of showing the nature of possession. The learned Subordinate Judge has relied on the Privy Council decision in 33 *C W N* 1150 (3). The instrument in that case was held definitely to come within the terms of S. 17, Registration Act, so that the provisions of S. 49 of that Act were applicable. As I have already pointed out the instrument in the present case is not incorporated into S. 17, Registration Act.

Once the kobala is admitted in evidence to show the nature of the defendant's possession it is difficult to find any fault with the decision that the defendant had been in adverse possession of the land for an uninterrupted period of 12 years. The appeal is allowed with costs both here and in the lower appellate Court and the suit must be dismissed.

R M./R.K.

Appeal dismissed.

1. *Rama Sahu v. Gowro Ratha*, 1921 *Mad* 337=59 *I C* 350=44 *Mad* 55 (F B).
2. *Sohan Lal v. Mohan Lal*, 1928 *All* 725=118 *I C* 177=50 *All* 985=26 *A L J* 1031 (F B).
3. *Skinner v. Skinner*, 1929 *P C* 239=119 *I C* 633=56 *I A* 353=51 *All* 771=33 *C W N* 1150 (P C).

A. I. R. 1936 Calcutta 132

MCNAIR, J.

Sitaram Khemka—Plaintiff.

v.

Arthur Charsley Thomas—Defendant.

Suit No. 1830 of 1934, Decided on 15th July 1935.

Contempt of Court—Charge of—Charge of deliberately withholding documents—It must be proved that there are documents which have been deliberately withheld—Mere suspicion is not sufficient.

To establish a charge of contempt of Court, it is essential to prove that there are in the case other documents which have been deliberately withheld by the person charged. Mere suspicion, although very deep is not sufficient to establish a charge of contempt of Court.

[P 133 C 2]

S. C. Roy and Nagon Bose—for Plaintiff.

B. C. Ghose—for Defendant.

Order.—This is an application to commit Mr. Arthur Charsley Thomas for contempt of Court. Mr. Thomas was the defendant in an action for dissolution of partnership. Dissolution has been decreed and a reference has been held in which the accounts of the partnership are being considered and the assets determined. The partnership traded under the name of Golden Reef Mining Syndicate, and its operative headquarters were at Patkum in the District of Manbhum. In December 1932 Mr. Thomas and one Teluram Agarwalla started prospecting for gold and in February and March 1933 they acquired prospecting licenses from the guardian of the minor zamindar of the Patkum estate. In December 1933 Teluram left, and a partnership was started between Thomas and the plaintiff in this suit *Sitaram Khemka*. Thomas was to have 2/3rd share and *Sitaram* 1/3rd. On 20th February 1934 prospecting licenses were renewed, and some eight months later machinery was in operation at Patkum. It is suggested that on an average 40 to 50 tons of ores were crushed daily which yielded a high percentage of gold. On 20th November 1934 an order was made by this Court in the suit appointing the Official Receiver interim receiver of the business called the "Golden Reef Mining Syndicate" and its assets and of the gold field, machinery and other accessories at Patkum and all books of account at the office of the said business at 7, Old Post Office Street, Calcutta, and at Patkum.

On 10th December 1934, there was a

reference to arbitration and two members of the Bar were appointed Receivers in place of the Official Receiver. A consent petition was made in connexion with the order. The petition is said to be the petition of the plaintiff, and in para. 11 there is a statement: "The defendant consents to this petition," and it is also signed by the defendant at the conclusion under the words "I consent." Para. 6 of that petition refers to the order appointing the Official Receiver and states that:

The Official Receiver had been to No. 7, Old Post Office Street, Calcutta, to take possession of all the books of account there, but the Official Receiver could not take possession of any books of account as there were no books of account at the said office.

Para. 7 states

that as negotiations for settlement were going on between the parties your petitioner did not take any further steps and did not take any steps to put the Official Receiver in possession of the books of account and the assets, machinery and properties of the said partnership at Patkum.

On 21st December 1934, there was a meeting before the Receivers, the minutes of which state that after hearing the parties the Receivers directed that within three weeks from that date Mr. Thomas should deliver the books of account and documents relating to the partnership in his possession to the Joint Receivers. Mr. Thomas was also directed to make a list of machinery, etc., at the mines and deliver that list to the Receivers. On 17th April 1935 an application was made that Mr. Thomas be committed to jail for contempt, and that he do forthwith deliver up possession of the partnership to the Receivers together with all papers, books of account, etc., relating to the said partnership. On 27th April 1935 Mr. Thomas made an affidavit stating that he was unable to comply with the order owing to illness. I will refer to this affidavit more fully later. An order was then made by this Court that Mr. Thomas should on or before the 10th of May deliver up to the Receivers possession of all the partnership assets referred in the previous order together with all papers, memoranda, writings and documents relating to the partnership business, and should also file affidavit of documents. On 9th May 1935 Mr. Thomas filed his affidavit of documents containing a statement of accounts, but disclosing no books of accounts.

On 6th June the present application was filed. The petition by the plaintiff Sitaram Khemka sets out the above facts and in para. 11 there are set out the charges on which the present application is based. The charges relate to five matters. Failure to deliver (1) account books; (2) assay books and assay reports; (3) a diary book alleged to have been kept by the defendant; (4) 3 prospecting licenses; and (5) a German map and another map of the mines said to contain details of the mining area and the reefs and other relevant matters. The matter came before Ameer Ali, J., who directed that Mr. Thomas and Mr. Biswas, his accountant, should appear before the Court and be examined orally. They were examined by Ameer Ali, J., and they have now been cross-examined before me. The main charge relates to the failure to disclose accounts. Thomas has put in a statement of accounts, and after a certain amount of correspondence he has informed the Receivers on 9th May that there were no separate books of the partnership, but that the statement which he had put in was based on the books of two companies, the Dorgbun Trust Limited which is an English Company and the Island Trust Limited which is an Indian Company. The minutes of the 9th May contain the following entry:

Mr. Thomas says that no cash ledger or journal of the partnership were kept, but there is a statement of accounts compiled from the books of the companies whose money was borrowed for the purpose of running the partnership business. The items in the statement of accounts filed can be checked and verified from the books of these companies.

That offer was repeated in a letter of the 17th May by Mr. Thomas's Solicitor to the Solicitors for the plaintiff. (His Lordship then discussed the evidence and proceeded.) With regard to all the charges excepting those relating to the accounts I find that they are based on supposition, and there is nothing really to support them in view of the denials which have been made by Mr. Thomas and Mr. Biswas and in the supporting affidavits. With regard to the accounts, on the other hand, there is a mass of material which raises the deepest suspicion. I have referred in detail to the fact that it was only at the very last moment that Mr. Thomas stated that there were no accounts of the partnership business other than accounts of the

Dorgbun Trust and the Island Trust from which the materials required in the reference could be gathered. The witnesses originally swore that these books contained only accounts relating to the mining syndicate, but Biswas was forced to admit that it was incorrect. The list of liabilities and the dues to store suppliers are not taken from the accounts of these companies as has been admitted in the witness box by the accountant. Mr. Thomas in the witness box was a thoroughly unsatisfactory witness. He fenced with most questions and created an extremely bad impression. He professed absolute ignorance of the accounts, but when his attention was directed to them he found little difficulty in following and in answering the question, quickly if the answer was in his favour, but with considerable difficulty if he did not consider that the answer would be satisfactory from his point of view.

From the material which has been placed before me, it appears to me that the petitioner was amply justified on the respondent's own statements in supposing that there are other accounts that Mr. Thomas had knowledge of, and access to, the other accounts, and that he was evading disclosing them to the Court. This raises the deepest suspicion, but it is not sufficient to establish a charge of contempt of Court. To establish such charges it is essential to prove that in fact there are in this case other documents which had been deliberately withheld. That, in my opinion, has not been established, and this application must be dismissed. In view, however, of the attitude which has been taken up by Mr. Thomas throughout, I direct that he should pay the costs of this application as of a hearing.

R.M./R.K. *Application dismissed.*

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MCNAIR, J.

Gopinath Motilal—Plaintiff.

v.

Ramdas and others—Defendants.

Suit No. 1839 of 1934, Decided on 16th August 1935.

(a) **Partnership Act (1932), S. 4—Certain persons referring to themselves as firm—They must be presumed to be partners.**

Where certain persons refer to themselves as a firm, it must be presumed even in absence of evidence, that they are parties who have en-

tered into partnership with one another and are a partnership firm. [P 134 C 2]

(b) Partnership Act (1932), S. 1 (3)—Meaning of—S. 1 (3) means that after 1st October 1933, S. 69 will become operative—Unregistered firm suing, shall be non-suited.

The meaning of the provision that "the Act shall come into force on 1st October 1932 except S. 69 which shall come into force on 1st October 1933" in S. 1 (3), Partnership Act, is that after 1st October 1933, S. 69 will become operative and a firm which is not registered and which sues to enforce a right arising from a contract shall be non-suited: 1934 Cal 754, *Foll.* [P 135 C 1]

(c) Jurisdiction—Plea of—Question which goes to root of suit can be raised at any time—Court must take cognizance of it when brought to its notice—Suit by partnership firm not registered under S. 58, Partnership Act—Plea that suit is not maintainable can be raised even after filing written statement.

A question which goes to the root of a suit can be raised at any stage of the suit and is a question of which a Court must take cognizance when brought to its notice. [P 135 C 1]

Where a suit is brought by a partnership firm which has not been registered under S. 58, Partnership Act, a plea that the suit by it is not maintainable can be raised even after a written statement is filed by the defendant: 1925 P C 83, *Rel. on.* [P 134 C 2; P 135 C 1]

N. N. Bose and H. K. Mitra—for Plaintiff.

H. S. Suhrawardy, S. K. Dutt and N. K. Ghosh—for Defendants.

Judgment.—This is a suit for the recovery of a sum of Rs. 18,000 odd stated in the concise statement to be due from the defendants to the plaintiff firm on the khotor patta account and for costs. The defendants are said to be members of a joint Mitakshara Hindu family who carried on business under the name of Ramdas Bhagwan Das. There were various loans and adjustments alleged and the sum which is claimed is the sum which is said to be due after giving credit for moneys received. The plaint was filed on 21st November 1934. A written statement was put in on behalf of defendants 2, 4, 5, 10, 11 and 12. Another written statement was put in on behalf of defendants 1, 3 and 9, both on 4th April 1935. There was also a written statement on behalf of certain minor defendants. About 20th May the plaintiff firm applied to amend their plaint by adding details of certain transactions and by referring to the defendants as a Mitakshara joint family and not as a firm. The order was made and it was further ordered that the adult defendants should be at liberty within 7 days

from date of their receiving a copy of the amended plaint to file such additional written statement in the suit as may be rendered necessary in consequence of the aforesaid amendment. A copy of the amended plaint was sent to the defendants' attorney on 9th May, and thereafter the attorneys for the plaintiff firm reminded the defendants on more than one occasion that the time to file other additional written statements had expired. No written statement was in fact filed until the suit came on for hearing today. Mr. Suhrawardy then on behalf of the defendants asked for leave to file the additional written statements, and Mr. Bose on behalf of the plaintiff firm stated that he objected to their being filed but that he was not willing to take an adjournment if I felt disposed to admit the additional written statements. In those additional written statements the plea was taken that the suit as framed is not maintainable and that the business of Ramdas Bhagwan Das was a joint family business and not a contractual partnership.

On the defendant being called upon to propose issues, the first issue suggested by Mr. Suhrawardy was that the suit was not maintainable inasmuch as it was a partnership firm and had not been registered under S. 58, Partnership Act. This section provides how registration may be effected and S. 69 (2) provides:

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

There is nothing to show that the plaintiff firm is a partnership firm, but that has not been denied before me and it is clear that the plaint refers throughout to the plaintiff as "the plaintiff firm." S. 4, Partnership Act, defines a partnership firm and says that persons who have entered into partnership with one another are called individually partners and collectively a firm, and there is no doubt that the plaintiffs have referred to themselves as a firm, and it must be presumed, even in the absence of evidence, that they are persons who have entered into partnership with one another and are a partnership firm. It was contended that S. 69 was not applicable inasmuch as the transactions which were the subject matter of this suit had all

taken place prior to 1st October 1933. The materiality of that date is by reason of S. 1 (3), Partnership Act 9 of 1932 which provides that:

The act shall come into force on the first day of October 1932, except S. 69, which shall come into force on the 1st day of October 1933.

The meaning of that provision seems to me perfectly clear, namely that after 1st October 1933 S. 69 will become operative and that a firm which is not registered and which sues to enforce a right arising from a contract shall be non-suited. Now, this view has already been taken by a Division Bench of this Court in 39 C W N 67 (1). It is further contended that the additional written statements should not be admitted to raise a question of this nature which was never foreshadowed either in the original written statement or in the amended written statement; and reliance is placed on the order made by Ameer Ali, J., granting leave to file an additional written statement, and limiting such additional pleas to those which may be rendered necessary in consequence of the amendment of the plaint. It is contended with justice that the amendment of the plaint did not necessitate a plea that the suit as framed is not maintainable. Mr. Suhrawardy for the defendants however contends that the additional written statement has been admitted, and that even if it had not been admitted, this is a question which goes to the root of the suit and it is a question of which the Court must take cognizance when brought to its notice. He further contends that it is a matter which he has the power to raise at any time, and in support of this contention he relies on the decision of the Privy Council in 52 I A 126 (2). At page 128, Lord Sumner, delivering the judgment of the Board, states that their attention had been drawn to a provision of the Stamp Act. "This section," he says,

had not been pleaded by the defendants in the suit, for their general plea No. 10. 'Lastly the defendant company submits that the suit of the plaintiff firm is not maintainable' cannot be read as raising a specific statutory answer. Their Lordships were informed that the point was not discussed in either Court below, . . .

1. Surendra Nath De v. Manohar De, 1934 Cal 754=153 I C 671=62 Cal 213=39 C W N 67.
2. Surajmall Nagarmall v. Triton Insurance Co., 1925 P C 83=86 I C 545=52 I A 126=52 Cal 408 (PC).

and the result has been that the effect of this section was not considered until the case came before their Lordship's Board.

The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of parties, or by a failure to plead or to argue the point at the outset:

and reference is made to (1867) 2 Ex 333 (3):

The enactment is prohibitory. It is not confined to affording a party a protection of which he may avail himself or not as he pleased.

His Lordship concludes:

To allow the suit to proceed in defiance of S. 7 would defeat the provisions of the law laid down therein.

The reasoning and the decision which was come to by the Board in regard to the provisions of the Stamp Act in that appeal appear to me entirely applicable to the argument which has now been raised with regard to the provisions of the Partnership Act. In the circumstances, I am deciding on this preliminary issue that the suit is not maintainable in its present form. I adjourn the further hearing to enable the plaintiffs to consider their position.

R.M./R.K.

Order accordingly.

3. Nixen v. Albion Insurance Co., (1867) 2 Ex 338.

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McNAIR, J.

Nishi Kanta Sarkar—Plaintiff.

v.

Sir David Ezra and another—Defendants 1 and 2.

Suits Nos. 924, 1196 of 1934 and 1193 of 1935, Decided on 19th December 1935.

(a) Pleadings—Liberal construction favoured.

Pleadings in India cannot be regarded with the same meticulous care with which they are scrutinised in the English Courts. [P 137 C 2]

(b) Landlord and Tenant—Rent—Suspension—Encroachment of few inches on leased premises—Tenant is entitled to suspension only if eviction was intentional and permanent.

Where a tenant claims suspension of rent owing to an encroachment of few inches on the leased premises by the erection of a platform, the question of fact which therefore has to be determined is, did the landlord by the erection of this platform do something of a grave and permanent character with the intention of permanently depriving the plaintiff of a portion

of the subject matter of the demise; *English Cases referred.* [P 138 C 1]

Sarat C. Bose, Sudhis Ray and A. K. Bhattacharjee—for Plaintiff.

Issacs, Cammiade and Sachin Choudhury—for Defendants 1 and 2.

Judgment.—These three suits have been heard together as their decision depends on the same facts. The main suit has been brought by Nishi Kanta Sarkar (to whom I shall refer as the plaintiff) against Sir David Ezra and Mr. Tylor Bryan, defendants 1 and 2, for damages for encroachment, for suspension and abatement of rent, and for a declaration that the plaintiff is entitled to the joint use of a common passage. Sir David Ezra is the lessor, and Sarkar and Bryan were lessees under him of Nos. 10 and 9, Chowringhee, respectively. In the other two suits Sir David Ezra sues Mr Sarkar for arrears of rent. In the main suit the plaintiff claims a right of user over a passage between his premises No. 10 and the premises No. 9, Chowringhee. It is common ground that a platform was built over that passage in July 1933, and was in position until July 1934. The plaintiff contends that it remained for a further two months before it was demolished. Both the defendants accept responsibility for the erection of the platform, and the plaintiff assesses the damages that he has suffered at Rupees 1,32,000. He also alleges that the platform encroached upon his premises and that he therefore was entitled to a suspension or abatement of rent from defendant 1. The plaintiff's lease is dated 12th December 1930. It provides that the plaintiff should hold the premises No. 10, Chowringhee Road, for a term of 10 years from 1st March 1931, on a monthly rent of Rs. 1,000, with an increase of Rs. 30 per month every three years; additions and alterations were to be made by the lessee at a cost of Rs. 12,000, to which the lessor was to contribute Rs. 4,000. The covenant around which the present dispute centres is 2 C, and is in the following terms:

And the lessor will allow the lessee attachment and use of the north wall of premises No. 11, Chowringhee Road, for the purpose of constructions detailed in Sch. B hereof and will also allow or permit the lessee uninterrupted joint use with the occupiers of No. 9, Chowringhee Road, the entire 4 feet (four feet) passage in width along the south wall of the said No. 9, Chowringhee Road from the date of these

presents, provided the lessee obtains the consent of the tenants concerned.

No. 10, Chowringhee is to the south of No. 9, Chowringhee, a road which runs north and south and to the west of both premises. There is some dispute as to the width of the passage described in the lease as "4 feet wide," but it is common ground that a space from 4 to 5 feet wide appertained to No. 9, Chowringhee, on its southern boundary which was marked by a low boundary wall. Defendant 2 was in occupation of No. 9, Chowringhee, under a lease from defendant 1 for a term of five years from 1st July 1928. The plaintiff on obtaining his lease immediately started negotiations with defendant 2, so as to obtain his consent to use the passage as required by the terms of the lease. From the correspondence it is apparent that the plaintiff considered this consent a mere matter of form, while defendant 2 was doubtful of its effect on the amenities of his premises and was unwilling to give his consent without receiving some advantage in return. In April 1931 defendant 2 went on leave out of India and the day before his departure, on 22nd April, certain terms were put on paper and signed by the plaintiff and defendant 2. Briefly these terms provided that the parties should have joint use of the passage described as "5 feet wide" and the plaintiff should, if called upon, take a sub-lease of a portion of the premises No. 9, Chowringhee.

One of the main questions in the suit is whether this document constituted a binding agreement between the parties, and I shall refer to its terms in detail hereafter. During the absence of defendant 2 his attorney called upon the plaintiff to take up the lease in terms of the agreement of 26th April. The plaintiff raised objections, and on 17th June 1932 defendant 2 brought a suit against the plaintiff for specific performance. In January 1933 that suit was withdrawn and stood dismissed with costs. On 22nd July 1933, the defendants erected a platform, about 5 feet wide and 50 feet long, adjoining the south wall of No. 9, Chowringhee. This platform was removed a year or 14 months later. The plaintiff contends that this platform obstructed the passage to No. 10, Chowringhee, caused an excess of water to collect, and drove away his tenants. On 14th May

1934, he filed this suit for damages which he assessed at Rs. 1,32,000, and claiming that he was entitled to suspension of rent, he ceased payment, but without prejudice deposited with his attorneys a sum of Rs. 8,000. On 4th July 1934, Sir David Ezra brought a suit for arrears of rent and municipal taxes, and on 25th June 1935 he sued for further arrears of rent amounting to Rs. 13,680. It is agreed by both parties that if the Court holds that the plaintiff is entitled to damages, the amount of such damages must be referred, but evidence has been given by the plaintiff and his tenants in support of the plaintiff's case that damage was in fact incurred. The following issues have been framed:

1. Is the plaintiff entitled to any rights in or over the passage referred to in paras. 2 and 5 of the plaint? 2. Did the defendant Bailey Tyler Bryan ever give his consent to the plaintiff having joint use of the said passage or agree to the plaintiff having such user? (a) If yea, was such consent conditional? (b) And if yea was such condition performed by the plaintiff? 3. What are the dimensions and what was the nature of the platform referred to in para. 8 of the plaint? 4. Was the said platform an encroachment or trespass on any portion of the plaintiff's demised lands? 5a Did the erection of the said platform wrongly deprive the plaintiff of the peaceful use and enjoyment of the demised lands or any portion thereof? 5b Did the said platform wrongfully deprive the plaintiff of the peaceful use and enjoyment of the passage? 6. Has the plaintiff suffered any damage as a consequence of such wrongful act? To what damages is the plaintiff entitled? 7. Is the plaintiff entitled to suspension of rent? 8. Is the sum of Rs. 2,860 claimed as arrears of rent in Suit No. 1196 of 1934 or any and what part thereof due and payable to the plaintiff therein? 9. Is the sum of Rs. 13,680 claimed as arrears of rent in Suit No. 1193 of 1935 or any and what part thereof due and payable to the plaintiff therein? 10. What sums, if any, are due and payable to the plaintiff on the said rent suits in respect of the excess rates claimed therein?

Extra issue:—Did the plaintiff erect shop-rooms at the Chowringhee Road side of No. 10, Chowringhee Road, on the assurance of defendant 1, that a clear

10 ft. passage would remain between No. 9, Chowringhee, and the north extremity of the new shoprooms? I have no hesitation in finding that the platform was erected on the 22nd July 1933, and demolished on the 20th July 1934. (The judgment after deciding issues 1 in the negative, 2(a), in the positive and 2(b), in the negative, 3, width 5 ft. 4, in the negative, 5 (a), and (b) in the negative and after holding that it was not necessary to decide issue 6 proceeded.) On the 7th issue the plaintiff contends that there has been an encroachment which amounts to an eviction, and, if the rent be one and indivisible, as it is here, justifies suspension of rent. The defendants contend that this plea cannot be raised because no eviction has been specifically pleaded. This plea cannot in my opinion be upheld. Pleadings in India cannot be regarded with the same meticulous care with which they were scrutinised in the English Courts, and in my view the plaint alleges encroachment and interference with sufficient particularity to justify the raising of this issue. The principles which have to be considered in deciding what constitutes eviction so as to justify suspension were laid down in England so long ago as 1855, in the well-known case of 17 C B 30 (1). Jervis, C. J., after dealing with the derivation of the word "eviction" says at p. 64 of the report:

It is now well settled, that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord, the rent is thereby suspended. The term "eviction" is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

Williams, J., at p. 68 says:

There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction.

And Crowder, J., says much the same thing at p. 71.

1. Upton v. Townend, (1855) 17 C B 30=25 L J C P 44=4 W R 56=1 Jur N S 1039.

Although, therefore, I agree that it is not every act of trespass by a landlord that will amount to an eviction, I think in both cases the tenant has been substantially and permanently deprived of the subject matter of the demise, so as to entitle him to say that he has not had the occupation of that which he was entitled to.

And Willes, J. at p. 75:

In both cases, therefore, as it seems to me, the tenant was, by an act of the landlord, which was intended to be, and was, of a permanent character, deprived of the perfect and convenient use of the thing demised.

The question of fact which therefore has to be determined is: Did the landlord by the erection of this platform do something of a grave and permanent character with the intention of permanently depriving the plaintiff of a portion of the subject matter of the demise? Neither of the defendants, both of whom accept responsibility for the erection of the platform, has given evidence, preferring to rely on the correspondence and other documents. For the plaintiff, stress is laid on the fact that no explanation has been given as to why the platform was erected. It is not uncommon to erect a barrier to protect an easement and it is probable that such was the purpose of the platform, for it must be remembered that the plaintiff had been using this passage for a considerable period though, as I have held, he had no legal right to do so. On my findings the platform did at any rate in one portion encroach to the extent of a few inches on to the plaintiff's premises and Mr. S. C. Bose for the plaintiff contends that an encroachment however small may constitute an eviction. In my view there was in fact no eviction, the defendants were evidently building the platform so far as possible along the southern boundary of No. 9. The platform was erected in a day, and I accept the defendants' evidence that it was demolished in a single morning, in July 1934, after it had been in position for one year. There is nothing to show that it was intended to be permanent, and in my opinion the encroachment was so slight that it amounted to a mere trespass. Its character was neither permanent nor grave. Secondly, I can find no evidence of an intention to deprive the plaintiff of the enjoyment of the demised premises. I find accordingly on issue 7 that there was no eviction so as to justify suspension of rent.

I have already commented on the unsatisfactory nature of the plaintiff's evidence. He seldom gave a direct answer and in the witness box he persisted in charging the defendants with colluding so that the landlord might regain his property with the improvements effected by the plaintiff. There is not the slightest justification for any such charge. The plaintiff's own attitude is apparent from the correspondence. He started a scheme of speculative building and his first disappointment came when he was refused sanction to install a petrol pump. Then to his dismay he found that Mr. Dryan would not convey his passage rights without consideration. Threats were of no avail and eventually he found that to gain his object he must take a lease of a portion of No. 9. He admits that he did not want to take up the lease if he could avoid it. The speculation was proving a failure, as appears from the undated letter to Mr. Bryan in England, as throughout the correspondence we find him making claims to which admittedly he is not entitled. When first the platform is erected he consents to put up with it, if he can get a remission of rent, and finally he claims suspension, and ceases to pay rent at all. The attitude which Mr. Sarkar himself has adopted is possibly responsible for his charges of bad faith against his landlord and neighbour. Those charges are in my view quite unfounded. Suit No. 924 of 1934 is dismissed. The plaintiff must pay the costs of both the defendants.

M.N./R.K.

Suit dismissed.

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D. N. MITTER AND PATTERSON, JJ.

Shah Tajmul Ali and another—Appellants.

v.

Kamala Ranjan Roy — Plaintiff and others—Respondents.

Appeal No. 16 of 1932, Decided on 19th December 1935, from original decree of Sub-Judge, 2nd Court, Tipperah, D/- 13th July 1931.

(a) Bengal Estates Partition Act (5 of 1897), S. 113 (c)—Commissioner directing fresh partition—No appeal lies.

There is no appeal to the Board in a case where the Commissioner after setting aside the partition made by the Collector has directed a fresh partition by him: 1916 Pat 154 *Foll.*

[P 140 C 2]

(b) **Jurisdiction—Order without, is void—Judgment can be impeached in collateral proceedings.**

An order made by a Court which has no jurisdiction to deal with the subject matter of the suit has no binding effect on the person who is affected by the order. It is absolutely void. It is open in a collateral proceeding to impeach even the judgment of a Court on the ground of want of jurisdiction: 9 *All 191 (P C)* and 11 *Mad 26 (P C)*, *Ref.* [P 141 C 1]

(c) **Jurisdiction—Civil Court can entertain suit to set aside order passed by revenue Court beyond its jurisdiction.**

When authorities of limited jurisdiction act in excess of their jurisdiction their acts become liable to be scrutinised by the civil Court and become liable to be set aside. Hence an order passed without jurisdiction by the Board of Revenue can be subject of civil suit.

[P 141 C 2; P 142 C 1]

Atul Chandra Gupta, Amarendra Mohan Mitra and Rashidul Hussain—for Appellants.

Brojo Lal Chakravarty, Hamidul Huq Choudhury, Krishna Lal Banerjee, Birendra Kumar De and Tapadhar Kumar Roy—for Respondents.

Panna Lal Chatterjee—for Deputy Registrar.

D. N. Mitter, J.—This appeal is on behalf of defendant 1 and arises out of a suit originally brought by the plaintiff, a ward of Court, through the Manager of the Court of Wards, for a declaration that certain proceedings purported to have been taken under the Estates Partition Act (Act 5 of 1897 B. C.) are void from a particular point of time and that every thing done thereafter including the partition of a revenue paying estate is void. The Subordinate Judge has granted a decree to the plaintiff and hence the present appeal by defendant 1. There are numerous defendants to this suit. The facts on which the present appeal depends lie within a very small compass and are not in dispute. They may be briefly stated as follows: In 1911 proceedings for the partition of Tauzi No. 31 of the Tipperah Collectorate consisting of 39 Mouzas were started and the Deputy Collector made the final partition as provided by the Estates Partition Act. The partition was approved by the Collector (See part 2, p. 13) order sheet K. An appeal was taken to the Commissioner as appears from the memorandum of appeal, Ex. 7, Part 2, p. 23.

The Commissioner heard the appeal on 1st July 1921 (see part 2, p. 25). The gist of the order, about which we shall have to advert later in greater detail, is

that he sent back the case to the Collector for a fresh partition. The controversy which was raised before the learned Commissioner on behalf of the plaintiff, who was represented by Mr. Haliday, Manager, Sarail Wards Estate, was mainly this, viz. that he does not want to take the Putni tenures and part of Putni tenures allotted to his Saham, for these tenures were not created by him or his predecessor in interest, but were created by other co-sharers who were in exclusive possession of the lands comprised in the Putnis. The loss which the Sarail Estate will suffer was stressed and the danger to the Government Revenue was indicated. Against this order of the learned Commissioner of the Chittagong Division, defendant 25, one co-sharer, filed an appeal to the Board of Revenue. It may be stated here that one of the questions raised in the suit is whether an appeal lay to the Board of Revenue under the Act. Proceeding now with the narrative of facts it appears that the Board heard the appeal and by its order dated 30th January 1928 (Ex. 5, Part 2, p. 28) set aside the order of remand with the result that the partition approved by the Collector was affirmed by the Board of Revenue. It does not appear that the question of the want of jurisdiction of the Board to hear the appeal was raised before the Board at the time of the hearing of the appeal but the plaintiff afterwards filed a petition of review (65 of 1925) (p. 31, part 2), in which the point questioning the jurisdiction of the Board was raised. The Board rejected the application for review on 14th November 1925, (Ex. 6, p. 41). In the meantime possession had been delivered to the parties according to the allotments. See order sheet 11th May 1923 (Ex. K, p. 20 part 2). In paras. 7 to 11 of the plaint, the plaintiff complains that the Collector allotted to the plaintiff's share 5 entire mouzas and portions of 3 mouzas specified in table A and 4 entire mauzas as shown in table B, that out of the said mouzas the mouzas of table A and certain shares of mouzas of table B were let out in leases by some of the proprietors other than plaintiff's predecessors and the plaintiffs without their consent, that the plaintiffs are not bound by the said leases and they would after the partition attach under the law to lands and mouzas allotted to the proprie-

tors who or whose predecessors in interest created those leases, that in the partition proceedings the lessees were not made parties and they are not willing to give up possession to the plaintiffs and, if after any litigation to recover possession the plaintiffs are unable to get possession of the said mouzas freed from the leases, the assets of the mouzas allotted to the plaintiff's share will be greatly reduced. The plaintiff has accordingly brought the suit for a declaration that the order of the Board of Revenue was ultra vires of the statute and the final partition is not binding on the plaintiff. Several defences were taken in the suit, the nature of which will appear from the grounds taken in his appeal which will be presently set forth. The Subordinate Judge has negatived all the defences and has given the declaration asked for by the plaintiff. Hence the present appeal. In appeal the following grounds have been taken:

(1) Under Ss. 57 and 59 and Ss. 90 and 113, Estates Partition Act (Act 5 of 1897) an appeal did lie to the Board of Revenue against the order of the Commissioner directing a fresh partition. (2) Assuming an appeal did not lie the Board's hearing of the appeal was an irregular assumption of jurisdiction and there was no inherent want of jurisdiction in the Board which was the appellate authority, as this might have been determined by the Board at a later stage. (3) The civil Court had no jurisdiction to entertain the suit. Such jurisdiction is impliedly barred.

To take ground 1 first: The determination of this ground depends on a construction of Ss. 57, 58 and 59, and Ss. 90 and 113, Estates Partition Act. Under S. 58 of the Act the Deputy Collector submitted the papers to the Collector for the sanction of the Collector, and the Collector is to follow the procedure laid down in Cls. 2, 3, 4 and 5, S. 58, as the circumstances of the case may require. In the present case the Collector approved the partition under sub-cl. (a), Cl. (4), S. 58. Against this order an appeal was presented to the Commissioner. The learned Commissioner returned the papers to the Collector for a fresh partition. Against this order of the Commissioner an appeal was preferred to the Board of Revenue and the Board of Revenue set aside the order of the Commissioner and confirmed the partition. It is

the competency of this appeal to the Board that is questioned in the present appeal before us and was also challenged in the Court below. An appeal is a creature of the statute, and an appeal to the Board from certain orders of the Commissioner are provided by S. 113 of the Act. The appeal against the order of the Commissioner is sought to be justified on behalf of the appellant on the ground that the order of the Commissioner directing a fresh partition is an order amending the partition as approved or made by the Collector within the meaning of Cl. (c), S. 113 of the Act. It is said that the term "amending" is wide enough to cover the case where the Commissioner sends back the case for re-partition.

It is argued that the word "amending" should not receive the limited construction so as to signify "confirming with amendments" the partition made by the Collector. In our opinion by no stretch of language can the order of Mr. De sending back the case to the Collector for re-partition by the Collector be regarded as an order by the Commissioner amending the partition made by the Collector. The order amending the partition can only signify a final order made by the Commissioner amending the partition i. e. confirming with amendment the partition made by the Collector. There is a decision of the High Court of Patna in 1 P L J 491 (1), which has held that there is no appeal to the Board in a case where the Commissioner, after setting aside the partition made by the Collector, has directed a fresh partition by him. The appellant argues that the Patna decision is wrong. We are unable to accede to this argument.

If one examines the scheme of provision regarding an appeal to the Board one can have no doubt that the intention of the framers of the Act was that there should be an appeal from final orders made by the Commissioners either confirming or amending the partition, not where the Commissioner directs the Collector to make a fresh partition.

This leads us to consider the second ground that the question of want of jurisdiction making the order of the Board of Revenue a nullity does not arise in the present case, for there is no inherent

1. Birbhadra Ruth v. Janardan Proharaj Mohapatra, 1916 Pat 154=38 I C 356=1 Pat L J 491.

jurisdiction of the Board over the subject matter of the partition, for an appeal would lie, if not at this stage but at a later stage, viz., after the matter comes again to the Commissioner and he has passed final orders thereon. We are unable to agree in this view. The Board of Revenue was incompetent to hear the appeal against the order of the Commissioner directing a fresh partition by the Collector and in entertaining the appeal the Board was acting without jurisdiction. The plaintiff has asked for a declaration that the appeal was without jurisdiction and all proceedings from the point of time when the Board entertained and allowed the appeal must be held to be void and of no effect. To this state of facts the observations of Lord McNaughten in 26 I A 16 (2) (at p. 28), apply with great force :

It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of a statute rightly understood pronounced void and of no effect.

The annulling of the order of the Commissioner directing a fresh partition by the Board who was acting ultra vires of the statute in entertaining the appeal cannot affect the rights of the plaintiff. As was put by Lord McNaughten in the case of an illegal cancellation of an order of the Collector directing registration of the appellant's village, in that case :

Cancellation in obedience to illegal commands of the Government can have no more effect than cancellation at the dictation of a lawless mob which the officer in charge has no power to resist.

It is now settled beyond controversy that an order made by a Court who has no jurisdiction to deal with the subject matter of the suit has no binding effect on the person who is affected by the order. It is absolutely void. It is open in a collateral proceeding to impeach even the judgment of a Court on the ground of want of jurisdiction : see S. 44, Evidence Act. Reference may be made to two leading decisions of the Judicial Committee in 9 All 191 (3) and 14 I A 160 (4). No amount of consent can cure the defect of jurisdiction. As Lord Watson observed in 9 All 191 (3) :

2. *Fischer v. Secretary of State*, (1899) 22 Mad 270=26 I A 16 (P C).

3. *Ledgard v. Bull*, (1887) 9 All 191=13 I A 134 (P C).

4. *Meenaksi Naidu v. Subramanya Sastri*, (1888) 11 Mad 26=14 I A 160 (P C).

Where the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process although they may constitute the Judge their arbiter, and be bound by his decision on the merits when they are submitted to him.

In 14 I A 160 (4) their Lordships pointed out that a right of appeal from the decision of a Judge must be given by the statute or an equivalent authority. In this case it was held that there was no right of appeal to the High Court from the order of the District Judge to fill up a vacancy in the Committee of a Pagoda and there being inherent incompetency in the High Court to deal with the appeal, consent could not confer on the High Court jurisdiction which it never possessed. These two cases are sought to be distinguished on the ground that in the present case the Board had entire seizin of the subject matter and it had merely interfered at an earlier stage whereas in 14 I A 160 (4) no question of the High Court having seizin of the subject matter arose, for it was a special jurisdiction in which the High Court did not come into the picture at all. There is nothing in the distinction, for the Board had no seizin of the appeal at that stage against the order of the Commissioner. The Board of Revenue and the other revenue Courts were given special jurisdiction for a particular purpose. They were statutory bodies vested with special jurisdiction for a particular purpose. If they act according to the provisions of the statute which created them, the civil Court has no jurisdiction to interfere; but if they act in contravention of the statute, the interference of the civil Court becomes justified.

It remains to consider the third ground: It is argued for the appellant that looking into the provisions of Act 5 of 1897 the civil Court had no jurisdiction to declare the proceedings before the revenue Courts to be a nullity. It is argued that the Act provides for a hierarchy of authorities to annul partition. The jurisdiction of the revenue Courts, it is said, is exclusive and therefore a suit in the civil Court does not lie. The point made is that the order of the Board of Revenue is final. But this finality has effect so long as the acts of revenue authorities are not ultra vires of the statute. When these authorities of limited jurisdiction

act in excess of their jurisdiction their acts become liable to be scrutinised by the civil Court and become liable to be set aside. For all the aforesaid reasons, we are of opinion that all the grounds of appeal fail and the appeal must be dismissed with costs. The costs must be paid to the plaintiff.

Patterson, J.—I agree.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 142

MUKHERJEE, AG. C. J. AND
S. K. GHOSE, J.

Manindra Nath Sen—Appellant.

v.

Khudiram Das and others—Respondents.

Letters Patent Appeal No. 35 of 1935, Decided on 18th December 1935, against judgment of M. C. Ghose, J., D/- 11th April 1935.

Bengal Land Revenue Sales Act (1859), S. 33—Ground not specifically set forth before commissioner can be taken in suit.

The wording of S. 33 of the Revenue Sale Law is very particular; and as worded, that section requires that the ground should be declared and specified. There can be no question that apart from anything else, omission to take the ground in a definite form and with sufficient particularity before the commissioner is a bar to the ground being put forward as a ground in a suit to set aside the sale. [P 142 C 1, 2]

Kanidhan Dutt, Indu Bhusan Mukherjee and Sudhansu Kumar Dey—for Appellant.

Panchanan Ghose, Pulin Behary Das and A. Quaseem—for Respondents.

Mukherjee, Ag. C. J.—This appeal is pressed upon two grounds. The first ground is to the effect that the revenue sale to set aside which the plaintiff instituted the present suit was bad, because notices under Ss. 6 and 7 of the Revenue Sale Law were defective in certain particulars. For disposing of this ground it would be sufficient to say that this was not a ground declared or specified in the appeal which the plaintiff had made to the commissioner. The memorandum of appeal filed by the plaintiff before the commissioner and the judgment of the commissioner in that appeal have been placed before us. We find that amongst other points taken, all that was said with reference to the procedure adopted for the sale was that the notices had not been properly served, but there was no point taken that notices were in any way defective. The wording of S. 33 of the

Revenue Sale Law is very particular; and as worded, that section requires that the grounds should be declared and specified. There can be no question that, apart from anything else, omission to take the ground in a definite form and with sufficient particularity before the commissioner is a bar to the ground being put forward as a ground in a suit to set aside the sale.

The other ground on which the appeal has been pressed before us is in substance this: that the revenue for arrears of which the sale took place was due for the March kist of 1927 and it became an arrear on 1st April 1927 and that therefore the latest day for its payment would be 12th January 1928 and that inasmuch as the sale was held on 23rd September 1927, it was a sale held without jurisdiction. It should be pointed out that in the trial Court no ground of this description was put forward and although there was an objection to the effect that the plaintiff believed that no arrears were really due and so the collector had no jurisdiction to sell the property that ground was practically abandoned at the trial, because the plaintiff at the trial admitted that the revenue due for March kist 1927 was really in arrears. In the memorandum of appeal filed before the Subordinate Judge from the decision of the trial Court the ground now taken before us was not taken. But at the hearing of the appeal before him it was put forward. The learned Judge held that the kistbandi not having been produced and no materials having been placed before him for the purpose of showing that the March kist of 1927 was a kist according to the kistbandi and not an instalment payable by the last date of payment as fixed by the Board of Revenue, it was not possible to hold that the contention was well founded. We think the decision of the learned Subordinate Judge on this point was correct.

In the appeal before M. C. Ghose, J., the matter was sought to be re-opened by the present appellant, as respondent therein, but the learned Judge declined to interfere with the finding of the Subordinate Judge on the ground that the question was a question of fact, and the conclusion which the Subordinate Judge had arrived at on the materials before him on that question could not be interfered with. We have heard Mr. Dutt on this

question and we are in entire agreement with the view that the learned Subordinate Judge had taken, namely that in the absence of any materials which would indicate that the revenue due for the March kist of 1927 was really an amount due according to the March kist, if there was any such kist in the kabuliyat and was not an amount due for which the last date of payment according to the date fixed by the Board of Revenue was some date in March 1927, it is not possible to say that the sale that took place on 27th September 1927 was held without jurisdiction. The appeal in our opinion fails and must be dismissed with costs.

Ghose, J.—I agree.

M.N./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 143

R. C. MITTER, J.

Amulya Ratan—Decree-holder—Appellant.

v.

Prosad Chandra Kar—Objector—Respondent.

Appeal No. 217 of 1935, Decided on 20th January 1936, from appellate order of Addl. Dist. Judge, Howrah, D/- 13th February 1935.

Civil P. C., (1908), S. 145 and O. 38, R. 5—Attachment before judgment released on surety undertaking to pay amount under decree that may be passed—Decree passed—Property sold in execution not fetching full decretal amount—Surety can be proceeded against—Court's demanding from surety security for prospective decretal amount is only irregularity—Surety having executed bond held could not raise objection as to illegality of bond in execution proceedings.

The appellant instituted a suit on a promissory note against two persons and thereafter applied for attachment before judgment of a motor lorry belonging to the said defendants. The Court issued on them a notice to show cause why the said motor lorry should not be attached before judgment or why they should not furnish security to the extent of Rs. 860 to cover the decree, if any, that may be passed against them. The said defendants appeared and offered to furnish security. They proposed the respondent and another person as sureties and the respondent and another person agreed to stand as sureties. They, the proposed sureties, executed in favour of the Court a surety bond reciting the notice issued on the defendants, the fact that the Court had allowed the defendants to furnish security, and that the executants had made themselves personally liable to the extent of Rs. 860, that is, for the amount that might be decreed against the defendants, and the sureties promised to pay the same in case the decretal amount be not realised from the judgment-debtors. The suit was decreed in full against the defendants. The ap-

pellant first executed his decree against the principal judgment-debtors and attached the lorry which was sold by the Court in execution. It fetched Rs. 100 only at the Court sale. The appellant could not realise anything more from the principal judgment-debtors who had been adjudicated insolvents on their own application. The appellant then applied for proceeding against the respondent, one of the sureties. The substantial objection raised by the respondent was that the Court went beyond jurisdiction in asking for security for the decretal amount under provisions of O. 38, R. 5, Civil P. C., and as the bond executed had gone beyond the terms of the said rule it could not be enforced in execution proceedings:

Held: that O. 38, R. 5 no doubt contemplated security for the production in Court of the property sought to be attached before judgment or its value at a future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached; but the object of the legislature for providing for attachments before judgment was to secure the prospective decree-holder in matter of realisation of the money that might be eventually found by the Court to be due to him. Having regard to the object of the provisions for attachment before judgment the Court in making a demand for and in taking security for the prospective decretal amount might have acted at most in an irregular manner in the exercise of its jurisdiction. [P 145 O 1]

Held further: that the respondent having executed the surety bond in the form he had done, could not raise the objection which he had raised in this case in the course of execution proceedings started against him under the provisions of S. 145 of the Code. [P 145 O 1]

Apurbadhone Mukherji—for Appellant.

Chandra Sekhar Sen and Pulin Behary Das—for Respondent.

Judgment.—This appeal is on behalf of the decree-holder and arises out of proceedings started under S. 145, Civil P. C., against the respondent, a surety. The appellant instituted a suit, in the year 1929 on a promissory note against two persons, Krishna Chandra Roy and Hiralal Roy. The claim was laid at Rs. 759.6-0 in the plaint. He thereafter applied for attachment before judgment of a motor lorry belonging to the said defendants. On 13th November 1929 the Court issued on them, the Roys, a notice to show cause why the said motor lorry should not be attached before judgment or they should not furnish security to the extent of Rs. 860 to cover the decree, if any, that may be passed against them. The said defendants appeared and offered to furnish security. They proposed the respondent and another person as sureties and the respondent and another person agreed to stand as sureties. They, the

proposed sureties, executed in favour of the Court a surety bond dated 30th November 1929. The bond recites the notice dated 13th November 1929, issued on the defendants, and the fact that the Court had allowed the defendants to furnish security. Then the bond states that the executants make themselves personally liable to the extent of Rs. 860, that is, for the amount that might be decreed against the defendants, and the sureties promise to pay the same in case the decretal amount be not realised from the judgment-debtors. The Court on a favourable report from the Sheristadar as to the solvency of the respondent and the other co-executant, accepted them as sureties and withdrew the order for attachment before judgment. On 4th June 1930, the suit was decreed in full against the defendants. The appellant first executed his decree against the principal judgment-debtors and attached the lorry which was sold by the Court in execution. It fetched Rs. 100 only at the Court sale.

The appellant could not realise anything more from the principal judgment-debtors who have been adjudicated insolvents on their own application. The appellant then applied for proceeding against the respondent, one of the sureties. The substantial objection raised by the respondent is that the Court went beyond jurisdiction in asking for security for the decretal amount under the provisions of O. 38, R. 5, Civil P. C., and as the bond executed has gone beyond the terms of the said rule it cannot be enforced in execution proceedings. This objection was overruled by the learned Munsif who allowed execution to proceed against the respondent. The learned District Judge on appeal, however, has accepted the said objection. He has further held that if the bond is to be regarded as one for the production in Court of the lorry or its value in cash, for which purpose only a bond could be taken under the provisions of O. 38, R. 5, there was no breach of the bond, as the lorry was actually brought in Court under the process of the Court and ultimately sold. He accordingly dismissed the execution. Against this order passed by the learned District Judge the decree-holder has preferred this appeal. I do not follow the last mentioned reasons of the learned District Judge. If the bond is not for the production of the

lorry or its value in Court, I do not see how it can be regarded as such. In proceeding in the aforesaid manner the learned District Judge in my view has proceeded upon a hypothetical case. He cannot make a new bond for the parties. The bond contains only one undertaking by the sureties, namely to pay the decretal amount to the decree-holder in a certain contingency, and the only question is whether the said undertaking can be enforced in execution.

The bond in its express terms is for the performance of a prospective decree that may be passed eventually against the defendants, Krishna Chandra and Hiralal Roy, and the sureties have by the terms of the security bond made themselves personally liable to the extent of Rs. 860. The case *prima facie* falls within S. 145 of the Code and the appellant has the *prima facie* right to enforce his remedies against the respondent in execution proceedings. It is said, however, that the surety bond is void being taken by the Court in excess of its powers. The notice of the Court issued on 13th November 1929 on the defendants was also to show cause why they should not furnish security to the extent of Rs. 860 which amount was estimated to cover . . . the amount of the decree. The sureties undertook to pay the amount of the decree that may eventually be passed against the defendants to the extent of Rs. 860. The figure was fixed at Rs. 860 apparently on the basis that the claim being laid at Rs. 759-6-0, the decree including costs could not exceed that amount. The order for attachment before judgment was withdrawn as the respondent and another person stood sureties and gave an undertaking to pay the amount of the decree that may be passed eventually in case the defendants could not pay. There was accordingly good consideration for the bond. It is however argued that the Court can only demand security from the defendants under O. 38, R. 5 for the production in Court of the property sought to be attached or its value, and to place it at the disposal of the Court when called upon, and it is said that when in the notice it made a demand on the defendants to furnish security for the estimated amount of the decree that may eventually be passed, it acted beyond its powers and without jurisdiction and the bond in question cannot be enforced. O. 38, R. 5

no doubt contemplates security for the production in Court of the property sought to be attached before judgment or its value at a future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached, but the object of the legislature for providing for attachments before judgment is to secure the prospective decree-holder in matter of realisation of the money that may be eventually found by the Court to be due to him. Every act done by a Court in contravention of the provisions of a statute is not necessarily beyond jurisdiction or a nullity.

It may be an irregularity. In cases of contravention of statutory provisions, no hard and fast line can be laid down for demarcating between acts which are nullities and acts which are irregularities but this much can be said, as was laid down by Mookerji, J., in delivering his judgment in 35 Cal 61 (1), that the question must be determined keeping in view the nature, scope and object of the provisions of the statute contravened. Having regard to the object of the provisions for attachment before judgment, which I have indicated above, I hold that the Court in making a demand for and in taking security for the prospective decretal amount may have acted at most in an irregular manner in the exercise of its jurisdiction. In that view of the matter the remedy of the defendants was to point out to the Court the irregularity in the notice, issued on 13th November 1929, which by its terms demand security from them of the decretal amount, when they appeared to show cause in pursuance of the same, and if the Court still insisted on the said security, to proceed to a higher tribunal, and the respondent having executed the surety bond in the form he has done cannot in my judgment raise the objection which he has raised in this case in the course of execution proceedings started against him under the provisions of S. 145 of the Code. For these reasons I set aside the order of the learned District Judge and restore that of the Munsiff. The execution against the respondent must proceed from the stage at which it was left, but the amount must be limited to Rs. 860. The appellant will have his

1. Ashutosh Sikdar v. Behary Lal Kirtania, (1908) 35 Cal 61=6 C L J 320=11 C W N 1011 (F B).

costs of this Court and of the lower appellate Court from the respondent. Hearing fee is assessed at one gold mohur.

K.S./R.K.

Order set aside.

A. I. R. 1936 Calcutta 145

M. C. GHOSE, J.

Corporation of Calcutta—Defendant—Appellant.

v.

Monarch Bioscope Co.—Plaintiff—Respondent.

Appeal No. 2022 of 1933, Decided on 19th December 1935, from appellate decree of Addl. Sub-Judge, First Court, 24 Parganas, D/- 27th June 1933.

(a) Interpretation of Statutes—Plain meaning clear—Previous law or proceedings of select committee should not be referred.

Every Act must be construed according to the plain meaning of its terms and, if the plain meaning is clear, such meaning should be taken without reference to the previous law on the subject or the proceedings of the Select Committee. [P 146 C 2]

(b) Calcutta Municipal Act (3 of 1923), S. 391—Cinema show is not excluded from S. 391.

The term theatre or circus or other similar place of public amusement in S. 391 cannot possibly omit a cinematograph show. A cinematograph show is one of the most widely spread popular forms of public amusement. It is held in a building similar to a theatre and it cannot possibly escape the words of S. 391. If the Legislature which enacted the section intended to omit the cinema in view of the Cinematograph Act of 1918, they should have specially stated it in a proviso to S. 391. As they have not done so and the words of the section are quite clear, it must be held that it includes cinematograph show. [P 146 C 2]

(c) Calcutta Municipal Act (3 of 1923), S. 391—That corporation generally used to give notice to take license would not make opening of show without previous license legal.

It is the duty of the owner of the place of amusement to take a license in proper time before he opens the place of public amusement. The mere fact that the Corporation generally used to give a notice to take out a license would not make it legal on the part of a proprietor to open a show without a previous license. [P 147 C 1]

(d) Calcutta Municipal Act (3 of 1923), S. 391—Cinematograph Act of 1918 does not take any Corporation's power under S. 391.

The Cinematograph Act is an All India Act and applies to Cinematograph shows exhibited at any time or place within British India and the chief object of the Act is to prevent the showing of unlicensed cinematograph films and further to have proper safeguard against fire. For this purpose, no one may open a cinematograph show at any place without any license under the Cinematograph Act of 1918. But this

will not necessarily take away the power of the Calcutta Corporation under S. 391. [P 147 C 1]

(e) **Calcutta Municipal Act (3 of 1923), S. 391—Cinema show opened without previous license of corporation—Corporation can suppress show and is not bound to make case in criminal Court.**

The Corporation can suppress a cinema show which is opened without previous license of the Corporation. And it is not bound to make a case against the proprietor in criminal Court and get him fined. [P 147 C 2]

Atul Chandra Gupta and Pashupati Ghose—for Appellant.

Amarendra Nath Bose and Abinash Chandra Ghose—for Respondent.

Judgment.—This is an appeal by the defendant, the Corporation of Calcutta. The facts in short are these: The plaintiff, the Monarch Bioscope Co., which is a peripatetic Bioscope Co., obtained a license from the Commissioner of Police, Calcutta, to exhibit at a certain Mela within the Corporation of Calcutta, and according to their license they were opening the cinema show on 23rd April 1929. They had put up their temporary erections and were selling their tickets when a Corporation officer appeared with police help and prevented the company from exhibiting the cinema show on the ground that they had not taken a license from the Corporation of Calcutta. The plaintiffs' case is that after they obtained a license from the Commissioner of Police they were not bound to take a further license from the Corporation of Calcutta and the action of the Corporation officer was ultra vires and oppressive and they claimed damages for the same. The trial Court held that the plaintiffs were legally bound to take a license from the Corporation and as they had not done so, the action of the Corporation officer was not illegal. The trial Court dismissed the suit. In appeal, the learned Additional Subordinate Judge has held that the plaintiffs were not bound to take a further license from the Corporation and the action of the Corporation officer was ultra vires and illegal. The Court awarded damages of Rs. 100. The main question in appeal is whether under S. 391, Calcutta Municipal Act, it was obligatory on the plaintiffs to take a license from the Corporation. S. 391 is in these terms:

No person shall, without or otherwise than in conformity with the terms of a license granted by the Corporation in the behalf, keep open any theatre, circus or other similar place of public resort recreation or amusement.

The Court of appeal below thought

that as the term 'cinema' is not in S. 391, and inasmuch as the report of the Select Committee dealt with the Bill and it appeared from the note of the Select Committee under the section that cinemas were not included in S. 391 in view of the Cinematograph Act of 1918, the cinematograph show does not come within the provisions of S. 391. It is urged on behalf of the appellant that the proceedings of the Legislature cannot be referred to as legitimate aids to the construction of the Act in which they result. See the case of 22 I A 107 (1). Every Act must be construed according to the plain meaning of its terms, and if the plain meaning is clear we must take that plain meaning without reference to the previous law on the subject or the proceedings of the Select Committee. In this case, after hearing the learned Advocates on both sides at great length it is absolutely clear that the term theatre or circus or other similar place of public amusement cannot possibly omit a cinematograph show. A cinematograph show is one of the most widely spread popular forms of public amusement. It is held in a building similar to a theatre and it cannot possibly escape the words of S. 391. If the Legislature which enacted the section intended to omit the cinema in view of the Cinematograph Act of 1918 they should have specially stated it in a proviso to S. 391. As they have not done so and the words of the section are quite clear, we must hold that it includes cinematograph show.

The next question urged by the learned Advocate is that under S. 391 it is an offence to keep open a theatre or other place of amusement. It is urged that the show in question had not yet opened. They were only selling tickets at the door and had not yet begun exhibiting the cinema show. This argument does not appeal to me. If the plaintiffs had no legal right to keep open a cinema they had no right to open it without a license. The next argument is that it has always been the practice of the Corporation to serve a notice upon the proprietor of the place of amusement calling upon him to take a license and that it is not necessary to take a license until such notice is served. Such may have been

1. *Administrator-General of Bengal v. Prem Lal Mullick*, (1895) 22 Cal 788=22 I A 107=6 Sar 608 (P O).

the practice of certain officers of the Corporation but it is clear upon the terms of the Act that it is the duty of the owner of the place of amusement to take a license in proper time before he opens the place of public amusement. It may be that the owners of a place which had a license may be allowed some time of grace to renew the license, but for a new show such as the plaintiffs were opening, they must according to the law take a license before they open their show. The mere fact that the Corporation chose to give a notice would not make it legal on the part of the proprietor to open a show without a previous license. It was urged that the Cinematograph Act of 1918 is a complete Act and that as it provides for the safety of the public no further action is called for by the Corporation. To this the reply is that the Cinematograph Act is an all India Act and applies to Cinematograph shows exhibited at any time or place within British India and the chief object of the Act is to prevent the showing of unlicensed cinematograph films and further to have proper safeguard against fire. For this purpose, no one may open a cinematograph show at any place without any license under the Cinematograph Act of 1918. But this will not necessarily take away the power of the Calcutta Corporation under S. 391.

It should be observed that the business of a Municipal Corporation is not only to secure the safety of the public but also to secure their comfort and convenience. Whether in fact a poor performer should be bound to take license both under the Cinematograph Act and under the Calcutta Municipal Act is a matter for the high authorities to determine. As the law now stands the plaintiffs were under obligation to take a license from the Corporation. Then it was urged that the Corporation Officers acted ultra vires in suppressing the cinema without giving the plaintiffs an opportunity to take a license. The reply is that it was the duty of the plaintiffs to take a license before preparing to open the cinema. The learned Subordinate Judge has made strictures on the conduct of the Corporation Officers. It was suggested that probably the Corporation Officers would have passed over the matter if an illegal gratification had been given. However that may be, we must deal with the matter according to law, and according to the

clear interpretation of the law the plaintiffs were under obligation to take a license from the Corporation and as they did not do so, it cannot be said that the Corporation Officers exceeded their authority in suppressing it. It was urged in the last place that the Corporation should have made a case against the plaintiffs and got them fined by the Magistrate and that they have no business to suppress the unlicensed show. The argument is of no weight. In the result, the appeal is allowed and the plaintiffs' suit is dismissed with costs. Leave to appeal under S. 15 of the Letters Patent is refused.

K.S./R.K.

Appeal allowed.

* A. I. R. 1936 Calcutta 147

LORT-WILLIAMS AND JACK, JJ.

Nitai Charan Ghose and others—Defendants—Petitioners.

v.

Kshetra Nath Ganguly — Plaintiff—Opposite Party.

Criminal Revn. Nos. 14 and 21 of 1935,
Decided on 7th January 1936.

* Criminal Trial—Complaint to Magistrate under S. 476, Criminal P. C.—Name of person not mentioned in complaint—Magistrate can proceed against such person also.

The Criminal Procedure Code provides for taking cognizance of offences and not of offenders and a Magistrate who has legally taken cognizance of an offence under S. 476 has jurisdiction to proceed against any one who might be proved by the evidence to be concerned in an offence, whether he is mentioned in the order under S. 476 or not: 1917 Cal 121 and 1 Marsh Rep 270, Foll.; 23 Cal 532, not Foll.

(P 149 C 1)

Santosh Kumar Basu, Purnendu Sekhar Basu and Suresh Chandra Taluqdar—for Petitioners.

Sudhansu Sekhar Mukherjee—for Opposite Party.

Order.—In these cases rules were issued to show cause why certain orders should not be set aside. These orders were the subject of one judgment of the learned Sessions Judge of Burdwan. The matter arose out of a civil suit tried by a Munsif. It was alleged that certain of the parties were guilty of an offence under S. 196, I. P. C. An application was made to the learned Munsif, asking him to make a complaint against these persons under S. 476, Criminal P. C. The Munsif held an inquiry and eventually made a complaint against the defendants Satya Kinkar Ghosh and Amrita Lal

Ghosh : but he refused to make a complaint against the pleader Haradas Banerjea or defendants 3 to 5 in the suit, because he considered that no prima facie case against them had been made out. There was an appeal to the Sessions Judge, and he agreed with the Munsif in making a complaint against Satya and Amrita, but disagreed with him with regard to the pleader and the other defendants, because in his opinion the effect of the order of the Munsif refusing to make a complaint against them was to debar the Magistrate, whose duty it would be to hold an inquiry, from taking action against those persons, even though after going into the case in much more detail than had been possible before the Munsif, a criminal case against them was disclosed. The learned Judge proceeded to say as follows :

I do not think that it is desirable that the learned Magistrate's hands should be fettered in this fashion, I must not be understood in the present case to be holding that a prima facie case has been made out against these persons. All that I wish to point out is that if the learned Magistrate, in the course of his inquiry, finds from the materials before him that the interests of justice require that criminal action should be taken against all or any of these persons, he should be free to take such action. In this view of the case, I set aside the order of the learned Munsif discharging the rules against the pleader Babu Haradas Banerjea and against defendants 3 to 5, leaving it open to the Magistrate, who holds the inquiry, to take any action against them, if the evidence before him justifies such a course,

and he allowed the appeal to that extent. It seems to us that the learned Sessions Judge correctly stated the legal position of the learned Magistrate who will hold the inquiry. In 1 Marsh Rep 270 (1) Sir Barnes Peacock, C. J., and two other Judges held that under the corresponding S. 171, Act 25 of 1861, a Court has power to order that the Magistrate shall investigate whether forgery has been committed with reference to a particular document offered in evidence before such Court, without particularising any individual as the suspected person. The learned Chief Justice remarked that it had been urged that this section (as does the present S. 476, Criminal P. C.) referred to an accused person, and that this showed that the section must refer to an individual selected, after an investigation, by the Court before whom the alleged

offence may have been committed, and that the section could not justify an order for the Magistrate to investigate and fix upon some person who shall be then convicted by the Magistrate. But the Court refused to concur in this view of the law and held that the section gave power to any Court to send the case for investigation to any Magistrate and directed that such Magistrate should thereupon proceed according to law.

If there be a person distinctly accused, of course the Magistrate can proceed equally against him as he can in investigating a case sent to him. But there is nothing in the section to prevent the investigation of a case where no particular individual is as yet accused. The investigation is to show whether any or what person is to be charged under the law. Moreover, no injustice is done to anyone. If on investigating the case it appears to the Magistrate that there is no proof to warrant his committing anyone, no one can be injured; if, on the other hand, the result of the investigation shows that someone has committed forgery, that person may be and ought to be proceeded against according to law, and if found guilty by a competent Court, he will be punished for the crime.

In 23 Cal 532 (2) it was held by a Division Bench of this Court that the provisions of S. 476, Criminal P. C., clearly indicate that a Court must not only have ground for enquiry into an offence of the description referred to in the section but must also be prima facie satisfied that the offence has been committed by some definite person or persons against whom proceedings in the Criminal Court are to be taken. That was a case in which the learned Munsif had sent the case to the Magistrate for investigation and trial of charges under S. 193 and other sections of the Indian Penal Code "against the plaintiff or some other person or persons." "Thereby showing," as the learned Judges remarked,

that he did not arrive at any definite conclusion as to whether the investigation, which he directs, should go on either against the plaintiff or against some other person or persons.

The case in Marshall's Reports does not seem to have been cited before that Court, and the cases upon which the learned Judges relied, specially the case of 23 Cal 532 (2), do not seem to support the view which they took. In 21 C W N 950 (3) this matter was again considered by a Division Bench of this Court. The

2. Mahomed Bhakku v. Queen Empress, (1896) 23 Cal 532.

3. Giridhari Lal v. Emperor, 1917 Cal 121=42 I O 133=21 C W N 950=18 Cr L J 901.

1. Essan Chunder Dutt v. Prannath Chowdry, 1 Marsh Rep 270=2 Hay 236=W R F B 71.

District Judge had made an order under S. 476 against a person who had applied for probate of a will which, in the Judge's opinion was *prima facie* a forgery. Before the Magistrate who held the inquiry, on the application of the Public Prosecutor, the petitioner, who was not a party to the probate proceedings, was also summoned in the same proceeding which was pending against the first accused. The Court held that the petitioner was not a party to the proceedings in the Civil Court, and neither sanction under S. 195, Criminal P. C., nor a complaint under S. 476, was a necessary precedent to proceedings against him. They further held that the Criminal Procedure Code provides for taking cognizance of offences and not of offenders, and that the Magistrate who had legally taken cognizance of an offence under S. 476 had jurisdiction to proceed against anyone who might be proved by the evidence to be concerned in that offence, whether he was mentioned in the order under S. 476 or not, and they distinguished the case of 23 Cal 532 (2) above referred to.

In our opinion, the law is correctly stated by the learned Judges in this case, and in 1 Marsh Rep 270 (1). But the learned Sessions Judge having correctly directed himself on this point of law, went on to set aside the order of the Munsif discharging the rules against the pleader Babu Haradas Banerjee and defendants 3 to 5. This, in our opinion, was unnecessary for the purpose which the learned Sessions Judge intended, and there seems to be no justification for setting aside the Munsif's order. The order, in our opinion, was no bar, as suggested by the learned Sessions Judge, and the question whether the Magistrate ought to and can in law proceed against any other persons except the defendants Satya and Amrita will have to be decided at the trial. If the learned Sessions Judge had thought fit himself to make a complaint against some person or persons unknown, in our opinion, he would have been acting within his powers. But the effect of his judgment is to do neither the one thing nor the other. He blows hot and cold. He has not decided to make a complaint against persons unknown, and yet he has set aside the Munsif's order refusing to make a complaint. In our opinion, therefore the learned Judge's order cannot be supported and must be

set aside. The rules in these two cases are made absolute.

B.D./R.K. Rules made absolute.

* A. I. R. 1936 Calcutta 149

LORT-WILLIAMS AND JACK, JJ.

Jadabendranath Panja — Petitioner.
v.

Emperor—Opposite Party.

Criminal Revn. No. 1269 of 1935, Decided on 14th January 1936.

* (a) Criminal Trial—Sentence of fine—Special Magistrate passing sentence of fine under provisions of S. 23, Ordinance 11 of 1931—Special powers coming to end in 1932—Magistrate succeeding to such special Magistrate is not a successor and cannot execute sentence of fine.

A sentence was passed by G as a Special Magistrate forming a Special Criminal Court within the meaning of S. 23 of Ordinance 11 of 1931. That Court came to an end in May 1932. S, who succeeded G as Sub-divisional Magistrate held that S was not a successor of G as a special Magistrate forming a special criminal Court within the meaning of that section. So S could not execute by issue of a warrant of attachment a sentence of fine imposed by G.

[P 150 C 2]

(b) Criminal Trial—Sentence of fine imposed by Special Magistrate under S. 23 of Ordinance 11 of 1931—Ordinance expiring in 1932—Sentence remaining unexecuted—Whether under S. 559, Criminal P. C. District Magistrate can order execution—*Quaere*.

Quaere.—Where a sentence of fine is passed by a Magistrate holding powers under S. 23, Ordinance 11 of 1931, and the sentence remains unexecuted and the ordinance also comes to an end in the year 1932, whether by resorting to S. 559, Criminal P. C., the District Magistrate can direct any other Magistrate to execute such sentence?

[P 154 C 1]

* (c) Criminal Trial—Sentence of fine and in default penal servitude—Sentence in default served out—Realisation of fine undesirable and unfair.

Except in special cases, it is both undesirable and unfair to seek to realise a fine when the sentence ordered to be served in default of payment of the fine has already been served in full; and the proviso to S. 386, Criminal P. C., is intended to deal with cases where for some sufficient reason the authorities have not been able to realise the fine before the default sentence has been served: 1935 Bom 160, *Foll*.

[P 151 C 2]

Santosh Kumar Basu and Debabrata Mookerjee—for Petitioner.

D. N. Bhattacharya—for the Crown.

Lort-Williams, J.—In this case a Rule was issued to show cause why an order issuing a warrant under S. 386, Criminal P. C., to the Collector of Burdwan, authorising him to realise the unrealised part of a fine imposed on the

petitioner in 1932 by a Special Magistrate under S. 17 (2), Criminal Law Amendment Act, should not be set aside.

The petitioner was convicted on 27th January 1932, under S. 17 (2), Criminal Law Amendment Act of 1908 for having promoted a meeting under the auspices of the Burdwan Congress Committee which had been declared unlawful. The case was tried by Mr. S. P. Ghose, special Magistrate, Burdwan, who sentenced the petitioner to undergo rigorous imprisonment for two years and six months and to pay a fine of Rs. 500, in default to suffer rigorous imprisonment for six months more. On 8th March 1932, an order was made for the execution of the fine and subsequently, while the petitioner was serving his sentence, a sum of Rs. 44-8-0 was realised by attachment and sale of his moveable properties. In May 1932 Ordinance No. 11 of 1931, under which Mr. S. P. Ghose had been appointed a Special Magistrate, expired. The petitioner alleges that although part of the fine was realised, no intimation of such realisation was given to the jail authorities, with the result that the petitioner had to serve out the whole term of imprisonment inflicted in default of payment of the fine, namely, 6 months in addition to the substantive sentence of imprisonment passed upon him. Further, he alleges that the fact of realisation of a part of the fine, if intimated to the jail authorities, would have earned for him a remission of sentence, but that he received no such remission on account of partial realization of the fine besides the usual remission for good conduct under the Jail Code. Subsequently, on 7th March 1935, a warrant was issued under S. 386, Criminal P. C., by Mr. B. Sinha, Sub-Divisional Magistrate of Burdwan, authorising the Collector of the district to realise the unrealised part of the fine, viz., Rs. 456, according to civil process by attachment and sale of the immoveable properties of the petitioner. The petitioner further alleges that although it appeared clear from the settlement papers, etc., that he had some landed properties, no proper steps were taken to realise the unrealised portion of the fine till after the lapse of three years from the date of his conviction.

The arguments raised on behalf of the petitioner are that the Court of Mr. B. Sinha, who issued the warrant, not being

a Court of the Special Magistrate who passed the sentence or his successor-in-office, had no power to issue the warrant. Further, the warrant was not signed by Mr. Sinha as a Special Magistrate but as Sub-divisional Magistrate of Burdwan. Further it has been argued that under S. 386, Criminal P. C., where the offender has suffered the whole of the imprisonment ordered to be undergone in default of payment of the fine, the Court shall not issue a warrant for the realisation of the fine, unless for special reasons to be recorded in writing it considers it necessary to do so. With regard to the first point, Ordinance 11 of 1931 provided in Chap. 1 for certain emergency powers, and in Chap. 2 for certain Special Criminal Courts, and S. 23 (included in that Chapter) provided that Courts of criminal jurisdiction may be constituted under that Ordinance of the following classes: namely, (i) Special tribunals and (ii) Special Magistrates. The note in the margin of that section is "Special Court." S. 386, Criminal P. C., provides that:

Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine by issuing certain warrants; provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

Section 389 provides that:

Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor-in-office.

It is contended on behalf of the Crown that Mr. Sinha is the successor-in-office of Mr. S. P. Ghose within the meaning of this section. In my opinion this contention is not sound. The sentence, passed by Mr. S. P. Ghose was passed by him as a Special Magistrate forming a Special Criminal Court within the meaning of S. 23, Ordinance 11 of 1931. That Court came to an end in May 1932. Mr. Sinha, who succeeded Mr. Ghose as Sub-divisional Magistrate, cannot possibly be held to be Mr. Ghose's successor as a Special Magistrate forming a Special Criminal Court within the meaning of that section. Similarly, although Mr. Sinha became a Special Magistrate on the very day he made the order in question, he did not make the order as a Special Magistrate, and it is doubtful whether he

even knew that special powers had been conferred upon him. Moreover, he was appointed a Special Magistrate under the Bengal Suppression of Terrorist Outrages Act (12 of 1932). Consequently, it is not possible to argue that on account of this appointment, he became the successor-in-office of Mr. Ghose, the Special Magistrate under the previous Ordinance, who convicted the accused and inflicted the sentence upon him.

Ordinance 9 of 1932 in S. 4 thereof provides that where before the expiration of the Bengal Emergency Powers Ordinance, 1931, an order has been made thereunder for the trial of any person by a Special Magistrate, but the trial has not begun, or the trial has proceeded but has not been completed, the offence may be tried or the trial completed by such Special Magistrate and such Special Magistrate shall continue to have all the powers with which he was vested under the said Ordinance. If a further provision had been made under that section for the execution by warrant of fines inflicted as part of the sentence as in the present case, no difficulty would have arisen. It is conceivable that the difficulty might be met by applying the provisions of S. 559, Criminal P. C. That section provides that:

The powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office. And when there is any doubt as to who is his successor-in-office, then any such Magistrate or the District Magistrate shall determine, by an order in writing, the Magistrate who shall, for the purposes of the Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Magistrate.

It is not necessary to give any decision on this point, because that matter is not in issue at the present moment and will have to be decided when if at all, such an order is made in this or any other similar case. The other point raised on behalf of the petitioner is that Mr. Sinha who issued the warrant, did not record any special reason in writing within the meaning of the proviso to S. 386. The reason he recorded was that the petitioner was a man of dangerous character. In my opinion this was not such a reason as is contemplated by the section. In 59 Bom 350 (1), Sir John Beaumont, C. J. said that the Court should follow the

policy which seems to have inspired the proviso to S. 386, which appears to be that in general an offender ought not to be required both to pay the fine and to serve the sentence in default. But the proviso enables a warrant to be issued for recovery of the fine even if the whole sentence of default has been served, if the Court considers that there are special reasons for issuing the warrant and in his opinion, those should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served. I am in agreement with the remarks of the learned Chief Justice. Except in special cases it seems to me both undesirable and unfair to seek to realise a fine when the sentence ordered to be served in default of payment of the fine has already been served in full; and in my opinion the proviso is intended to deal with cases where for some sufficient reason the authorities have not been able to realise the fine before the default sentence has been served. It is true that there seems to be some evidence to show that the authorities did try to realise the fine but were not aware that the petitioner possessed landed properties.

On the other hand, he alleges that they had the settlement papers which they could have had examined and which would show clearly that he was the owner of the properties, and that their inability to realise the fine was due to their own laches. Whether that be true or not, that is not the reason recorded by the learned Magistrate for issuing a warrant within the meaning of the proviso to S. 386, Criminal P. C. For all these reasons, I am of opinion that the order of Mr. Sinha must be set aside and the warrant quashed.

Jack, J.—I agree that the order should be set aside as it appears to be a case which is not contemplated by the Criminal Procedure Code, namely, where there is no successor-in-office to the Special Magistrate. S. 559 applies where there is any doubt as to who is the successor-in-office and possibly it might be held that under that section, the District Magistrate would be empowered to appoint a successor-in-office for the purpose of these proceedings. But in this case no such appointment has been made. As regards the other point, it may be noted that although in the Bombay case,

1. Digambar Kashinath v. Emperor, 1935 Bom 160=59 Bom 350=1935 Cr C 320=156 I C 772=36 Cr L J 1034=37 Bom L R 99.

59 Bom 350 (1), the learned Chief Justice held that the reason given by the Magistrate was not such a reason as is referred to in S. 386, he still refused to interfere with the order for the execution of the warrant on the ground that although the reason given by the Magistrate was not such a reason, still there was a special reason in that case why the warrant should be executed, namely a reason similar to that which the prosecution alleged in the present case i. e. that the authorities had endeavoured to realise the fine but had not been able to do so in due time owing to not knowing where the properties were situated.

B.D./R.K.

Order set aside.

A. I. R. 1936 Calcutta 152

GUHA AND BARTLEY, JJ.

R. S. N. Co. Ltd. and I. G. N. & Ry. Co. Ltd.—Defendants—Appellants.

v

Ram Kanai Madhab Chandra Iswar Chandra Pal and others—Plaintiffs—Respondents.

Appeal No. 194 of 1933, Decided on 23rd January 1936, from original decree of Sub-Judge, First Court, Bakargunj, D/- 22nd May 1933.

(a) **Tort—Negligence—Collision between vessel at anchor and one in motion—Onus of proof is on latter.**

The burden of proof in an action founded upon collision between a vessel at anchor and one in motion, is upon the owner of the latter to prove that the collision was not occasioned, by any negligence on their part. They have to prove that the collision was due to inevitable accident not arising from negligent navigation: *The Annot Lyle*, 11 P D 114, *Rel. on.*

[P 154 C 1]

(b) **Tort—Negligence—Contributory negligence—Vessel lying at anchor not complying with regulation to have lights—But vessel visible from upper deck of vessel in motion and accident capable of being averted by exercise of ordinary care and skill—No contributory negligence arises and negligence of former will not excuse latter.**

In a case of collision between a vessel at anchor and another in motion, it was found that the vessel at anchor had not complied with the regulation to have lights on the boat. But it was found that this absence of light was not the cause of the collision, that the boat was visible from a distance of about 300 cubits from the upper deck of the vessel in motion and that the accident could have been averted by the exercise of ordinary care and skill. In a suit for damages by former against latter:

Held: that the question of contributory negligence did not arise, and that as the defendants could by exercise of ordinary care and

diligence have avoided the mischief which happened, the plaintiff's negligence would not excuse him: *Radly v. L. and N. W. Ry. Co.*, (1867) 1 A C 754, *Rel. on.* [P 154 C 2, P 155 C 1]

Atul Ch. Gupta and Fanindra Mohan Sanyal—for Appellants.

Jogesh Ch. Roy and Bankim Ch. Banerji—for Respondents.

Judgment.—This is an appeal by the defendants in a suit described in the plaint filed in Court as a suit for compensation on account of the plaintiffs' cargo boats having been broken and sunk by a steamer owned by the defendants. The case of the plaintiffs, a firm carrying on business in the name and style of Ram Kanai Madhab Chandra Pal Radha Krishna Pal, Gobinda Chandra Pal, Krishna Kumar Choudhury Srinath Talukdar before the Court, was that in the month of December 1927, goods specified in detail in the plaint, belonging to them, were being carried from Calcutta to a place named Kalaiya Bandar in a boat (Narain Majhi's boat), which reached the river to the south of a village named Karmakati, on 16th December 1927, a little after dusk, and lay at anchor beyond the usual track of steamers passing by the river there, with lights on it, visible from a distance. On that night between 9-30 and 11 p. m. the steamer "Brahmin" of which the defendants the R. S. N. Co. Ltd., and the I. G. N. and Railway Company Ltd., were the owners, while on its journey from Patuakhali to Barisal, deviated from the usual route and collided with the boat and broke and sunk the same. The breaking and sinking of the boat, resulting from the collision, caused damage to the plaintiffs' firm, and compensation for damages and loss sustained was claimed. The claim was for recovery of Rs. 5,946-7-9, with interest from the defendant-companies.

The defence in the suit was that there was no negligence on the part of the master or Serang in navigating the steamer; that the steamer was following the usual steamer track and that the boat in question was in the deep navigable channel of the river and carried no light as required by the Government Regulations. The defendants pleaded non-liability for damages as claimed in the suit on the ground that the boat was kept in deep and navigable water channel, without any light on it. On the pleadings of the

parties bearing upon the main case before the Court, a number of issues were raised for determination. The decision of the learned Subordinate Judge in the Court below, on the three of these issues requires consideration in the appeal as the decree passed in favour of the plaintiffs in the suit for the amount of Rs. 4,995-7-6, against which this appeal is directed is based on the decision of those issues.

Issue 4. Whether the accident was due to any negligence or rashness on the part of the master and senior Serang of S. S. Brahmin in navigating his vessel.

Issue 5. Whether the accident was due to Narain Majhi keeping his boat in the deep navigable channel and not exhibiting any light as required by law?

Issue 6. Whether the plaintiffs are entitled to any damages from the defendants? If so, what is the amount of such damage?

The findings on evidence in this case documentary and oral, so far as they are material for the purpose of this appeal, may be summarised under the following three different heads: I. The Serang allowed the steamer to go beyond the usual track and got into the places used for the mooring of boats, and collided with the boat in question. The Serang or master of the steamer was not fully acquainted with the usual tract of steamers in the Patuakhali line. II. There were lights before the collision in the boat in question as also in other two boats, lying close by, as required by the Government Rules. III. The steamer clerk went to the upper deck; and he and the Serang were conversing with each other, and the talk in which they were absorbed went on until black things, i. e., the boat in question, along with other boats, were seen on the river, at a distance of 10 to 15, or 15 to 20 cubits off from the prow of the steamer, when they were first seen by them. On the evidence coming from the defendants' side, there was no fog in the river at the time of or before the collision, and that there was negligence on the part of the Serang not to see the boats when they were 300 feet or so off from the steamer. Witness 1 for the defendants deposed to the fact that things up to 200 cubits were visible; according to witness 2, things up to 150 to 200 cubits were visible. Mr. Dunn, the Marine Assistant of the defendants at

the time of the accident, and who was on board the steamer at the time, deposed to these facts: There was no fog till after midnight, i. e., till after the steamer had left the place of accident. It would not be correct for anybody to say that at that time of accident there was fog. Owing to darkness objects on both sides of the river could not be seen clearly but they could be seen from 300 feet at most from the steamer.

On consideration of the evidence in the case, the whole of which was placed before us, the conclusion arrived at by the Judge in the Court below mentioned under I and II above, does not appear to us to be justifiable. The evidence in the case does not make out the position that there was any usual track or route which had to be followed on the part of the river where the collision took place, in the Patuakhali line, nor could it be said, on the evidence before us that the Serang of the steamer was not acquainted with the track to be followed by a steamer in the Patuakhali line. The materials on record do not further establish the fact on which great deal of evidence appears to have been adduced on both sides, that there were lights on Narain Majhi's boat, the boat in question, as was asserted by the plaintiffs. The presence of lights on the other boats lying close by was not of much importance or consequence in view of the definite case before the Court as to lights having been exhibited by Narain Majhi's boat, which was sunk as the result of collision. The other findings arrived at by the Court below as mentioned in III above, appear to us to be amply supported by the evidence in the case. The evidence in the case establishes that there was negligence on the part of the Serang, that the collision was not an inevitable accident, inasmuch as he could have but had not seen the boat with which the steamer collided when it was at a distance of 300 feet from the prow of the steamer; that a competent Serang could easily have averted the collision by the exercise of ordinary care and skill. The evidence in the case indicates further that the absence of light on the boat was not the cause of collision, seeing that the Serang and the steamer clerk who were on the upper deck together saw what according to the clerk was a "big black heap" and according to the Serang, two or three black marks like

"jungles" or "black things". On the materials before us, we have no hesitation in coming to the conclusion, in agreement with the Judge in the Court below, that both the Serang and the steamer clerk were unreliable witnesses, so far as important facts arising for consideration in the case go, and that there was clear indication in their evidence, taking the same with other evidence, that their endeavour throughout was to clear their own conduct and exonerate the defendants from liability if possible. "The big black heap" and "the black marks like jungles" or "black things" in their evidence were the boats lying at anchor, which according to unimpeachable evidence on record were visible from the upper deck of the steamer from a distance of 300 cubits, and the absence of light therefore could not possibly be taken to be the cause of collision, which could very well have been averted but for the negligence of the person entrusted with the navigation of the steamer. The collision was due to negligence and failure on the part of the Serang to use ordinary care and skill, and not to the fact of there being absence of light on the boat with which the steamer collided. On the facts of the case as established by evidence dealt with above, the law applicable to the case before us may be briefly reviewed, with reference to the authority of decided cases bearing upon the questions arising for consideration.

The burden of proof, although it loses its importance in a case like the present where all the relevant and material evidence has been placed on record, by one side or the other, in an action founded upon a collision between a vessel at anchor and one in motion is upon the owner of the latter to prove that the collision was not occasioned by any negligence on their part. The defendant has to prove that the collision was due to inevitable accident not arising from negligent navigation: see 11 P D 114 (1). The defendant in the case before us did not satisfy the test by evidence led on their side; and did not discharge the onus that was upon them. The question of onus directly arising for consideration in a case of collision between a steamship and a sailing vessel, which had failed to

comply with Admiralty Regulations regarding lights, was considered in 3 P C 212 (2), in which the Judicial Committee of the Privy Council, being of opinion that the collision might have been avoided if the sailing vessel had obeyed the regulations, she was to blame for the collision that occurred. It was held in that case, that though the omission to exhibit proper lights might be immaterial where it was shown that absence of such lights was not the cause of the collision and did not conduce to it, the onus lay on such vessel to show that non-compliance with regulation was not the cause of the collision. In the case before us, not only the evidence for the plaintiffs, but the evidence on the side of the owners of the steamer, indicates clearly that the absence of lights on the boat was not the cause of the collision. The evidence coming from the side of the plaintiffs and the defendants points clearly to the fact that the boat at anchor was visible from the upper deck of the steamer, and that the collision was due not to the absence of light on the boat, but to the negligence and want of exercise of ordinary care and skill on the part of the Serang.

In the case before us a vessel under steam ran down a boat at her mooring when there was no fog, and when things on the river and on its banks were visible at a distance of 300 cubits from the steamer. That fact was *prima facie* evidence of fault on the part of the steamer, and she could not escape liability for the consequences of the act, except by proving that a competent Serang could have averted the collision by the exercise of ordinary care and skill: 14 A C 40 (3). The evidence in this case establishes the position that the Serang concerned could very well have averted the collision with the exercise of ordinary care and skill on his part.

The question of contributory negligence does not arise in the case before us on the conclusions on evidence mentioned in different parts of the judgment. There is no doubt about the proposition that the plaintiff in an action for negligence cannot succeed if it is found that he him-

1. The Annot Lyle, (1886) 11 P D 114=55 L J P 62=6 Asp M C 50=34 W R 647=55 L T 576.

2. Owners of the Steamship Fenham v. Surtees Wake, (1871) 3 P C 212.

3. The City of Peaking, (1890) 14 A C 40=53 L J P C 64=6 Asp M C 396=61 L T 136.

self has been guilty of negligence or want of ordinary care which contributed to cause an accident. But the proposition is well established that the plaintiff may have been guilty of negligence, and although that negligence, may, in part, have contributed to the accident, yet if the defendants could by exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiffs' negligence will not excuse him: see (1867) 1 A C 754 (4). The plaintiffs in this case might have been at fault for not having complied with Government rules for exhibition of lights on their boats lying at anchor; but the collision could very well have been averted by the exercise of ordinary care and skill of the Serang of the steamer, who we have no doubt, on the evidence before us, saw or was in a position to see the boat at anchor from a distance, and could well have by exercise of ordinary care prevented the collision. On the conclusions we have arrived, as indicated above, the decision of the Court below, holding the defendants liable for damages must be affirmed.

The quantum of damages has been determined by the Court on evidence before it, regard being had to the claim in suit. Out of the total amount of Rupees 4,995-7-6, decreed in favour of the plaintiffs, the sum of Rs. 500 approximately was objected on three main grounds. It was urged on behalf of the defendants-appellants, that the amount of Rupees 287-4-9, representing the expenses incurred by the plaintiffs for sending the goods mentioned in Sch. (Ka) to the plaint, from Calcutta to Kaliya Bandar, should not have been allowed; that Rs. 200 should not have been allowed for miscellaneous expenses; and that the amount of Rs. 100 for costs of conducting criminal case was not recoverable by the plaintiffs from the defendants. In the matter of costs for sending goods from Calcutta to Kaliya Bandar, it was conceded on behalf of the plaintiffs-respondents in this appeal, that the amount charged under that head could not properly be allowed to the plaintiffs in the suit. In regard to the three items generally it was stated that interest on damages having been disallowed by the Court below, the plaintiffs were entitled

to get the amounts under the above three heads, on an equitable consideration of the case before the Court. In our judgment, the Court below was right in disallowing interest on damages in the case before us; and taking all the three items together, it would not be unfair, on the materials on record, to allow deduction in favour of the defendants-appellants, to the extent of Rs. 500, as claimed by them in this appeal from the total amount of damages decreed against them. The amount of Rs. 500 will be deducted from the amount of Rs. 4,994-7-6 mentioned in the decree of the Court below, passed in favour of the plaintiffs-respondents. The decree passed by the lower Court, against which this appeal is directed, is affirmed in other respects. The parties are to bear their own costs in this Court.

K.S./R.K.

Order accordingly.

* A. I. R. 1936 Calcutta 155

R. C. MITTER, J.

Parbati Charan Mukhopadhyaya—Plaintiff and *others*—Appellants.

v.

Bandeali Akon and *others*—Respondents.

Appeal No. 201 of 1934, Decided on 17th January 1936, from appellate decree of Sub-Judge, Bakargunj, D/- 7th September 1933.

* **Lease—Varying terms of lease with respect to amount of rent—Document requires registration.**

A document given by the owner of land to his tenant or by the tenant to his landlord, varying the term of the tenancy with reference to the amount of rent to be paid is an interest in immoveable property and does require registration: 2 I C 89, held impliedly overruled by 39 Cal 284 (F.B); 24 Cal 20 and 22 Mad 217, Not foll. [P 157 C 1]

Chandra Sekhar Sen—for Appellants.

Profulla Kumar Roy—for Respondents.

Surajit Chandra Lahiri—for Deputy Registrar.

Judgment.—The question involved in this appeal is whether the plaintiff is entitled to get a decree for rent against the defendants as tenants at the rate of Rs. 76-12-7 a year or at the rate of Rs. 58-13-10 a year. It is admitted that the tenancy is a permanent tenancy. It is also admitted that Rs. 58-13-10 have been realized by the landlord from the tenants up to the year 1316. It is a find-

4. *Radly v. L & N W Ry Co.*, (1867) 1 A C 754=46 L J Ex 578=25 W R 147=35 L T 637.

ing of the Court that the origin of the tenancy is lost in obscurity, at least it was not created after the Transfer of Property Act came into force: and there is no registered document or any document showing the creation of the tenancy. The landlord's case is that at the time of the Settlement Operation under Ch. 10, Ben. Ten. Act, excess lands were found in possession of the tenants, that is to say, more land than what was stated in the collection paper of the landlord; and that in the year 1317, the tenants verbally agreed to pay additional rent for excess area, and the total rent was settled at Rs. 76-12-7 which the tenants undertook to pay from 1317, and the tenants had in fact paid at that rate since 1317. The defendants state that the rent was Rs. 58-13-10 and that is still the rent and the landlord never realized rent at the higher rate at any time, and that in any event the said contract cannot be proved except by a registered document.

In support of the landlord's claim he produced a large number of counterfoils of rent receipts from the year 1317 up to a few years of the suit. These counterfoil rent receipts show that rent has been realized at the rate of Rupees 76-12-7. Both the Courts below have believed these counterfoils to be genuine and they have found that the landlord realized from the tenants from 1317 rent at Rs. 76-12-7. The Court of first instance decreed the plaintiff's claim at the aforesaid rate. But the lower appellate Court has dismissed the plaintiff's claim. From the evidence of realization of rent at the rate of Rs. 76-12-7 from 1317, the necessary inference is that that figure was arrived at by agreement between the landlord and the tenants, that is to say the tenants agreed orally to pay from 1317 at the rate of Rupees 76-12-7 instead of the low rate of Rs. 58-13-10. The lower appellate Court in granting the plaintiff a decree at the rate of Rs. 58-13-10, has held that such oral contract was ineffective in law, for such a contract must be by a registered document. If a permanent tenancy is created after the Transfer of Property Act it is clear that a registered document is necessary under S. 107, T. P. Act. The question, therefore, is whether the rent of a permanent tenancy can be varied after the passing of the Transfer

of Property Act by an oral agreement, that is to say without a registered document. As I have said, the lower appellate Court has taken the view that it cannot be done without a registered document.

Mr. Sen on behalf of the appellant contends that the view taken by the lower appellate Court is wrong, and for that purpose he cites before me a passage from the case of 11 C L J 22 (1). The passage is to be found at p. 25 of the report, and it runs as follows:

The question to be decided in the case of every dowl therefore is as to whether it embodies a special agreement between the parties; if it does, it requires registration; if it does not the registration is not needed. Now in the case before us it cannot be said that the dowl upon which reliance was placed is a lease. There was a pre-existing tenancy; that is the common case of both the parties. The only effect of the dowl was to evidence that there had been a commutation of rent and that the rent which was previously payable, partly in kind and partly in cash, was henceforth to be paid in cash. To a document of this description the principle laid down by this Court in 24 Cal 20 (2), and by the learned Judges of the Madras High Court in 22 Mad 217 (3) applies. That principle is that a document given by the owner of land to his tenant or by the tenant to his landlord, varying the term of the tenancy with reference to the amount of rent to be paid is not an interest in immoveable property and does not require registration.

The question is whether the passage which I have italicized above, is still good law in view of the decision of the Full Bench in 39 Cal 284 (4). So far as the facts of the case of 11 C L J 22 (1) are concerned there cannot be any doubt that the actual decision therein has not been affected by the Full Bench, for in that case there was no question of variation of rent of a tenancy. The rent was originally fixed partly in cash and partly in kind, and all that the landlord and tenant agreed upon was to put a value upon the rent payable in kind and agreed to pay thereafter the rent in cash only. In the referring order to the Full Bench Woodroffe, J. and Caspersz, J., relying upon 24 Cal 20 (2), and the case of *Obai Goundan* (3) (supra) noticed in the aforesaid passage in 11 C L J 22 (1),

1. Haro Prosad Das v. Ram Narain Chowdhury, (1910) 11 C L J 22=2 I C 89.
2. Satyesh Chandra v. Dhunpat Sing, (1897) 24 Cal 20.
3. Obai Goundan v. Ramlinga Ayyar, (1899) 22 Mad 217=8 M L J 256.
4. Lalit Mohan Ghose v. Gopali Chuk Coal Co. Ltd., (1912) 39 Cal 284=12 I C 723 (FB).

expressed the view that a document which varied an existing rent in a registered lease did not require registration. The Full Bench, however, had to consider the case of variation of rent or royalty, or reduction of rent or royalty in a lease originating with a registered document executed after the Transfer of Property Act, by reason of certain letters written by the landlord and the tenant by which an agreement for reduction of royalty had been arrived at. But in dealing with this question the Full Bench went into the matter fully and after referring to S. 107, T. P. Act, said that the plain intent of that section was that all essentials of a lease of this description, that is to say a lease of immoveable property from year to year or any term exceeding one year, or reserving an annual rent, must be embodied in one or more documents duly registered, and then it pointed out that the provision about the amount of rent was an essential element of a lease. In my judgment, therefore, the reasons so given by the Full Bench in the case of 39 Cal 284 (4), furnish an answer to the case which I have before me, and the said Full Bench case affected very much the law as laid down in the portion of the judgment in the case of 11 C L J 22 (1), which I have underlined. It might be mere incidentally noticed that Mookerjee, J., who delivered the judgment in 11 C L J 22 (1) was himself a party to the Full Bench judgment.

Having regard to these facts, I do hold that the learned Subordinate Judge is right in holding that without a registered document, the plaintiff is not entitled to claim rent at more than the rate of Rs. 58-13-10 a year. The result is that this appeal is dismissed with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 157

JACK, J.

Arman Shaik and others — Accused—
Petitioners.

v.

Naimuddin Shaik—Opposite Party.

Criminal Revn. No. 894 of 1935, Decided on 19th November 1935.

Penal Code (1860), Ss. 143 and 427—Person put in possession of field under O. 21, R. 95, Civil P. C., cutting crops—No offence under either S. 143 or S. 427 is committed.

Where a purchaser is put into possession of fields under O. 21, R. 95, Civil P. C., he is en-

titled to cut the crop standing on it and he cannot be convicted under Ss. 143 and 427, Penal Code. [P 158 C 1]

*Sudhansu Sekhar Mukherjee—*for Petitioners.

*Nirmal Chandra Das Gupta—*for Opposite Party.

Order.—In this case a rule was issued on the District Magistrate and the opposite party to show cause why an order convicting the petitioners under Ss. 143 and 427, Penal Code, and fining one Rs. 100 and the other petitioners Rs. 50 each should not be set aside.

The prosecution case is that the petitioners and others forcibly cut and took away unripe paddy from the complainant's land and thereby committed mischief to the extent of Rs. 1,200. The finding is that the petitioners had been put in symbolical possession by a civil Court and that they had been trying to oust the complainant and one Musobdi from the land. These were the persons who actually grew the crop and the petitioners came there and cut away the unripe crop while the complainant left the locality in order to institute a suit to restrain the petitioners from cutting away the standing crop from the land.

It is contended on behalf of the petitioners that they had been put into actual physical possession by a civil Court of the land with the standing crop and were therefore entitled to cut the crop. On a reference to the statement of the complainant it appears that the complainant admits that the petitioners were put into possession by a civil Court. There appears to be nothing on the record in support of the theory that they were merely put into symbolical possession. In the circumstances, having been put into possession of the land and the crop by a civil Court, they were perfectly entitled to cut the paddy whether it was ripe or unripe.

The deposition of the Assistant Sub-Inspector in another case against the petitioners had been shown to me in which he states that only ripe paddy was cut and that the unripe paddy was not cut. The proceedings under S. 144 which followed this case also show that all the paddy was not reaped. There appears to be therefore some doubt whether the Courts below were right in accepting the complainant's statement that the paddy which was cut was unripe. The peti-

tioners apparently were put into possession under O. 21, R. 95 and that being the case, they were entitled to cut the crop, and their convictions under Ss. 143 and 427 cannot be supported.

This rule is, accordingly, made absolute and the convictions and the sentences are set aside. The fine, if paid, will be refunded.

B.D./R.K. *Rule made absolute.*

**** A. I. R. 1936 Calcutta 158**
Special Bench

MUKERJI, AG. C. J., LORT-WILLIAMS
AND S. K. GHOSE, JJ.

In the matter of N, an Advocate.

O. O. C. J., Decided on 10th January 1936.

***(a) Legal Practitioner — Professional or other misconduct—**Court has jurisdiction to take action in respect of all misconducts—Under S. 10 (1), Bar Councils Act, Court can take cognizance of all misconducts—Discretion left in Court should be judicially exercised.

By the words professional or other misconduct, the legislature intended to confer on the Court jurisdiction to take action in all cases of misconduct, whether in a professional or other capacity. The word 'may' in sub-s. 1 of S. 10, Bar Councils Act, makes it plain, that while the jurisdiction of the Court is not restricted but extends to all cases of misconduct, a discretion is left to the Court to take action in suitable cases only. It is not possible to lay down any hard and fast rule, and the exercise of the discretion will often have to be varied with changing conditions. No general principles can or ought to be laid down fettering the Court's discretion, except that it must be exercised judicially: *In re Weare*, (1893) 11 Q B 439 and 1935 P C 168, *Ref.* [P 159 C 2; P 160 C 1]

**** (b) Legal Practitioner—Misconduct —**Two tests—One of misconduct such as to be unworthy of remaining in profession; second of unfitness to perform duties of advocate—Two tests to be read disjunctively — Tests equally applicable in cases of suspension or reprimand of advocates.

The test that the Court has to apply in considering whether an advocate should be struck off the roll of advocates is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to be a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an advocate is called upon to perform. The two conditions laid down as aforesaid should be taken disjunctively so that on the fulfilment of any one of the conditions the test would be regarded as satisfied. This test would prove a sound working rule in the majority of cases and would be applicable to all branches of the profession: the first condition being a standard applicable to all, and as regards the second condition the circumstances to be taken into consideration differing according to the duties attaching to the particular

profession. The test speaks of striking off the roll which is equivalent to removal. But as regards suspension or reprimand the test would apply equally well, the form of the action taken being dependent on the nature and gravity of the misconduct found and also other circumstances: 1934 Rang 33, *Applied.* [P 160 C 1]

***(c) Legal Practitioner — Disciplinary jurisdiction of Court —**Jurisdiction should not be employed either to aid or to supplement ordinary criminal law of the land.

The disciplinary jurisdiction vested in Courts should not be employed merely in aid of the criminal law of the land and merely to supplement, as it were, by way of a further punishment, a punishment which the advocate has received under that law for the misconduct of which he is guilty: *Ex parte Brounsall*, 2 Cowd Rep 829, *Applied.* [P 160 C 2]

**** (d) Legal Practitioner—Misconduct—**Conviction of criminal offence is per se evidence of misconduct—All criminal offences do not call for disciplinary measures—Conviction for sedition does not necessarily involve removal or suspension of advocate—Court should consider facts on which conviction is based.

Conviction of a criminal offence is per se evidence of misconduct. But while conviction for a criminal offence is prima facie evidence of misconduct, all criminal convictions are not grounds for the exercise of the Court's disciplinary jurisdiction, e. g., motoring offences. A mere conviction under S 124-A does not necessarily involve the removal or suspension of a legal practitioner but the Court must ascertain and take into consideration the facts on which the conviction is based: 1935 P C 168; 1922 P C 351; 1934 Lah 251; 6 N L R 129; 1920 Bom 168 and 1924 Mad 129, *Discussed.*

[P 160 C 2; P 161 C 1]

S. C. Roy, P. C. Ghose, J. C. Moitra
and *R. Chowdhury*—for Advocate.

A. K. Roy—for the Crown.

H. C. Mazumdar—for the Bar Council.

Judgment. — Mr. Niharendra Dutt Mazumdar, a Barrister of the Middle Temple, was enrolled under the Bar Councils Act, on 11th January 1933 and was admitted as an advocate of this Court, his name being entered in the roll of advocates entitled to appear and plead on the original side of the Court on 17th January 1933. It is his case that soon after his enrolment as aforesaid he began to take a prominent part in Labour and Trade Union movements and became, as he says, an "Honorary Trustee," some sort of a principal officer of a Trade Union of the labourers of the Port and Docks of Calcutta registered under the Indian Trade Unions Act of 1926. In 1934, between 3rd March and 2nd December, he delivered a number of speeches at certain

meetings of the Union held at public places. For three of the speeches, said to have been made on 3rd, 4th and 18th March respectively, proceedings under S. 107, Criminal P. C., were taken against him and the Magistrate ordered him to be bound over to keep the peace for one year, and this order was affirmed by this Court on appeal. For three other speeches, made respectively on 29th April, 11th November and 2nd December, the Magistrate convicted him in three separate cases under S. 124, Penal Code, and sentenced him to undergo rigorous imprisonment for nine months, one year and one year respectively. He preferred appeals to this Court in the first and the third of these cases, but not in the second case, and this Court being of opinion that the sentence which he was undergoing in the second case would be sufficient for all the cases, reduced the sentence in the first case to the period already undergone and ordered the sentence in the third case to run concurrently with that in the second case.

In the meantime, upon a petition presented by the Registrar on the original side of this Court on 22nd July 1935, in which all the aforesaid cases were set out the Court referred the matter to the Bar Council for inquiry. The tribunal constituted for the purpose held the inquiry, its findings having been received, the case has come up before us for passing final orders.

A considerable part of the arguments addressed to us on behalf of the advocate was directed to establish that the misconduct referred to in sub-s. (1) of S. 10, Indian Bar Councils Act, means such misconduct as would make a lawyer unfit for the exercise of his profession. This contention apparently is based upon a comparison of the language of the said subsection with the wording of Cl. 10 of the Letters Patent, under which the Court can take action on reasonable cause; it being suggested that the legislature by using the word "misconduct" in the Indian Bar Councils Act in the place of the more indefinite phrase "reasonable cause" in the Letters Patent has restricted the powers of the High Court in this respect. On this supposition it has been argued that the words "professional or other misconduct" can mean misconduct in a professional capacity and also only such misconduct in a private capa-

city as would denote unfitness for the duties of an advocate. The argument is sought to be supported by reference to these decisions of English Courts in which arose the question of taking disciplinary action against Solicitors and in which, while formulating the principles on which such action should be taken, the question of their unfitness to practice as Solicitors was stressed upon. One such case is (1893) 11 Q B 439 (1) in which Lopes L. J., observed :

The jurisdiction of the Court extends not only to the case where the misconduct has been connected with the profession of the Solicitors, but also to cases where the conduct, though not so connected, has been such as to make it clear to the Court that that person is no longer fit to be held out as a fit and proper person to exercise the important functions with which the Court entrusts him. * * *

If he has previously misconducted himself we should consider whether the circumstances were such as to prevent his being admitted or whether he had condoned his offence by subsequent good conduct, the principle on which the Court acts being to see that suitors are not exposed to improper officers of the Court.

But in the same case Lord Esher, M. R., expressed himself in words which may perhaps be read as taking a much wider view of the Court's jurisdiction in this respect. He observed :

The Court is not bound to strike him off the rolls unless it considers that the criminal offence of which he has been convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession.

There is, however, no authority in which it has been said that in the case of misconduct in a private capacity, unless it denotes unfitness in professional capacity, action should not be taken. And I do not see why the words "professional or other misconduct" should not be read in their plain and natural meaning. I therefore respectfully agree with Beaumont, C. J., in holding that by the words aforesaid the legislature intended to confer on the Court jurisdiction to take action in all cases of misconduct, misconduct in a professional or other capacity : 59 Bom 57 (2), affirmed on appeal by the Judicial Committee in 39 C W N 1281 (3). The word "may" in sub-s. (1) of S. 10 of the Act makes it plain, that

1. *In re Weare* (1893) 11 Q B 439.

2. *Advocate-General of Bombay v. Three Advocates*, 1935 Bom 1=154 I C 546=59 Bom 57=36 Bom L R 1136.

3. *Advocate-General of Bombay v. Pharoj Rustomji Bharucha*, 1935 P C 168=157 I C 428=1935 Cr C 1059=39 C W N 1281 (P C).

while the jurisdiction of the Court is not restricted but extends to all cases of misconduct, a discretion is left to Court to take action in suitable cases only. With regard to the exercise of the Court's discretion in a case of this nature, or for the matter of that in any other case, it is not possible to lay down any hard and fast rule, and the exercise of the discretion will often have to be varied with changing conditions. No general principles can or ought to be laid down fettering the Court's discretion, except that it must be exercised judicially. But if reported decisions afford us a guide, I would adopt, with respect, the test which Page, C. J., on a consideration of some of the authorities, laid down in 12 Rang 110 (4). He said :

The test that the Court has to apply in considering whether an advocate should be struck off the roll of advocates is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an advocate is called upon to perform.

With all respect I would prefer to take the two conditions laid down as aforesaid disjunctively, and apply the test in that way so that on the fulfilment of any one of the conditions the test would be regarded as satisfied. This test would prove a sound working rule in the majority of cases and would be applicable to all branches of the profession; the first condition being a standard applicable to all and as regards the second condition the circumstances to be taken into consideration differing according to the duties attaching to the particular profession. The test speaks of 'striking off the roll' which is equivalent to removal. But as regards suspension or reprimand the test would apply equally well, the form of the action taken being dependent on the nature and gravity of the misconduct found and also on other circumstances. Amongst the principles that are well settled in this connexion one is contained in the following words of Lord Mansfield in 2 Cowd Rep 829 (5) :

This application is not in the nature of a second trial or a new punishment. But the question is whether after the conduct of this man, it is proper that he should continue a member of the profession which should stand free of all suspicion. It is not by way of

punishment, but the Courts in such cases, exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.

If the above principle be correct, then another principle follows immediately from it and it is this: that the disciplinary jurisdiction vested in Courts should not be employed merely in aid of the Criminal law of the land and merely to supplement, as it were, by way of a further punishment, a punishment which the advocate has received under that law for the misconduct of which he is guilty.

The present case is not one in which the advocate concerned had engaged himself in revolutionary activities designed to destroy the Government or the system of which the Courts of justice form part or to boycott the Courts or to break any particular law which it is the duty of the Courts to administer. Nor is there any indication of his having made an organised or persistent attempt to create a breach of the peace or to incite acts tending to subvert law and order. In the speeches that he made on a subject in which he was interested, he advocated certain reforms and supported a policy which suited his ideals, and in the course of those speeches he made utterances which were open to objection. For some of these speeches it was considered necessary to bind him over for a year to keep the peace, and in others, passages were found in which he had transgressed the limits of fair criticism and which appeared to bring him within the clutches of the law as to sedition. For the offences of sedition he was punished in the three cases in which he was tried. It is really the convictions in these last mentioned cases which have to be regarded for the present purpose.

That to be convicted of sedition is to be found guilty of a misconduct cannot be denied. Indeed it is beyond question now that conviction of a criminal offence is per se evidence of misconduct: 59 Bom 57 (2), affirmed on appeal by the Judicial Committee in 39 C W N 1281 (3). But while conviction for a criminal offence is prima facie evidence of misconduct, all criminal convictions are not grounds for the exercise of the Court's disciplinary jurisdiction e.g., motoring offences. And here the first question is whether a conviction for the offence of sedition is such

4. In the matter of an Advocate, 1934 Rang 33 =149 I C 856=12 Rang 110.

5. Ex parte Brounsall, 2 Cowd Rep 829.

misconduct as would, in all circumstances, require action to be taken under the Court's disciplinary jurisdiction. A consideration of some of the authorities relevant upon the point will be useful. A case to which very great importance must attach is that of 49 Cal 845 (6), in which a pleader made speeches at various places against a particular land revenue system in vogue in the Province, in the course of which he characterized the system as unjust and illegal, and advised his audience to stop payment under that system and leave it to Government to recover the dues by attachment. His sanad was cancelled upon grounds one of which was that his conduct appeared to be incompatible with his obvious duties and responsibilities as an official of the Court. The case went up to the Judicial Committee and their Lordships in refusing leave laid stress on the point that the pleader had not confined himself to protests, however vehement, against the tax or against its injustice, but that he had urged an organised resistance of payment and attempted to establish a system which would have impeded and might have defeated its recovery with grave danger to public peace. The case was one under S. 13 (f), Legal Practitioners Act.

The abovementioned cases, as well as a large number of other cases where legal practitioners convicted under S. 17, Criminal Law Amendment Act, 1908, or under S. 3, Police Incitement Disaffection Act, 1922, or for similar other offences, or found guilty of Civil Disobedience, or of participating in hartals or revolutionary campaigns for breaking or disobeying the laws of the land have been referred to and discussed in an elaborate judgment by Jai Lal, J., in 15 Lah 354 (7). Of these cases special reference must be made to three. One of these is 8 I C 282 (8), in which a legal practitioner of the Central Provinces was convicted under S. 124-A, I. P. C. and the question of his dismissal arose under S. 12, Legal Practitioners Act. The Court held that

6. *Shankar Ganesh v. Secy. of State*, 1922 P O 351=69 I O 367=49 I A 319=49 Cal 845 (P O).

7. *In the matter of Mohammad Alam*, 1934 Lah 251=1934 Cr O 479=149 I O 764=15 Lah 354.

8. *Emperor v. Kolhatkar*, (1910) 6 Nag L R 129 =8 I C 282=11 Cr L J 615.

Prima facie, such a conviction implied a defect of character and that loyalty to the Crown is a fundamental part of the structure of the legal profession throughout the British Empire.

It was found that the sedition of the pleader took the form of an implacable hatred of the British rule and everything connected with it, indicating a desire and intention not to correct but to root out the Government of India. And it was found that, even after the punishment was served out, he stubbornly adhered to his criminal tendencies and that there was an entire absence of any change of character or disposition in the direction of loyalty to the Crown. On these findings the pleader was dismissed.

Another case is 44 Bom 418 (9), in which the Advocates involved had signed a pledge whereby they bound themselves to refuse civilly to obey certain laws and such other laws as a committee to be appointed thereafter might think fit. Mcleod, C. J., held that it was the duty of the legal practitioners to advise their clients to the best of their abilities as to what the law is, and not as to what the law should be in their opinion, and that this conflict should be more pronounced if any of the legal practitioners had occasion to advise his clients regarding one of the laws denounced by the league, and added:

A very sound principle to remember is that those who live by the law should keep the law.

Beaumont, C. J., Bom 57 (2), dissented from the aforesaid view and observed that no such embarrassment was likely to ensue and also observed:

In our opinion, the obligation of obedience to the law is neither greater nor less in the case of lawyers than that of other citizens. If the so-called principle means that those who earn their living by the practice of the law must cease to do so if they break the law, the condition is one which should be imposed under legislative authority when the advocate is admitted and not invented afterwards by the Court.

The third case is 75 I C 977 (10). In this case the legal practitioner had instigated to forsake the English Courts and resort to the Courts to be set up by the Congress and to cease paying taxes to Government. For this conduct the re-

9. *In re Jivanlal Varajraj*, 1920 Bom 168=54 I C 679=44 Bom 418=22 Bom L R 13 (FB).

10. *In the matter of Ramachandra Rao*, 1924 Mad 129=75 I O 977=25 Cri L J 65=45 M L J 684 (F B).

newal of his sanad was refused, Coutts-Trotter, J. remarking as follows:

The last thing that I think we should consider ourselves concerned with in the ordinary way is what the political opinions of anybody are, whether they are members of the legal or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant who comes to ask for the issue or renewal of a sanad is applying to be treated as a part of the machinery for the maintenance of law and order in the body politic and to take an active part in administering for the other subjects of the Crown the benefit that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position while at the same time he is saying that law and order should be disobeyed, that taxes are not to be paid, and that public offices are to be abandoned in order to paralyse the very life of the body politic.

It is apparent that the pleader in the case last mentioned was persisting in his tenets when the order aforesaid was made. On a consideration of the cases referred to in his judgment, Jailal, J., in the case aforementioned deduced certain tests and came to the following conclusion:

Applying the above tests to the present case, it seems to me that a mere conviction under S. 124-A does not necessarily involve the removal or suspension of a legal practitioner, but the Court must ascertain and take into consideration the facts on which the conviction is based.

The case before the learned Judge was one in which the advocate concerned had been convicted of sedition, and the question that was being considered was whether he should not be removed or suspended from practice under Cl. 8, Letters Patent of the Lahore High Court and S. 41, Legal Practitioners Act. I have carefully considered all the decisions referred to by the learned Judge and with the conclusion quoted above, I entirely agree. I have read the speeches which the advocate delivered on the several occasions. They certainly bring the advocate within the clutches of the law as to sedition, inasmuch as in some of the passages therein base motives were attributed to Government and remarks were made which were likely to lead to disaffection and hold the Government up to contempt in the eyes of the public. At the same time, however, I am clearly of opinion that the general tenor of the speeches was inoffensive and was such as one would expect to find in speeches made in connexion with questions affecting a labour union. I would say of all the

speeches what was said in respect of one of them by my learned brother Lord Williams, J., namely:

Unfortunately in his enthusiasm, this accused, as so often happens, went over any line which could be held to be legitimate.

Regarding the speeches together, I find that except on some particular questions his views are not in any way hostile to the Government; and indeed there are several passages in them in which he may be taken to have advocated obedience to law and order. The tribunal of the Bar Council has pointed out:

Apart from his activities in connexion with the labour movement the respondent (meaning the advocate) seems to be a young man of good character, inexperienced in his profession, honest and straight in his dealings. No question of professional misconduct arises here. . . . After a very careful and anxious consideration of the speeches, and all the surrounding circumstances, we have come to the conclusion, not without some hesitation, that the respondent is guilty of 'other misconduct' under S. 10, Bar Councils Act; though in view of the fact that his speeches and conduct were in connexion with the then existing industrial movements and disputes, the case seemed to us to be very near the border line.

In my opinion no further action is called for in the case and I would order accordingly.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 162

GUHA AND BARTLEY, JJ.

Manikganj Trading and Banking Co. Ltd.—Judgment-debtor—Appellant.

v.

Madhabendra Kumar Shaha and another—Decree-holders—Respondents.

Appeal No. 117 of 1935, Decided on 23rd January 1936, from appellate order of Dist. Judge, Dacca, D/- 7th December 1934.

Company—Agreement by one class of creditors will not bind another class not party to agreement—Depositor in banking company obtaining decree ceases to be depositor—Hence he is not bound by scheme sanctioned by other depositors.

Sec. 153, Companies Act, itself contemplates an agreement with any class of creditors or an agreement with all creditors but, inasmuch as different classes affected by any scheme must hold separate meetings, and the term "class" must be confined to those persons whose rights are not so dissimilar as to make it possible for them to consult together with a view to their common interest, it is clear that an agreement arrived at by one class of creditors will not bind another class which has not been a party to it. And a depositor who has obtained a decree against a banking Company before any scheme

has been embarked on by the latter, ceases to be a depositor and becomes a decree-holder. Hence where the scheme was sanctioned by one class of creditors the depositors, a decree-holder, an entirely different class of creditors, will not be bound by it. The position is not altered by the consideration that the depositors in the meeting purported to treat decree-holders as "creditors": 1935 Cal 117, *Rel. on.*

[P 163 C 2, P 164 C 1]

Jatindra Mohan Choudhury for Asita Ranjan Ghose—for Appellant.

Atul Chandra Gupta and Bhagirath Ch. Das—for Respondent.

Satyendra Nath Mitra—for Dy. Registrar.

Bartley, J.—This appeal arises from an order made in execution proceedings. The judgment-creditor respondents obtained a compromise decree against the appellant Bank on 25th July 1933. On 28th August 1933, an order was obtained from this Court under S. 153, Companies Act, directing the Company to convene a meeting of its depositors for the purpose of considering a scheme of arrangement between the Company and its depositors. At this meeting, held in November 1933, it was agreed that depositors should not be entitled to demand payment for a period of seven years, and that each depositor should, for the purposes of the scheme, be deemed to be a creditor for the amount shown to his credit in the books of the Company as on 30th July 1933 irrespective of whether he had obtained a decree or not. The scheme was sanctioned by this Court on 23rd February 1934. On an application by the Bank objecting to the execution of the decree obtained by the respondents, the Court of first instance held that it could not be executed, on the ground that every depositor, whether armed with a decree or not, was bound by the arrangement entered into by the majority and sanctioned by this Court. The Court of appeal below reversed this decision, holding that the decree-holders ceased to be depositors when their decree was obtained. On appeal before us, it was contended on the strength of two decisions, 39 C W N 1198 (1) and 39 C W N 1199 (2), that this decision was wrong, and that the decree in the present case was incapable of execution.

Now the earlier of the two decisions

1. *Barisal Loan Office v. Sasthi Oharan Bhattacharya*, (1935) 39 C W N 1198.
2. *Serajgunj Loan Office v. Nil Kanta Lahiri*, 1935 Cal 777=39 C W N 1199=62 C L J 310.

cited is authority for the proposition that a scheme of composition passed and sanctioned under S. 153, Companies Act, binds all creditors of the Company, and it was definitely found in that case that on the facts, the composition applied to all the creditors, including the judgment-creditors. In the subsequent case cited, *Mitter, J.*, while adopting the view of the law stated above, pointed out that it was the duty of the Court sanctioning a scheme under the Act to see that one class of creditors or depositors does not feast upon the rights of another class. "It is for this purpose," he went on to say, "that separate meetings must be convened by distinct classes of creditors." Finally he held that if the Court grants sanction, the agreement of the majority of the creditors with the Company binds all those who fall within the class represented by the said majority. With this view of law, we are in entire agreement. S. 153, Companies Act, itself contemplates an agreement with any class of creditors or an agreement with all creditors but, inasmuch as different classes affected by any scheme must hold separate meetings, and the term "Class" must be confined to those persons whose rights are not so dissimilar as to make it possible for them to consult together with a view to their common interest, it is clear that an agreement arrived at by one class of creditors will not bind another class which has not been a party to it. In the present case, the scheme applied to the depositors only. It bound all depositors with effect from 5th November 1933, the date of the meeting, but did not bind any other class of creditors.

If then the present appellants were depositors on that date, they could not execute their decree. They had been depositors but, on 25th July 1933, had obtained a decree in a suit to recover the amount in deposit. It has been held in 38 C W N 1171 (3), that a depositor who has obtained a decree against a banking Company before any scheme has been embarked on by the latter, ceases to be a depositor and becomes a decree-holder. We see no reason to dissent from this view. In our judgment there is no conflict in the principle underlying the three decisions of this Court in the cases refer-

3. *In re Dewangunj Bank and Industry Ltd.*, 1935 Cal 117=155 I C 811=38 C W N 1171.

red to above, and what follows from that principle is that, in the present case, where the scheme was sanctioned by one class of creditors, the depositors, a decree-holder, an entirely different class of creditors, will not be bound by it. The position is not, in our opinion, altered by the consideration that the depositors in the meeting, purported to treat decree-holders as 'creditors.' The legal position remains that an agreement entered into by depositors would not necessarily bind creditors, who might conceivably include a much larger body of claimants. In the result, this appeal fails and must be dismissed with costs. We assess the hearing-fee at three gold mohurs.

Guha, J.—I agree.

K.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 164

R. C. MITTER, J.

Dol Govinda Das—Plaintiff—Applt.

v.

Makbul Sekh's infant heir and others
—Defendants—Respondents.

Appeal No. 322 of 1933, Decided on 8th April 1935, from appellate decree of Dist. Judge, Murshidabad, D/- 23rd August 1932.

(a) **Evidence Act (1872), S. 65**—Document per se inadmissible in evidence can be objected to at any time—Objection to method of proof must be taken at earliest point of time—Document not inadmissible per se—Secondary evidence sought to be given—Objection must be raised when document is put in and not in appeal or at time of argument.

A document which is per se inadmissible in evidence can be objected to at any time. If however the objection relates to the method of proof and if secondary evidence is sought to be put instead of the original, the objection must be taken at the earliest point of time. If the document is not inadmissible per se and if secondary evidence of it is sought to be tendered, the right time to object would be at the time the document is put in and not either at the appellate stage or at the time of the argument.

[P 164 C 2; P 165 C 1]

(b) **Evidence Act (1872), S. 65**—Secondary evidence of document alleged to have been lost, sought to be given—Hearsay evidence is admissible to show loss.

In order to show that search has been made for a document, so as to let in secondary proof of its contents, hearsay evidence of the answers given by the persons who were likely to have it in their custody ought to be received.

[P 165 C 1]

Ramaprasad Mukhopadhaya — for Appellant.

Ramendra Mohan Majumdar, Deputy Registrar—for Respondents.

Judgment.—This appeal is on behalf of the plaintiff in a suit for recovery of arrears of rent with cesses and damages for the years 1334 to the Pous Kist of 1337 B. S. and also for enhancement of rent under S. 30 (b), Ben. Ten. Act. It is admitted that the plaintiff would be entitled to claim arrears of rent if he is able to prove that the Dar Putni interest under Touzi No. 1152 of the Murshidabad Collectorate, under which the tenancy is admittedly held, has vested in him. For the purpose of proving the purchase of the said Dar Putni interest, the plaintiff proved the certified copy of the conveyance dated 13th November 1929 by which he purchased the property. At the time when the certified copy of the conveyance was put in, no objection was taken to its going in. In fact, neither in the deposition nor in the list of documents admitted into evidence nor on the back of the document is there any note that the document was objected to. For the purpose of proving the conveyance the plaintiff examined a man of the name of Umesh Chandra Mandal, a Gomasta of the plaintiff's Koolgachi Kutchery who was an attesting witness to the original conveyance. In his examination-in-chief he said that the original was lost from the Mianpur Kutchery, that he attested the Kobala written by Raghu Nath and executed by Purna Babu who had signed it in his presence. "The original of Ex. 1 was to this effect". In the course of the cross-examination, the witness stated that "the original of Ex. 1 is lost". I heard that from Khajaddi Gomasta. He lives within the jurisdiction of this Court and is alive." As I have stated before the document Ex. 1 was not objected to. At the time of the argument it was urged that the loss of the original being not proved, because the evidence of loss given by the witness Umesh Chandra Mandal was only hearsay, the document Ex. 1 cannot be received in this case.

This objection has been given effect to by both the Courts. I do not think that it was open to the defendants at the time of argument to object to Ex. 1. It is an undoubted principle of law that a document which is per se inadmissible in evidence can be objected to at any time. If however the objection relates to the method of proof, that is, if secondary evidence is sought to be put in instead of the original, the objection must be taken

at the earliest point of time. If the document is not inadmissible per se and if secondary evidence of it is sought to be tendered, the right time to object would be at the time when the document is put in and not either at the appellate stage or at the time of the argument. In this case if the objection had been taken at the proper time and in the proper form, the party who had put that document in, would have been able to adduce other evidence for the purpose of establishing that secondary evidence could be taken. With regard to the observation made by the Courts below that the loss has not been proved as the evidence of loss is merely hearsay, the following passage in Taylor on Evidence, Edn. 11, Vol. 1, p. 323, para. 430, is relevant. The learned author summarises the case law in England in these terms :

Indeed, it has been held that, in order to show that search has been made for a document so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received.

On the above principle also I think that the lower Courts were not right in rejecting Ex. 1 from consideration. I hold therefore that it must be taken that the plaintiff has proved the devolution of title on him and he is entitled to the arrears of rent claimed. As the plaintiff has also prayed for enhancement of rent under S. 30 (b), Ben. Ten. Act, and as that question has not been investigated by any of the Courts below having regard to the view taken by them that the plaintiff's suit was liable to be dismissed as he had failed to prove his title, I think there should be a remand of the case to the Court of first instance in order that this further claim, namely, the claim for enhancement under S. 30 (b) may be considered, and I direct accordingly. The plaintiff is entitled to his costs of this Court. Further costs are left to the discretion of the Court of first instance.

R.M./R.K.

Case remanded.

A. I. R. 1936 Calcutta 165

NASIM ALI, J.

Chandra Nath Das and others—Defendants—Appellants.

v.

Puskar Chandra Das and others—Respondents.

Appeal No. 1584 of 1932, Decided on 23rd January 1935.

Easement—Right of fishery—Right exclusively enjoyed from time immemorial—Legal origin for right can be inferred.

Where a person and his predecessor have been catching fish in a disputed *khaos* to the exclusion of all others from time immemorial, a legal origin for this right can be inferred in their favour. This legal origin may be either a grant or a regulation as evidenced by custom under which fishermen of the village have been exclusively catching fish in the disputed *khaos*: 9 Cal 698, *Disting*; *Lord Rivers v. Adams*, (1878) 3 Ex D 361; *Hall v. Nottingham*, (1875) 1 Ex D 1 and 1914 P C 48, *Ref*. [P 166 C 2]

Bhagirath Chandra Das—for Appellants.

Jogesh Chandra Roy and Shyama Prasanna Deb—for Respondents.

Judgment.— This is an appeal by some of the defendants in a suit for a declaration of fishery right of the fishermen of the village Manikpur in particular places (*khaos*) on the south bank of the tidal navigable river Lohar and for certain consequential reliefs. The plaintiffs' case is that they and their predecessors had been catching fish in those four *khaos* to the exclusion of all others from time immemorial peacefully and without interruption by placing stake-net, that the defendants who live in the village Budhanti lying on the north bank of the river dispossessed them from the first and second *khaos* in the month of Bhadra 1336 B.S. and were threatening to dispossess them from the other *khaos*. The defence of the defendants is that they have got exclusive right to fish in the disputed *khaos* and that the plaintiffs' story of possession and dispossession was absolutely false. The defendants also stated that the plaintiffs have got no *khaos* in the river Lohar. The learned Munsif held that the plaintiffs have succeeded in proving their title to the disputed *khaos* and in that view decreed the plaintiffs' suit. On appeal the decree of the trial Court has been affirmed by the learned District Judge. The only point urged in support of this appeal is that an exclusive right of fishery in portions of tidal navigable rivers cannot be claimed either by prescription or custom. Reliance was placed by the learned advocate for the appellant on the decision in, in 9 Cal 698 (1). The facts of that case however are entirely different. In that case fishery right was claimed in certain beels against the

1. *Lutchmееput Sing v. Sadanka Nushyo*, (1883) 9 Cal 698=12 C L R 382.

owner of those beels by an unlimited number of tenants of several parganas. Under these circumstances, it was held that such a custom would be unreasonable, for if the right based on such a custom were declared the tenants would take away the whole fish stocked in the beels and nothing would be left for the owner. The learned Judges in that case relied upon the case of (1878) 3 Ex D 361 (2). But in (1875) 1 Ex D 1 (3), the possibility that the custom there set up might have the effect of taking away from the owner the whole use and enjoyment of property was not thought sufficient ground for disallowing it.

The facts of the present case as stated above are entirely different. Here both the parties claim exclusive right to fish in the disputed places under a custom. The real issue in the suit was whether the plaintiffs or the defendants were entitled to fish in the disputed places exclusively under the admitted custom and the parties led evidence on that issue. The existence or validity of the custom was not denied by either of the parties. The munsif in this connexion has observed as follows: "Both parties claim exclusive right in the disputed *khaos* standing upon custom." It was not suggested in the pleadings or in the evidence that the custom was unreasonable as the plaintiffs would take away all the fishes of the river. The right claimed in the present suit is by the fishermen of one village only. In (1859) Cal S D A 1357 (4), at p. 1361, the following observations were made:

By our Regulation Law, Regn. 11 of 1825 which is declaratory of the common law of this country, as well as by the common law of England, the bed of a navigable river is not the property of any individual and consequently the right of fishery in such rivers is not private property, but that right is a right common to every person; and if any individual claims an exclusive right in navigable waters, he must show that it has been acquired either by grant or by prescription which is evidence of a grant.

A legal origin for the right can be inferred from long user: see 41 I A 221 (5), at p. 227. It was however contended by the learned advocate for the appellant that a legal origin for the original claim

cannot be inferred in favour of the fishermen of a village. But in the case of 31 I A 75 (6), at p. 81, in which the question was whether the tenants of nine villages appertaining to a certain taraf of a pargana could acquire a right of pasturage over the waste lands of the villages to which they belonged, Lord Macnaghten observed as follows:

On proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately however both in the Munsif's Court and in the Court of the Subordinate Judge, the question was overlaid and in some measure obscured by copious references to English authorities and by the application of principles or doctrines, more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions.

Again a fishery common to the public might be used subject to such regulations as are essential for its enjoyment by the public. If such a regulation is evidenced by a custom obtaining from time immemorial, there is no reason why it should not be enforced as creating an obligation: see 12 Mad 43 (7). Again in the case of 39 Cal 53 (8), Cox, J. (Teunon, J., concurring), observed as follows:

There is authority in the cases of 2 Bom 19 (9) and 12 Mad 43 (7) for the proposition that the method of enjoying the common right may be regulated by custom.

It has been concurrently found by the Courts below that the plaintiffs and their predecessors had been catching fish in the disputed *khaos* to the exclusion of all others from time immemorial. I have already pointed out that a legal origin for this right can be inferred from immemorial user. This legal origin may be either a grant or a regulation as evidenced by custom under which fishermen of the village Manikpur have been exclusively catching fish in the disputed *khaos*. The Courts below were therefore right in decreeing the plaintiffs' suit. The appeal is accordingly dismissed with costs. Leave to appeal under S. 15, Letters Patent, has been asked for in this case and is refused.

B.D./R.K.

Appeal dismissed.

2. Lord Rivers v. Adams, (1878) 3 Ex D 361=48 L J Ex 47=39 L T 39=27 W R 381.

3. Hall v. Nottingham, (1875) 1 Ex D 1.

4. Gureeb Hossain Chowdhree v. Lamb, (1859) Cal Sadar Dewani Adalat 1357.

5. Srinath Roy v. Dinabandhu Sen, 1914 P C 43=41 I A 221=25 I C 467=42 Cal 489 (P C).

6. Bholanath Nandi v. Midnapore Zemindary Co., (1904) 31 I A 75=31 Cal 503=8 C W N 425=8 Sar 611 (P C).

7. Narasayya v. Sami, (1889) 12 Mad 43.

8. Abhoy Charan Jalia v. Dwarka Nath Mahto, (1912) 39 Cal 53=15 C W N 972=11 I O 180.

9. Baban Mayacha v. Nagu Shrivacha, (1876) 2 Bom 19.

A. I. R. 1936 Calcutta 167

HENDERSON, J.

Nibaran Chandra Bhattacharjee —
Petitioner.

v.

Hem Nalini Debi and another—Oppo-
site Parties.

Civil Rule No. 1700 of 1934, Decided
on 14th March 1935, from order of
Munsiff, 1st Court, Burdwan, D/- 22nd
September 1934.

**Bengal Tenancy Act (1885), S. 26-F—Peti-
tion for pre-emption—Complicated questions
of title should not be gone into in proceed-
ings for pre-emption.**

The complicated questions of title should not
be gone into and determined in proceedings for
pre-emption under S. 26-F of the Act. Any
right which the transferor may have in the
property remains entirely unaffected and it is
only the right, title and interest of the trans-
feree which passes. [P 167 C 2]

*Ramaprosad Mukerji and Purusottam
Chatterji*—for Petitioner.

*Sitaram Banerji and Sital Prosad
Chatterji*—for Opposite Parties.

Prokas Chandra Ghose—for Transferee
—Opposite Party.

Order.—This is a rule calling upon
the opposite parties to show cause why
an order of the Munsiff dismissing an
application made by the petitioner for
pre-emption under the provisions of
S. 26-F, Ben. Ten. Act, should not be set
aside. The facts are these : Opposite
party No. 2 is the transferor, opposite
party No. 1 is the transferee. When
the notice was served upon the petitioner
he filed an application. The opposite
parties then combined together to make
out a case that there was no transfer ;
that opposite party No. 2 was a minor ;
that no consideration passed and so on.
The learned Munsiff went into all these
questions and came to the conclusion
that there was no transfer, with the re-
sult that opposite party No. 2 is still a
raiyyat holding under the petitioner. The
question raised in this rule is whether it
was open to the Munsiff to consider this
question at all. The section appears to
have been enacted in order to provide a
procedure by which the money due from
the pre-emptor will be paid to the trans-
feree and for ensuring that the right of
pre-emption is exercised within the time
allowed. Under sub-s. (1), as soon as
the notice is served, the landlord has the
right to make an applicaton. This appli-
cation will be dismissed unless the amount
of the consideration money together

with the compensation is paid into Court.
The Court then has to give notice to the
transferee so that he may have an op-
portunity of stating what other sums, if
any, he may have paid in respect of the
property. The Court then directs the
applicant to pay these amounts into Court
as well. When these deposits are made
under sub-s. (5), the Court shall make
an order allowing the application.

The first thing to be noticed is that
the transferor takes no part whatever in
these proceedings. No notice is to be
served upon him and it does not appear
that he has any locus standi. The trans-
feree is entitled to show that he spent
money on account of the property ; but
he is not allowed to file any objection to
the granting of the petition on any other
ground. On the contrary, under the
sub-section the Court shall make an
order allowing the application provided
the deposits have been made. It is quite
clear from these provisions that it was
never the intention of the legislature
that complicated questions of title should
be gone into and determined in these
proceedings. Any right which the trans-
feror may have in the property remains
entirely unaffected and it is only the
right, title and interest of the transferee
which passes. It appears that in this
case the transferor is still in possession
and the petitioner will not be able to
obtain possession without bringing a suit
in which the question of title between
him and the transferor will be gone into
and decided on proper materials after
proper issues have been framed. But it
was never the intention of the legislature
that questions of that sort should be
determined in the way in which it was
sought to do in these proceedings. It
was not suggested on behalf of the trans-
feree that the necessary deposits were
not made and this is the only ground on
which he could resist the granting of the
application. If in spite of having notice
of the case now made between the trans-
feror and transferee the petitioner wishes
to proceed with his application, he is
entitled to succeed. The result is that
this rule is made absolute. The peti-
tioner will be granted a declaration
allowing the application in the terms of
sub-s. (5). In the circumstances, I make
no order as to costs.

R.M./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 168

NASIM ALI, J.

Sasthi Charan Barnik—Defendant—Appellant.

v.

Mannidra Lal Singha — Plaintiff — Respondent.

Appeal No. 1016 of 1933, Decided on 22nd May 1935, against decree of Addl. Sub-Judge, Chittagong, D/- 9th January 1933.

Bengal Tenancy Act (1885), S. 87—Transfer of holding on footing that under-lease should be given to transferor—Transaction merely amounts to transfer of part of holding—It does not amount to abandonment

Where a transfer of a holding is made on the footing that an under-lease should be given to transferor, the transaction is to be treated not as a transfer of the whole interest in the holding but as being no more than a transfer of the part. Such a transfer does not amount to an abandonment within the meaning of S. 87, and the landlord is not entitled to recover possession of the holding. The principle also applies where the raiyat is in possession of a portion of agricultural lands. [P 168 C 2; P 169 C 1]

Where, therefore, an occupancy tenant, although he sells the entire holding to another person, continues to be in possession of a portion of it as a sub-lessee and has not left the village and the transferee has been paying rent after his purchase to the landlord in the name of the transferor nor is there any repudiation of tenancy by the occupancy tenant, there is no abandonment within the meaning of S. 87. The mere fact that the occupancy tenant has been paying rent to the transferee for the land which is in his cultivation is not enough to show that he had repudiated his liability to pay rent to the landlord: 1932 Cal 584 and 1915 Cal 242, *Rel on*. [P 169 C 1]

Charu Chandra Sen and Panchanan Ghosal—for Appellant.

Chandra Sekhar Sen—for Respondent.

Judgment.—This appeal arises out of a suit for khas possession of a holding on declaration of the plaintiff's title thereto. The plaintiff's case briefly stated is as follows: One Man Gazi held the disputed holding under the plaintiff as an occupancy raiyat having no transferable right therein. He transferred the entire holding to the defendant in Asarh 1290 M. E. and abandoned the holding. The defendant is therefore a trespasser and is therefore liable to be evicted. The main defence of the defendant is that he is a purchaser only of a portion of the holding and that there had been no abandonment of the holding by the raiyat Man Gazi. The learned Munsif held that the defendant is the transferee of a portion

of the holding and that there had been no abandonment of the holding by Man Gazi. He accordingly dismissed the plaintiff's claim for khas possession. On appeal by the plaintiff to the lower appellate Court the learned Judge has found that Man Gazi has sold the entire holding to the defendant, but he has continued to be in possession of a small portion of the holding as a sub-lessee under the transferee. On these facts the learned Judge was of opinion that the holding was abandoned by Man Gazi and that the plaintiff was entitled to re-enter. He accordingly allowed the appeal and decreed the plaintiff's suit for khas possession. Hence the present appeal by the defendant.

The point for determination in this appeal is whether the tenancy of Man Gazi had come to an end by transfer as alleged by the plaintiff. Now the position, when a transfer is made on the footing that under-lease shall be given to the transferor, is this that the transaction is to be treated not as a transfer of the whole interest of the holding but as being no more than a transfer of the part: see 36 C W N 478 (1). On the facts found by the learned Judge therefore the transfer of the holding in the present case must be taken to be a transfer of only a part of the holding. The plaintiff is therefore not ordinarily entitled to recover possession of the holding unless there has been either abandonment within the meaning of S. 87, Ben. Ten. Act, or repudiation in the tenancy: see 42 Cal 172 (2). The point for consideration therefore is whether there has been abandonment in the present case within the meaning of S. 87, B. T. Act. The possession of Man Gazi of a portion of the holding has been proved in the present case. He has not left the village. His evidence which has been accepted by the learned Judge goes to indicate that the transferee has been paying rent after his purchase to the plaintiff. The plaintiff's case is that he did not recognize the purchase by defendant 1. There cannot be any doubt therefore that the transferee has been paying rent in the name of the transferor. Under these

1. *Hira Lal Ghose v Imanuddi*, 1932 Cal 584=199 I C 227=56 C L J 256=36 C W N 478.
2. *Dayamoyee v. Anandamohan Roy*, 1915 Cal 242=27 I C 61=20 C L J 52=42 Cal 172=18 C W N 971 (F B).

circumstances, it cannot be said that no arrangement has been made for payment of the rent due to the landlord. I am therefore of opinion that there has been no abandonment within the meaning of S. 87, Ben. Ten. Act.

The facts of this case also do not go to show that there had been repudiation of the tenancy by Man Gazi. The mere fact that he is paying rent to the transferee for the land which is in his cultivation is not enough to show that he has repudiated his liability between himself and the plaintiff to pay rent: see 36 C W N 478 (1), cited above. The learned advocate for the respondent however tried to distinguish the above case on the ground that in that case the raiyat was in possession of the homestead portion of the holding. But the principle laid down in that case has equal application where the raiyat is in possession of a portion of the agricultural lands. In fact the plaintiff has failed to produce any material before the Court from which it can be inferred that Man Gazi has repudiated his liability to pay rent to him. The plaintiff is therefore not entitled to re-enter as there has been neither abandonment nor repudiation of the tenancy by the raiyat Man Gazi. The result therefore is that this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and those of the trial Court are restored. The appellant will get his costs in this Court as well as in the lower appellate Court.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 169

NASIM ALI, J.

Kashinath Mukherjee and others—
Plaintiffs—Appellants.

v.

Paban Chandra Manna and others—
Defendants—Respondents.

Appeal No. 1116 of 1932, Decided on 29th November 1934, from appellate decree of Addl. Sub-Judge, Howrah, D/- 16th February 1932.

(a) Bengal Tenancy Act (1885), Ss. 48-C (a) and 66—S. 66 is very wide—Under-raiyats can claim benefit of S. 66 (2), if proviso to S. 48-C Cl. (a) is not attracted.

The language in S. 66 is very wide. The word used there is 'tenant' and where under-raiyats are tenants, if the proviso to S. 48-C, Cl. (a) is not attracted, the under-raiyats can claim the benefit under S. 66 (2). [P 170 C 1]

(b) Bengal Tenancy Act (1885), S. 66—S. 66 includes suit for recovery of arrears of rent as also for ejectment.

Section 66 does not contemplate cases for ejectment only. It includes a suit for recovery of arrears of rent as also for ejectment.

[P 170 C 1]

*Hari Charan Sastri and Manilal Bhattacharjee—*for Appellants

*Khitish Chandra Chakravarti and Panchanan Ghosal—*for Respondents.

Judgment.—The appellants are the plaintiffs in a suit for ejectment under S. 48-C, Cl. (a), Ben. Ten. Act as also for recovery of the price of Bhag produce for the years 1332 to 1335 B.S. with damages thereon. The Courts below have decreed the plaintiffs' claim for rent for the year 1335 B. S. at Rs. 40 per annum with damages thereon at 25 per cent. They agreed in dismissing the plaintiffs' claim for ejectment. Hence the present appeal by the plaintiffs. The only point urged in support of the appeal is that in view of the terms of the kabuliyat the defendants are not entitled to get the benefit of the proviso to S. 48-C, Cl. (a). Assuming that this contention is correct still the plaintiff cannot succeed in the present appeal. The facts in this case are not disputed. The defendant held the under-raiyati on the basis of a registered kabuliyat dated 1306 B.S. From the terms of the kabuliyat it is clear that the tenants have got the option of paying their rent either in money or in kind. The Courts below on a construction of the kabuliyat have come to the conclusion that the under-raiyats are protected by the proviso to S. 48-C, Cl. (a), Ben. Ten. Act and have given the benefit of S. 66 (2) to them. Now S. 48-C Cl. (a), is in these terms:

An under-raiyat shall, subject to the provisions of this Act be liable to ejectment on one or more of the following grounds, and not otherwise, namely (a) on the ground that he has failed to pay an arrear of rent: Provided that, if the under-raiyat is one whose rent is payable in terms of cash and not of produce and he pays through the Court all arrears up-to-date together with such interest and damages as the Court may award, he shall not be liable to ejectment on account of such arrears.

This section therefore is controlled by the other provisions of the Act. S. 66 of the Act runs as follows:

When an arrear of rent remains due from a tenant not being a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, at the end of the agricultural year (Bengali year), the landlord may, whether he has obtained a decree for the recovery of the

arrears or not and whether he is entitled by the terms of any contract to eject the tenants for arrears or not, institute a suit to eject the tenant. (2) In a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon and the decree shall not be executed if that amount and the costs of the suit are paid into Court within 30 days from the date of the decree, or when the Court is closed on the 30th day on the day upon which the Court re-opens. (3) The Court may for special reasons extend the period of 30 days mentioned in this section.

The language in S. 66 is very wide. The word used there is "tenant" and it is not disputed in this case that the under-raiyats in the present case are tenants, and that they are not mere Bhagidars or Adhidars or Borgadars. If the proviso to S. 48-C, Cl. (a) is not attracted to this case the under-raiyats can claim the benefit under S. 66, Cl. (2). The learned Advocate for the appellant did not seriously dispute this position but he argued that S. 66 contemplated cases for ejectment only, and that the present suit being a suit for recovery of arrears of rent as also for ejectment, the provisions of S. 66 could not be attracted to this case. But if this contention be correct, the present suit is not within the purview of S. 48-C also. This argument therefore is of no assistance to the plaintiff. The Courts below were therefore right in giving the under-raiyats the benefit of S. 66. In view of the above conclusions, it is not necessary to express any definite opinion as to whether in view of the terms of the kabuliyat, the under-raiyats in the present case can claim the benefit of the proviso to S. 48-C Cl. (a). The proviso speaks of an under-raiyat whose rent is payable in terms of cash and not in terms of produce. It is therefore contended by the learned Advocate for the appellant that where the tenant has got the option to pay the rent either in money or in kind, he cannot claim the benefit of the proviso, in other words the argument is that the proviso contemplates cases where the rent is payable only in cash and not cases where the raiyat has got the option to pay either in cash or in kind. There is some force in this contention. But as the under-raiyats in the present case are entitled to the benefit of the provisions of S. 66, it is not necessary for the purposes of this case to pursue the point any further. In any view of the case

the plaintiffs are not entitled to eject the defendants, as it is admitted that the arrears have been all paid up.

The appeal therefore fails, but in the circumstances of the case, I make no order as to costs. Leave to appeal under S. 15 of the Letters Patent, has been asked for and is refused.

K.S./R.K. *Appeal dismissed.*

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R. C. MITTER, J.

Mahatabuddin Mia—Plaintiff—Appellant.

v.

Mahammad Nazir Joddar—Defendant—Respondent.

Appeal No. 1483 of 1933, Decided on 16th August 1935, from appellate decree of Addl. Dist. Judge, Jessor-Khulna, D/- 1st May 1933.

Promissory Note—Suit for money not based on promissory note because of insufficient stamp—Plaintiff proving payment to defendant—He is entitled to recover money with interest though promissory note is inadmissible—Fact of loan gives plaintiff cause of action independently of pro-note.

In a suit for recovery of loan of money represented by a promissory note insufficiently stamped, but on which the suit is not based on account of the defect, as soon as the plaintiff proves that he paid a sum of money by way of loan to the defendant, he is entitled to get back the money with interest though the promissory note cannot be introduced in evidence on the ground of insufficiency of stamp. The fact that money has been lent gives a cause of action to the plaintiff which is independent of the promissory note: 23 Cal 851, *Rel. on.*

[P 171 C 1, 2]

Dr. Basak and Narendra Krishna Bose—for Appellant.

Dr. Mukherjee—for Respondent.

Judgment.—The plaintiff's case is that on 14th Chaitra 1334, corresponding to 28th March 1928, the defendant borrowed from him a sum of Rs. 629 and executed in his favour a promissory note for the said sum of money on the same date with a stipulation to pay interest at Rs. 3-2-0 per cent per month. He filed his suit on 5th March 1931, and in the plaint as originally filed he based his claim on the promissory note. But as the promissory note was insufficiently stamped, and so inadmissible in evidence he applied for amendment of the plaint. The said application for amendment was allowed by the Court on 25th February 1932. The amended plaint proceeded upon the footing that the plaintiff was

entitled to recover back the money lent independently of the promissory note. The learned Munsif held that the sum of Rs. 629 had in fact been lent by the plaintiff to the defendant. He accordingly made a decree in favour of the plaintiff for Rs. 629, but reduced the rate of interest to Rs. 1-4-0 per cent per month. At the trial the plaintiff led evidence to prove not only the advance of the said money to the defendant by way of loan but went a step further and attempted to prove that before the promissory note was executed the defendant made a verbal promise to repay the amount with interest at the rate of Rs. 3-2-0 per cent per month. The defendant preferred an appeal to the learned District Judge. The said appeal was heard by the learned Additional District Judge. The learned Judge held that the evidence of an independent oral promise by the defendant to repay the money with interest was unreliable. He held that such being the case the plaintiff could not recover except with the aid of the promissory note which could not be admitted in evidence as it was insufficiently stamped. He accordingly dismissed the plaintiff's suit without recording any finding as to whether the defendant took Rs. 629 from the plaintiff as a loan.

In my judgment the learned Judge is wrong in his views. He seems to labour under the impression that the plaintiff, in order to succeed on the plaint as amended, was required to prove an independent express contract prior to the execution of the promissory note. The law as laid down in the cases of this Court, however, is that the plaintiff is entitled to recover if he has a cause of action independent of the promissory note. Sir Comer Petheram, C. J., pointed out in 23 Cal 851 (1), where the observation of Garth, C. J., in 7 Cal 256 (2) was considered, and explained that:

An implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it.

The fact that money has been lent therefore gives a cause of action to the plaintiff which is independent of the promissory note. In my judgment as soon

as the plaintiff in such a case proves that he paid to the defendant a sum of money by way of loan, he is entitled to get back the money lent with interest, though the promissory note cannot be introduced in evidence on the ground of insufficiency of the stamps. The view I am taking is in accord with the preponderance of authority of this Court which have been reviewed in the judgment of Mukherjee, J., in 34 C W N 554 (3) and in the judgment of Sir Harold Derbyshire, C. J., in A F O D No. 287 of 1930 (4). I accordingly set aside the judgment and decree of the lower appellate Court and remand the appeal to that Court so that the appeal may be decided in accordance with the observations made above. The most important point for that Court to consider would be whether the plaintiff had paid to the defendant the sum of Rs. 629 or any sum by way of loan. If it answers the said question in the affirmative it will confirm the decree of the Munsif. The appeal is accordingly allowed and the case remanded to the lower appellate Court. The costs of this appeal to abide the result.

S.R./R.K.

Appeal allowed.

3. Abdul Rabbani v. Shyam Lal Thapa, (1930) 34 C W N 554.

4. East Bengal Commercial Bank Ltd. v. Surendra Narayan Saha, A F O D No 287 of 1930, decided on 18th February 1935.

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GUHA AND LODGE, JJ.

Durga Charan Das and another—Judgment-debtors—Appellants.

v.

Chairman of Labonga Samabai Samity—Decree-holder—Respondent.

Appeal No. 184 of 1935, Decided on 26th August 1935, from appellate order of Addl. Dist. Judge, 24 Parganas, D/- 29th January 1935.

(a) Bengal Tenancy Act (1885), S. 26-E—Re-sale—Not fresh execution but fresh sale in pending execution is contemplated—Provisions of S. 26-E (3) are mandatory—Order of forfeiture of first purchase money should be made before ordering fresh sale.

Section 26-E (3) does not contemplate fresh execution proceedings; it provides for fresh sale in the execution proceedings then pending. Such resale should be held under S. 26-E (3) of the Act, and the provisions of that section complied with. Under that section an order of resale can ordinarily be made only after an order for the forfeiture of the purchase money has been made. —

[P 172 C 2]

1. Pramatha Nath Sanyal v. Dwarka Nath Dey, (1896) 23 Cal 851.

2. Sheikh Akbar v. Sheikh Khan, (1881) 7 Cal 256=8 C L R 523.

(b) Bengal Tenancy Act (1885), S. 26-E—Execution sale—Court not fixing time or overlooking time fixed to deposit landlord's fees—Auction purchaser not depositing such fees—Sale is not a nullity.

Where no time is specified, on the occasion of the execution sale within which the deposit of the landlord's fees under S. 26-E (1) of the Act is to be made or the Court overlooks the fact that such time had been specified, and the auction-purchaser does not deposit such fees, the Court has no justification to treat the sale as nullity. [P 173 C 1]

S. C. Basak, Hiran K. Roy and S. C. Jana—for Appellants.

Hiralal Chakravarti and Bijan B. Das Gupta—for Respondent.

Lodge, J.—This appeal arises out of orders passed on an objection under S. 47, Civil P. C. The material facts are these: Defendant 1 took a loan from the Labanga Samaboy Samity on mortgage of his share of a certain holding. Defendants 2 to 7 stood surety for defendant 1 and gave their shares in the same holding as security for the repayment of the loan. On application being made to the Registrar of Co-operative Societies a decree was passed against defendants 1 to 7 on 15th July 1928. In the decree it was found that Rs. 1,312-8-0 was due from defendant 1 to the Labanga Samaboy Samity; and he was directed to pay the amount by 7th January 1929. In the event of his failure to pay the decretal amount within the time fixed, it was ordered that the mortgaged property be put to sale; and that if the sale proceeds were insufficient to satisfy the decretal debt, the Society would be at liberty to apply for a personal decree against defendants 1 to 7. Defendant failed to pay the decretal amount, and in execution Case No. 235 of 1929, the mortgaged properties were put to sale, and purchased by the decree-holder. The sale proceeds were sufficient to satisfy the decretal debt, and a note was made in the order sheet of the execution case that the case was disposed of on full satisfaction. The decree-holder auction-purchaser failed to deposit the landlord's fee as required by S. 26-E, Ben. Ten. Act. But it seems clear from the materials placed before us that the executing Court omitted to specify the time within which such deposit should be made.

On 7th November 1933, the decree-holder applied to the Court to have the order of full satisfaction vacated; and this prayer was granted without any notice to the judgment-debtors, and

merely on the ground that the auction-purchaser had failed to deposit the landlord's fees. The decree-holder then filed a fresh execution case, being case No. 196 of 1933, in which he prayed for the sale not only of the mortgaged property, but also of the property of defendants 2 to 7 which were given as security for the loan. These properties were put to sale and purchased by the decree-holder for a sum much less than the decretal amount. Defendants 1 and 3 filed an objection under S. 47, Civil P. C., on the grounds (1) that the order of full satisfaction should not have been set aside without notice to them; and (2) that if resale of the property was necessary, it should be held in accordance with the provisions of S. 26-E (3), Bengal Tenancy Act, and any deficit on such resale should be realised from the first auction purchaser; and (3) that the property of defendants 2 to 7 could not be sold until after the mortgaged property had been sold and the sale proceeds found insufficient to satisfy the decretal debt. These objections were overruled by the Subordinate Judge, third Court, 24 Parganas and an appeal from his order was dismissed by the Additional District Judge of that district. Hence this appeal. The lower Courts have held that as the landlord's fee was not deposited after the first sale, that sale was a nullity and consequently the decree-holder was entitled to apply again for execution of his decree. In our opinion, the first sale cannot be treated as a nullity.

If the only defect was the failure to deposit the landlord's fee, and if the decree-holder required that the holding be resold, then such resale should have been held under S. 26-E (3), Ben. Ten. Act, and the provisions of that section complied with. Under that section an order for resale can ordinarily be made only after an order for the forfeiture of the purchase money has been made. No such order of forfeiture was made in the present case and no reason was given for the omission. The fact that the decree-holder was himself the auction purchaser does not affect his liability to be penalised for failure to deposit the landlord's fee. S. 26-E (3) does not contemplate fresh execution proceedings: it provides for fresh sale in the execution proceedings then pending. We are satisfied from the materials placed before us that the

provisions of S. 26-E were not strictly followed, and the Courts below have fallen into error in consequence. Though S. 26-E (1) does not state that the landlord's fees are to be deposited within a time to be fixed by the Court, it is clear from S. 26-E (3) that the Court must specify the time within which the deposit is to be made. Doubtless the Court may extend that time in suitable cases. But until the time specified has expired, there can be no resale under S. 26-E (3). It appears to us that either no time was specified, on the occasion of the first sale, within which the deposit was to be made, or the Court overlooked the fact that such time had been specified. In either case, the Court had no justification to treat the sale as a nullity, and to set aside the order of full satisfaction. Further it is obvious that no order to the detriment of defendant 1's interest should have been made without notice to him.

The order vacating the order of disposal on full satisfaction was made without jurisdiction. The appeal must be allowed, and the *Mis.* case remanded to the original Court for disposal according to law. Execution case No. 196 of 1933 should be treated as a continuation of execution case No. 235 of 1929 : and the order passed on the application of the decree-holder to have the order of full satisfaction vacated, and all subsequent orders, set aside. The Court should fix a time within which the deposit required by S. 26-E (1), Ben. Ten. Act, shall be made in connexion with the first sale. If the auction-purchaser fails to make the deposit within the time so specified, the Court may then make an order for the forfeiture of the purchase money, and for resale of the property. The Court may not order resale without first making an order of forfeiture. If it shall be found necessary to order resale, the mortgaged property alone shall first be resold ; and only after such resale, and if the sale proceeds be found insufficient to satisfy the decretal debt, shall the property of defendants 2 to 7 be sold. The appeal is allowed with costs throughout; and the case is remanded for disposal in accordance with the directions given above. Hearing fee in this Court three gold mohurs.

Guha, J.—I agree.

B.D./R.K.

Case remanded.

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M. N. MUKERJI, J.

Debendra Lal Khan and others—Plaintiffs—Appellants.

v.

Sudharam Roy and others—Respondents.

Appeal No. 1778 of 1932, Decided on 28th January 1935, from appellate decree of Dist. Judge, Midnapore, D/- 21st April 1932.

(a) Bengal Tenancy Act (1885), Ss. 105 and 106 and 109 (amended)—Plaintiff recorded as 1/4 share-holder in record-of-rights—Application under Ss. 105 and 106 claiming 1/3 share—Application dismissed—Plaintiff's suit for assessment of rent for 1/4 share based on record-of-rights—Such suit is not barred by S. 109.

The plaintiff was recorded as a 4 anna sharer in the record-of-rights and claimed to be entitled to a 5 annas share and made an application under Ss. 105 and 106 for a claim for assessment of rent in respect of 5 annas share. The application was dismissed whereupon the plaintiff brought a suit, based on the entry in the record-of-rights for a claim for assessment in respect of 4 annas share:

Held : that though it was open to the plaintiff in his application under Ss. 105 and 106 to have included a claim for assessment of rent in respect of $\frac{1}{4}$ share on the basis of the entry in the record-of-rights but such a claim was not included it cannot be said that the subject matter of the present suit and that of the previous application are the same and as such S. 109 is no bar to the present suit. [P 175 C 1]

(b) Practice—Suit instituted after amendment of Section came in force—Suit must be governed by Section as amended.

Where a suit was instituted after the proviso to section had already come into operation:

Held : that it is governed by the Section as it stands together with the proviso contained in it ; the ordinary law being that the rights of the parties with regard to a suit should be determined upon the law as it stands at the date of the institution of the suit. [P 176 C 1]

Rama Prosad Mukherji—for Appellants.

Surajit Chunder Lahiri, Ganga Prosad Bose and Ramendra Chandra Roy—for Respondents.

Judgment.—The plaintiffs are the appellants in this appeal. The principal defendants were in occupation of some lands which belonged to the plaintiffs and their co-sharers, the pro forma defendants. These lands were recorded in the record-of rights as being lands wherein the plaintiffs had a 4-anna share and it was also stated therein that they were assessable to rent. On that the plaintiffs applied under Ss. 105 and 106, Ben.

Ten. Act, for correction of the records alleging that they had a 5-anna share in the lands and not a 4-anna share as stated in the record-of-rights. In that application they prayed for a declaration of their title to a 5-anna share and for khas possession in respect of that share and, in the event of such khas possession not being allowed, for settlement of a fair and equitable rent for the lands in respect of that share. The proceedings instituted on the basis of this application were struck off on 7th December 1917 with the following order: "No action taken: deficit process-fee of Rs. 1-12-0, not paid; case struck off." Thereafter the plaintiffs instituted a suit for declaration of title on the allegation that the entry in the record-of-rights was wrong and they also prayed for khas possession and for other reliefs. This suit was eventually dismissed by the Court, the Court holding that S. 109, Ben. Ten. Act, operated as a bar to the suit. No question in this appeal arises upon the suit aforesaid or upon the result thereof, and so it will not be necessary to refer to it again hereafter. Thereafter the plaintiffs instituted the present suit in which they took their stand upon the entry in the record-of-rights and asked for assessment of rent in respect of their 4-annas share as recorded therein and also for recovery of rent at the assessed rate for certain years previous to the institution of the suit. Defendant 1 took several pleas—some in the nature of pleas in bar and others on the merits; but these pleas were all overruled and the Munsif made a decree in the plaintiffs' favour holding that the plaintiffs were entitled to a rent of Rs. 14 for the lands per year in respect of their 4-anna share and allowing the plaintiffs arrears of damages for use and occupation at the said rate for three years immediately preceding the date of the institution of the suit.

From this decree the principal defendants preferred an appeal to the District Judge. The learned District Judge held that the present suit was barred by reason of the provisions of S. 109, Ben. Ten. Act. To his reasons on which this conclusion of his is founded, reference will presently be made; but it may be stated here that except as regards this preliminary point on which he dissented from the view which the Munsif had taken he agreed with the Munsif in other matters,

namely in so far as the latter had decided against defendant 1 as regards his other objections. He held that the objection raised by the said defendant on the ground of limitation was entirely without force and that the rate of rent which had been fixed by the learned Munsif was fair and equitable. Being of this view, the learned Judge took as the basis of his decree the rate of Rs. 6 for the sixteen annas share of the lands which defendant 1 had admitted as the rental and on that basis gave the plaintiffs a modified decree. From this decree of the learned District Judge, the present appeal has been taken by the plaintiffs.

From what has been stated above, it would appear that the substantial question which arises for determination in this appeal is the question whether by reason of the application which the plaintiffs had made under Ss. 105 and 106, Ben. Ten. Act, the present suit is barred in consequence of the provisions of S. 109 of that Act. It has to be stated here that before the suit was instituted the said S. 109, Ben. Ten. Act, was amended by the introduction into it of the proviso that is to be found now under the said section. The reason upon which the learned Judge proceeded in arriving at his conclusion as regards the bar afforded by S. 109, Ben. Ten. Act, may be summarized in the following words: He refers to S. 2, Cl. (3), Ben. Ten. Act, in the first instance and then he observes:

Under the old S. 109 the defendant had acquired a right not to have his jote assessed to rent as that was a matter in the S. 106 case.

And in respect of this conclusion of his he has observed thus:

The amendment to S. 109 amounts to a repeal of the old S. 109 and the enactment of the new section, and it could not affect a right of the defendant acquired before the amendment. The respondent urges that the old section was a mere bar, and that the bar has been removed. But the correct view is that the old bar supported an erection under which the appellant was entitled to shelter. The amendment has not removed the bar and brought the edifice toppling down on the appellant and the hundreds dwelling in peace under similar erections similarly supported; it has merely said that in future the law will not provide such bars to support such erections to shelter people, which is quite a different thing. The point cannot be disposed of by talking loosely about bars.

The learned Judge apparently thought that the proviso which had been introduced into S. 109, Ben. Ten. Act, amounted merely to the repeal of a certain provi-

sion which was to be found in the Act as it stood before the amendment. That however is not the position. It is a substantive provision enacted in order to be operative from the point of time at which the enactment was intended to come into force. It is expressed in very clear words, from which no intention to delay its effect for any length of time can possibly be inferred. It seems to me that for two reasons, if not more, the view that the learned Judge has taken of this matter is not correct. In the first place, the question is whether the first part of the section apart from the proviso is applicable to the present case. In answering that question I ask myself, what was the subject matter of the application under Ss. 105 and 106, Ben. Ten. Act? And reading that application it seems to me perfectly plain that the subject matter of that application was a claim to a one-third share in the lands, a claim which had been negatived in the record-of-rights, and the claim with respect to that one-third share consisted of two alternative reliefs, namely, (1) for khas possession and (2) for assessment of rent. It is quite true that the one-fourth share on which the plaintiffs now take their stand is less than the one-third share which they had claimed in the said application; but even then upon a proper consideration of the matter, it seems to me inconceivable that it can be said that the present claim for assessment of rent in respect of a one-fourth share can, in any way, be treated as a subject matter of the application under Ss. 105 and 106, Ben. Ten. Act. It is quite true that it was open to the plaintiffs in that application to have included a claim for assessment of rent in respect of a one-fourth share on the basis of the entry in the record-of-rights; but such a claim was not included and I find it very difficult to hold that the present suit in so far as it was a suit for assessment of rent in respect of a one-fourth share on the footing of the record-of-rights was a matter which was the subject matter of the application under Ss. 105 and 106, Ben. Ten. Act. I am of opinion therefore that the present case does not in fact attract the operation of S. 109, Ben. Ten. Act at all.

Even if this view be regarded as incorrect, I am of opinion that it cannot be disputed that the plaintiffs are saved

by the proviso to the section. The learned Judge has observed that the proper view to take of the proviso is that it merely removes a bar and that it cannot affect any right already accrued to the party in whose favour the section itself operated before the proviso was introduced. This view, has been sought to be supported to a certain extent by certain observations which are to be found in a decision of this Court to which my attention has been drawn: the case in 35 C W N 1147 (1). That was a case where the suit to which S. 109, Ben. Ten. Act as amended by the Bengal Act 4 of 1928 was sought to be applied had been instituted prior to the introduction of the proviso and it was held that the amendment had no retrospective operation so as to affect proceedings pending at the date of the amendment and that such S. 109 as it stood before the amendment would apply. The decision therefore was a decision in respect of a case which was very different on facts from the present case. But the observations which at first sight seem to be in support of the learned Judge's view run in these words:

There seems hardly room for doubt that S. 109 did not merely lay down the procedure but by taking away the ordinary right of suit of the plaintiff, conferred a very valuable right on the defendant in some cases. The immunity from a civil suit thus gained by the defendant is a substantive right inasmuch as it enabled him to hold the property in the right mentioned in the record-of-rights without further litigation. In essence it is difficult to distinguish such a right from a right of appeal. If no right of appeal is given by statute at the date of the suit, the successful party acquires a certain right under the decision of the suit which is not open to challenge in appeal. In a case under S. 109 (old Act) where an application is made and withdrawn, the defendant obtains the rights to hold the property as recorded in the record-of-rights without further risk of litigation. I accordingly hold that the right which the defendant in this case obtained under S. 109 (old Act) is a substantive right which cannot be affected, except by express words, by subsequent alteration of the law.

There is no question, under the terms of the section as it stood before the amendment, of anybody acquiring any right: the section imposed a disability on intending suitors of which their opponents could undoubtedly take advantage. Such disability lasted only so long as the section itself lasted in

1. Gosta Behari Pramanik v. Nawab Bahadur of Murshidabad, 1932 Cal 207=136 I C 606=35 C W N 1147.

its old state. The proviso enacted an express provision removing the disability in certain circumstances. And if it be held, as it must be held in the absence of anything in the Act to the contrary, that the proviso came into operation at the same time as all the other amendments did, there cannot be the slightest doubt that the legislature by express words created in favour of an intending plaintiff a right which inferentially took away any other right which the defendant may have acquired by reason of the disability which the section, as it stood before its amendment, had placed on the plaintiff. To adopt the respondents' contention or the view of the learned District Judge would necessitate our holding that the amended Section would come into play only in respect of proceedings under Ss. 105 to 108 instituted after the amended Act came into force. Such a position is untenable. I am clearly of opinion that the view which the learned Judge has taken of this matter cannot be supported and that the suit, having been instituted at a time when the proviso had already come into operation, was to be governed by the section as it stands now together with the proviso contained in it; the ordinary law being that the rights of the parties with regard to a suit should be determined upon the law as it stands at the date of the institution of the suit.

For these reasons, the view which the learned Judge has taken cannot, in my opinion, be supported. In view of the fact that the learned Judge has upheld the learned Munsiff's decisions with regard to the other matters that have arisen in the case, it follows that the appellants are entitled to a decree from this Court setting aside the decree of the learned District Judge and restoring that of the learned Munsiff. The result is that the appeal should be allowed, and the decision of the learned District Judge being set aside, that of the learned Munsiff should be restored with costs in this Court and in the Court of appeal below. Leave to prefer an appeal under the Letters Patent asked for by the respondents is refused.

S.R./v.v.

*Appeal allowed.***A. I. R. 1936 Calcutta 176**

R. C. MITTER, J.

Nirad Chandra Sinha Sarma and others—Plaintiffs—Appellants.

v.

Sankar Chandra Shaha—Defendant—Respondent.

Appeal No. 1169 of 1932, Decided on 10th December 1934, from appellate decree of Sub-Judge, 3rd Court, Mymensingh, D/- 29th January 1932.

(a) Practice—New case—Court should not make new case for defendant in appeal and dismiss plaintiff's suit on plea not taken at proper stage.

The appellate Court should not make a new case for the defendant in appeal and dismiss plaintiff's suit on a plea which was never taken by the defendant at a proper stage of the suit.

[P 177 C 2]

(b) Bengal Tenancy Act (1885), S. 44 (c)—Lands of old tenancy not included in subsequent deed—Rent fixed quite out of proportion to old rent—Period fixed and option given to tenant to continue for another term in case he complied with certain demands—Landlord entitled to evict tenant even before expiry of period in case tenant transfers land—Tenant held liable to be evicted on expiry of term and could not claim occupancy right.

In a subsequent deed the lands of the old tenancy were not included but only some and the rent which was fixed for the land was quite out of proportion to the old rent. The period was fixed by the deed and an option was given to the tenant to remain for another period only in case he complied with certain demands of the landlord. There was a further clause that on transfer by the tenant either by way of sale or usufructuary mortgage of the whole or part of the demised land or on building substantial structures on the land there would be an end to the tenancy and the landlord would be entitled to re-enter even within the period:

Held: that the deed created a new tenancy and the landlord was entitled to evict the tenant on expiry of period and that the tenant could not claim occupancy right. [P 178 C 1]

Jatindra Nath Sanyal—for Appellants.

Upendra Kumar Roy—for Respondent.

Judgment.—The plaintiffs appeal from the judgment and decree of the Subordinate Judge, 3rd Court, Mymensingh by which their suit for ejectment has been dismissed. It appears that three plots of land constituted a holding formerly held by two persons, Raghunath Garo and Labanga Garani under the plaintiffs at the rate of Rs 30-11-9 per year. The area of the three plots is 7.18 acres. It is admitted that Raghunath Garu and Labanga Garani had occupancy rights in

these three plots of land and that there is no custom of transferability of occupancy holdings in the locality. On 30th Sravan 1325 B. S. Raghunath and Labanga sold the entire holding to the defendant but the plaintiffs refused to recognise this transfer. The defendant remained on the land from the date of his purchase till the year 1334 B. S., the landlord refusing to do anything with him. In Baisakh 1335 B. S., the defendant executed a kabuliati in favour of the plaintiffs in respect of a portion of the lands of the holding of Raghunath and Labanga. The area in respect of which the kabuliati was taken is 4.31 acres and the rent that is reserved is Rs. 23-10-3. This kabuliati was for a term of three years and in Cl. 11 of the same it is provided that on the expiry of the term of three years the tenant would be allowed to remain on the land for another period of three years if he chose to accept the rent the landlords then demanded. On the expiry of this kabuliati the landlords instituted the present suit asking the defendant to vacate under S. 44, Cl. (c) Ben. Ten. Act, that is to say, the plaintiffs have taken the position that the defendant is a non-occupancy raiyat admitted to occupation under a registered kabuliati of Baisak 1335 and as his lease had expired he was not entitled to remain on the land. The defence as contained in the written statement raised one point and one point only, namely, that he the defendant, was then an occupancy raiyat, that is to say, the contention seems to be this that the defendant's occupation as raiyat must be taken from the date of his purchase in 1325 to the date of the suit which was instituted on 14th March 1931, corresponding to Chait 1337. Secondly, his contention rests on the ground that the kabuliati of the year 1335 is really the recognition of the transfer to him by Raghunath and Labanga and in law therefore the old occupancy holding must be taken to continue in his ownership and possession by reason of the landlord's recognition.

The Court of first instance gave effect to these two contentions and dismissed the suit of the plaintiffs on the footing that the defendant was not a non-occupancy raiyat but had acquired a right of occupancy of the land. On appeal, the learned Subordinate Judge disagreed with the learned Munsif on these points. He held that the occupation of the defen-

dant from the date of his purchase till the end of the year 1334 was that of a trespasser and the document of 2nd Baisakh 1335 above referred to created a new tenancy in his favour. He accordingly held that the plaintiffs would prima facie be entitled to get possession from the defendant but he dismissed the plaintiff's suit on a ground which he admits was not taken by the defendant either in his written statement or in the lower appellate Court. He said that Cl. 11 of the kabuliati of the year 1335 conferred an option of renewal for a period of three years on the defendant. The defendant therefore according to the Subordinate Judge is entitled to fall back upon this clause and say that he has exercised the option. By reason of this clause, says the learned Subordinate Judge, the defendant would be entitled to remain on the land up to the year 1341 and the suit which was instituted before the year 1341 was premature. In my view, the learned Subordinate Judge was not right in making a new case for the defendant in appeal. A determination of the questions that would arise on Cl. 11 of the kabuliati would have entitled an investigation into facts, one of them being whether the landlord had offered a fresh tenancy to the defendant and whether the defendant had refused it or not had this defence been taken in the written statement. I am clearly of opinion that the learned Subordinate Judge was not right in dismissing the plaintiffs' suit on a plea which was never taken by the defendant at a proper stage of the suit.

Mr. Roy who appears on behalf of the defendant-respondent, however, contends that the conclusion of the learned Subordinate Judge that the tenancy for the first time was created in favour of the defendant in the year 1334 is wrong. He contends that the kabuliati of that year which is Ex. 1 is merely a recognition of the transfer to the defendant by the old tenants effected in the year 1325 and if this be so the defendant could acquire a right of occupancy by reason of S. 20, Ben. Ten. Act; secondly he says that the old occupancy holding would be still subsisting in the hands of the defendant and S. 44 (c) would not apply because the defendant would not be taken to be admitted into occupation under a registered document. All these

contentions raised by Mr. Roy depend upon one cardinal fact, and that is, what is the nature and effect of Ex. 1? I have gone through Ex. 1. There is no recital in that document of the purchase of the defendant from Raghunath and Labanga. The recital indicates as if a new settlement is being conferred and there are at least three circumstances which would tell against the contention that the kabuliati was only a confirmatory kabuliati in recognition of the transfer to the defendant by the old tenants. First of all, all the lands of the old tenancy are not included in this document but only some and the rent which is fixed for the lands is quite out of proportion to the old rent. It indicates an enhancement of more than 2 annas in the rupee which the landlord would have been entitled to get at the most if the old tenancy continued. Secondly, the period of three years fixed by Ex. 1 coupled with the option of the tenant to remain for another period of three years only, in case he complied with certain demands of the landlord, is quite inconsistent with the continuance of the old occupancy holding of the Garoes.

Thirdly, the clause in the lease that on transfer by the tenant either by way of sale or usufructuary mortgage of the whole or part of the demised land or on building substantial structures on the land there would be an end to the tenancy and the landlord would be entitled to re-enter even within the period of three years is also against the contentions of the respondent. Having regard to these terms of the documents, I am of opinion that a new lease was created in favour of the defendant by Ex. 1 and the judgment of the learned Subordinate Judge on this part of the case is correct.

I accordingly set aside the decree of the learned Subordinate Judge inasmuch as he had no business to make a new case for the defendant and direct that the plaintiffs' suit for khas possession be decreed. The result is that the appeal is allowed and the plaintiffs' suit for khas possession is decreed with costs throughout.

K.S./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 178**

CUNLIFFE AND HENDERSON, JJ.

Ramesh Chandra Guha — Plaintiff — Appellant.

v.

Dinanath Mestari and others— Defendant 1—Respondents.

Appeal No. 198 of 1933, Decided on 6th December 1935, from appellate decree of Sub-Judge, Second Court, Bakarganj, D/- 19th September 1932.

(a) Landlord and Tenant—Rent — Holding sold in execution of decree in favour of landlord purchased by *P* and possession obtained — Interest of one of tenure-holders previously sold in execution of money decree and purchased by *K* — Sale in favour of *K* confirmed after *P*'s purchase — Interest of one *D* annulled by *P* by service of notice under S. 167, Bengal Tenancy Act — *D* contending that only right of judgment-debtors passed to *P*—*D* held not entitled to raise the defence, having no interest in the matter—*D* held not entitled to defeat *P*'s claim merely by asserting that *K* had interest in holding without obtaining declaration to that effect.

A holding was put to sale in execution of a decree in a suit by the landlords against the recorded tenant and was purchased by *P*, who obtained possession of it. The interest of one of the tenure-holders had been put up to sale in execution of a money decree and had been purchased by one *K* before the institution of the suit by the landlords, but the sale was not confirmed till after *P*'s purchase and *K* obtained delivery of possession later on. One *D* had an interest which was annulled by *P* by a service of notice under S. 167, Bengal Tenancy Act. The landlords did not know of *K*'s purchase. *D* contended that only the right and title of the judgment-debtors passed to *P* :

Held: that it was not open to *D* to raise that defence as *D* did not claim through *K*. *D* had no direct interest in the matter but merely put *K* as a shield. [P 179 C 2]

That *D* could not defeat *P*'s claim by mere assertion that *K* had an interest in the holding without obtaining a declaration to that effect in presence of both *P* and *K* that *K* had an interest in the tenure and was liable for rent. [P 180 C 1]

(b) Landlord and Tenant—Rent — Suit for — Landlord must implead those persons who are actually tenants — Impleading recorded tenants only is not enough—*Obiter*.

Obiter.—In order to obtain a rent decree, it is not enough for the landlord to implead the recorded tenants, if, in fact the interest of any of them has passed to a third person, unless there are circumstances to show that the tenants impleaded represent the whole estate. The landlord must sue all the actual tenants: 1929 Cal 452, *Foll*. [P 179 C 2]

(c) Second Appeal—Finding of fact—Lower appellate Court not properly reversing finding of fact of trial Court—Its finding is not binding in second appeal.

Where the final Court of fact does not properly reverse the finding of the trial Court, by reason of his failure to consider certain evidence, the finding not having been arrived at properly, is not binding in second appeal.

[P 180 C 1]

Gunada Charan Sen and Abinash Chandra Ghose—for Appellants.

Satindra Nath Roy Choudhury — for Respondents.

Surajit Chandra Lahiry—for Deputy Registrar.

Henderson, J. — This is an appeal against the decree of the lower appellate Court dismissing the plaintiff's suit for khas possession. It was originally argued before R.C. Mitter, J., and it has now come before us on a reference by him. The substantial point urged before us is whether a decree in execution of which the plaintiff alleges that he purchased a certain tenure was a rent decree or a money decree. The landlords instituted the suit against the recorded tenants on 15th April 1920. They put up the holding to sale and it was purchased by the plaintiff on 7th April 1922. He obtained possession on 21st July 1922. It appears that the interest of one of the tenure-holders, Sashi was put up to sale in execution of a money decree and purchased by one Kunja on 12th November 1919. The sale however was not confirmed till 7th September 1922, (that is to say, after the plaintiff's purchase) and he did not obtain delivery of possession until 2nd December 1922. The contesting defendant 1 had an interest which was annulled by the plaintiff by the service of a notice under the provisions S. 167, Bengal Tenancy Act.

Now it is not suggested that the landlords knew of Kunja's purchase in the execution sale. It has accordingly been contended on behalf of the appellant that inasmuch as the recorded tenants were all made parties to the rent suit, the tenure passed at the sale. In support of this contention reliance was placed upon the decision reported in 23 C W N 590 (1). On the other hand it is contended on behalf of the contesting respondent that only the right, title and interest of the judgment-debtors passed on the authority of the case reported in 56 Cal 462 (2). It is to be observed that although

Kunja's purchase took place before the institution of the rent suit, the sale was not confirmed until long after. But the property vests in a purchaser from the date of the sale and not from the date of the confirmation and he would be liable for the rent from the date of the sale. The point at issue is whether the landlord, in order to obtain a rent decree must sue all the actual tenants or whether it is enough if he sues those whose names are recorded in his Sherista. The case of 23 C W N 590 (1) which was decided by N. R. Chatterjea and Newbould, JJ., is an authority in favour of the appellant. The learned Judges observed as follows :

The property sold was described as an entire tenure ; and as the decree was obtained by the plaintiff against the recorded tenants, we think that what was intended to be sold and was sold was the tenure itself, and not merely the interest of defendants 1 to 5 We are of opinion that the entire tenure including the interest, if any, of defendant 6 passed by the sale to the plaintiff.

On the other hand the case of 56 Cal 462 (2) which was decided by Rankin, C. J., and Page, J., lays down that it is not enough for the landlord to implead the recorded tenants if, in fact, the interest of any of them passed to a third person unless there are circumstances to show that the tenants impleaded represented the whole estate. In this connexion we need only say that as at present advised we should be disposed to agree with the judgment of Page, J. But in our opinion it is not necessary to pursue the matter any further or to consider whether we should refer the case to a Full Bench, as we are not satisfied that it was open to defendant 1 to raise this defence at all. Defendant 1 does not claim through Kunja. The effect of the decision of the lower appellate Court is that Kunja is liable for the rent, although Kunja was not a party to the suit. Defendant 1 has no direct interest in the matter and merely wishes to put forward Kunja as a shield.

Now there is a most important question on which the Courts below differed. The contention of the plaintiff is that Kunja was a mere benamidar and the learned Munsif found in his favour ; but this decision was reversed by the learned Subordinate Judge. No doubt the question whether the transaction was benami or not is a question of fact. But we find it difficult to say that the judg-

1. *Profulla Kumar Sen v. Salimulla Bahadur*, 1919 Cal 62=52 I C 304=23 C W N 590
2. *Faridpur Loan Office, Ltd. v. Nirode Krishna Ray*, 1929 Cal 452=118 I C 864=56 Cal 462.

ment of the learned Judge is a proper judgment of reversal. All he says is this:

I am afraid there is no evidence in the circumstances to hold that Kunja was a benamidar for Sashi.

There was certainly circumstantial evidence to justify an inference that Kunja was a mere benamidar, and unless the final Court of fact considers that evidence, it cannot be said that he has properly reversed the decision of the trial Judge. It is therefore not possible to hold that this question of fact has been properly determined. Had it been necessary to decide the point, we should have been compelled to remand the case for further consideration. There can be no doubt that if the finding of the learned Munsif is correct, the tenure passed to the plaintiff. The delivery of possession to Kunja was only symbolical and he could not recover possession from the plaintiff without instituting a suit for a declaration of his title. It does not appear that he has even attempted to do so and it may well be that such a suit has now become barred by limitation. In these circumstances, it would be rather strange if defendant 1 could defeat the plaintiff's claim by a mere assertion that Kunja has an interest in the holding.

We are of opinion that without obtaining a declaration in the presence of both the plaintiff and Kunja that Kunja has an interest in the tenure and is liable for rent, such a defence is not open to him. The result is that this appeal must be allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored. Defendant 1 will pay the costs to the appellant in all Courts.

Cunliffe, J.—I agree.

R.M./R.K.

Appeal allowed.

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NASIM ALI AND HENDERSON, JJ.

Satish Chandra Chakravarty—Defendant 1—Appellant.

v.

Abdul Haque Sardar and others—Respondents.

Appeal No. 450 of 1934, Decided on 28th June 1935, from appellate decree of Dist. Judge, Khulna, D/- 30th May 1934.

(a) Bengal Tenancy Act (1885), Ss. 30 and 37—Enhancement under S. 30, Cls. (a) and (b) is subject to limitations in S. 37—But

such limitations do not apply to claims for additional rent for excess area.

Landlord's right to claim enhancement under Cls. (a) and (b), S. 30, are subject to the limitations laid down in S. 37. These limitations however do not apply to a claim for additional rent for an excess area inasmuch as rent is money payable by a tenant to his landlord on account of the use or occupation of the land held by the tenant. [P 181 C 1]

(b) Bengal Tenancy Act (1885), S. 30 (b)—“During currency of present rent”, meaning.

The words “during the currency of the present rent” in S. 30 (b) mean “during the currency of the rent which the raiyat has been actually paying or was liable to pay for the use and occupation of the land held by him”: 29 Cal 247, 6 C W N 360 and 1929 Cal 47, Ref.

[P 181 C 1]

(c) Bengal Tenancy Act (1885), Ss. 52 and 30 (b)—Prior suit for alteration of rent under S. 52 decreed—Subsequent suit for enhancement under S. 30 (b) is not barred.

There is a distinction between enhancement of rent and alteration of rent on alteration of area. Even though a landlord can unite two causes of action, viz. for enhancement of rent and alteration, in one suit, he is not bound to do so. Hence where he obtains a decree in a suit under S. 52 that does not preclude him from asking the Court for enhancement of the rent altered under S. 52: 11 C W N 1154, Rel. on. [P 181 C 1, 2]

Panchanan Ghosal—for Appellant.

Sris Chandra Dutta—for Respondents.

Nasim Ali, J.—The suit out of which this appeal arises was for recovery of arrears of rent and for enhancement of rent under S. 30 (b), Ben. Ten. Act. In the present appeal, however, I am concerned only with the question of enhancement. The holding is admittedly an occupancy holding. The claim for enhancement is also not hit by S. 37 of the Act. The learned Munsif rejected the plaintiffs' prayer for enhancement under S. 30 (b) on the ground that there had been a fall in the price of staple foods since the rent was adjusted by a decree under S. 52 of the Act in the year 1929. The lower appellate Court however has reversed that decision and has remanded the suit to the trial Court. Hence this appeal by the tenant. By S. 30 (b) the landlord of an occupancy holding held at a money rent, is entitled, subject to other provisions of the Act, to institute a suit to enhance the rent of the holding on the ground that there has been a rise in the average local prices of staple food crops during the currency of the present rent.

The learned Munsif took the date of the decree under S. 52 as the date from which the present rent was current. I

am unable to agree with him in this view of the matter. The decree under S. 52 did not enhance the rent but simply altered it for excess area already in the use or occupation of the tenant. The Act makes a distinction between enhancement of rent and alteration of rent on alteration of area. The landlord cannot claim back rent in a proceeding for enhancement (S. 154 of the Act). Further his right to claim enhancement under Cls. (a) and (b), S. 30 are subject to the limitation laid down in S. 37. These limitations however do not apply to a claim for additional rent for an excess area inasmuch as rent is money payable by a tenant to his landlord on account of the use or occupation of the land held by the tenant. "Present rent" in S. 30 (b), "previous rent" in S. 32 (b) and "existing rent" in S. 105, Cl. (4) have been used in the Act in the same sense:

It is possible that the landlord for some reasons or other may not have realised the full rent. It is also possible that the landlord may not have realized any rent at all. In the latter case it is hardly reasonable to say that by existing rent is meant no rent : 32 C W N 999 (1).

The right to recover additional rent for excess area is a recurring one. A landlord is entitled to exercise it whenever he finds it necessary to do so: 6 C W N 360 (2). There is nothing to prevent the landlord from claiming back rent for any additional area in the use and occupation of the raiyat provided the claim is not barred by limitation: 29 Cal 247 (3). The words "during the currency of the present rent" in S. 30 (b) must therefore mean

during the currency of the rent which the raiyat has been actually paying or was liable to pay for the use and occupation of the land held by him.

By the decree in the previous suit under S. 52 the landlord obtained a decree for rent for the back period for the excess lands in the occupation of the tenant at the rate mentioned in the kabuliat of the year 1901 on the basis of which he came to possess the holding. In the previous suit the rent was not enhanced but simply altered. The landlord could have united the two causes of

action in the previous suit and could have asked the Court under S. 30 (b) to enhance the rent altered under S. 52 see 11 C W N 1154 (4). But he was not bound to do. In the present case; he is therefore entitled to ask the Court to enhance the rent altered under S. 52. The decree under S. 52 does not preclude him from doing so, and the date of the said decree cannot be taken as the date from which the present rent is current. Whether he will get any enhancement in view of the economic depression is entirely a different matter. S. 35 of the Act leaves the matter to the discretion of the Court. If the learned Munsif had not taken the date of the decree as the date from which the present rent was current, and had refused to decree enhancement by exercising his discretion under S. 35 on the ground that it would be unfair or inequitable in view of the fall in the price of staple foodcrops, the position might have been different. But he rejected the landlord's prayer for enhancement on an erroneous view of the effect of the decree under S. 52. I am not prepared to say therefore that the order of remand by the lower appellate Court is wrong. The appeal is accordingly dismissed with costs. Hearing fee one gold mohur.

Henderson, J.—I agree.

K.S./R.K.

Appeal dismissed.

4. Sarada Charan v. Iswar Samti, (1907) 11 C W N 1154.

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NASIM ALI, J.

Prativa Nath Roy—Defendant 1—Appellant.

v.

Benode Behari Ghose and others—Respondents.

Appeal No. 1117 of 1932, Decided on 29th November 1934, from appellate decree of Sub-Judge, First Court, Pabna, D/- 22nd January 1932.

(a) Bengal Tenancy Act (1885), S. 104-H—Land sold in execution against defendant 2 by defendant 1 purchased by defendant 3—Sold in execution against defendant 3 by defendant 1—Purchased by plaintiff—Defendant 1's rent suit against defendant 2 and defendant 3—Decrees obtained—Defendant 1 trying to sell land in execution of decrees—Plaintiff suing to restrain defendant 1 from putting land to sale—Held suit not being in respect of any rent or omission to settle rent S. 104-H is no bar.

The disputed land was sold in execution of a rent decree obtained by defendant 1 against

1. Kailash Sundari v. Midnapore Zamindary Co., 1929 Cal 47=115 I C 525=32 C W N 999.

2. Jatindra Mohan Tagore v. Chandra Nath, (1902) 6 C W N 360.

3. Jagannath Manjhi v. Jumman Ali Patwari, (1902) 29 Cal 247.

defendant 2 and was purchased by defendant 3 against whom also defendant 1 obtained a rent decree and the land was sold again and purchased by the plaintiff at the execution sale. Defendant 1 brought rent suit against defendants 2 and 3 and obtained decrees against them and was taking steps to put the land to sale in execution of these decrees. The plaintiff brought a suit to restrain defendant 1 from putting the land to sale :

Held : that the suit was not one in respect of any rent or omission to settle any rent and therefore S. 104-H, sub-cl. (8) was no bar to the suit. [P 183 C 1]

(b) Estoppel—Estoppel is not pure question of law.

Estoppel is not a pure question of law. Certain necessary facts have got to be found out in order to enable the Court to apply the doctrine of estoppel. [P 183 C 1]

(c) Specific Relief Act (1877), S. 56 (1)—Collusive decree—Defendant trying to execute collusive decree not affecting interest of plaintiff—Injunction should be granted.

Where the decree which the defendant was trying to execute was obtained by collusion and did not in any way affect the interest of the plaintiff :

Held : that order granting injunction was proper. [P 183 C 2]

(d) Decree—Execution—Decree not affecting interest of person—There is no principle or precedence compelling him to satisfy decree.

There is no principle or precedence which compels a person whose interest is not at all affected by a decree and against whom the decree is not at all binding to satisfy that decree. [P 183 C 2]

Girija Prasanna Roy Choudhury and Alinash Chandra Ghose—for Appellant.

Radhabenode Pal and Rabindra Nath Roy Choudhury—for Respondents.

Judgment.—This is an appeal by defendant 1 in a suit for a declaration that the plaintiff lands are not saleable in execution of a rent decree and for obtaining a perpetual injunction restraining defendant 1 from putting that land to sale in execution. The plaintiffs' case briefly stated is as follows :

The disputed land previously belonged to the pro forma defendant 1 in tenancy right under Kumar Protiva Nath Roy, defendant 1. The latter in execution of a rent decree against the pro forma defendant 2 put the suit land to sale and one Jatin Saha purchased the same. The landlord again put the disputed land to sale in execution of a decree against Jatin Saha and this time Krishna Nath Ghose purchased the tenancy. Defendant 1 again put the suit land to sale in execution of a rent decree against Krishna Nath Ghose and plaintiff purchased the

disputed land at that sale and took delivery of possession through Court : that thereafter defendant 1 brought a rent suit against the pro forma defendants 2 and 3, obtained a rent decree against them and is taking steps to put the disputed land to sale in execution of the said rent decree. Defendant 1, that is the appellant before me, resisted the claim of the plaintiff on the following grounds : (1) that in the settlement records which were prepared with the knowledge of the plaintiff, the names of the pro forma defendants were recorded with the knowledge and consent of the plaintiff ; (2) that in the rent suit in which the rent decree in question was obtained the plaintiff made Tadbir on behalf of the pro forma defendants and deposed that Jatin Saha, Krishna Nath Ghose and the plaintiff were in fact the benamidars of the pro forma defendants, and (3) that the plaintiff was never in possession of any portion of the disputed land after his auction purchase.

The trial Court on a consideration of the evidence found that the plaintiff's title to the property was not at all affected by the sale. The trial Court found that the plaintiff did not know anything about the settlement operation. It was also found by the trial Court that the purchase in auction by the plaintiff was not a benami or mala fide one. The plaintiff's possession after the auction-purchase was also found. The trial Court also came to the conclusion that the conduct of defendant 1 in the rent suit in which the decree in question was obtained would go to show that defendant 1 himself was in collusion with the pro forma defendants 2 and 3. In this view of the matter the trial Court decreed the plaintiff's suit. On appeal the decree of the trial Court has been affirmed. Hence the present appeal by defendant 1.

Four points have been urged by the learned advocate for the appellant in support of the appeal, namely, (1) that S. 104-H, sub-cl. (8) is a bar to the present suit, (2) that in view of the facts admitted and found the plaintiff is estopped from contending that the decree is not binding on him, (3) that the prayer for perpetual injunction being discretionary, in view of the facts and circumstances of the case the Courts below did not exercise their discretion properly in granting plaintiff's prayer for perpetual

injunction in this case; and (4) that in view of the provisions of S. 56, Cl. (i), Specific Relief Act, this is not a fit case in which perpetual injunction should be granted, inasmuch as the plaintiff had equally efficacious relief for putting a stop to the sale by depositing the decretal amount in Court.

As regards the first contention, the obvious answer is that this is not a suit in respect of any rent or omission to settle any rent under Ss. 104-A to 104-F.

As regards the second point, the issue about estoppel was decided against the appellant in the trial Court. As has been already pointed out the trial Court definitely found that the plaintiff was not at all aware of the settlement operation and consequently it was not possible for him to represent to the Settlement authorities that pro forma defendants 2 and 3 were to represent the tenancy in the settlement papers. In fact the finding of the trial Court that defendant 1 himself was in collusion with the pro forma defendants 2 and 3 would show conclusively that the defendant 1 was not misled in any way by any act or representation on the part of the plaintiff. Again when the appeal was taken to the lower appellate Court it appears that no such ground was specifically taken before the lower appellate Court. Again the ground of estoppel was also not taken in the memorandum of appeal to this Court. Estoppel is not a pure question of law. Certain necessary facts have got to be found out in order to enable the Court to apply the doctrine of estoppel. The plea of estoppel, as has been stated above, was no doubt taken in the trial Court, but the finding of the trial Court was against the defendant. That finding was not apparently challenged before the lower appellate Court. Under these circumstances, there appears to be no substance in this contention.

As regards the third point it may be observed that according to the findings of the Courts below the decree is a collusive decree and the plaintiff's right is not at all affected by the decree and cannot be affected by the sale which will be held in execution of that decree. In these circumstances, the defendant is threatening to invade the plaintiff's right to the property and the Court therefore acted properly in restraining the defendant from selling the property. Reliance

was placed by the learned advocate for the appellant on S. 56 (a), Specific Relief Act, which lays down that :

An injunction cannot be granted to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought unless such restraint is necessary to prevent the multiplicity of proceedings

Now what would be the effect if the defendant be not restrained from selling the property at this stage? The property would be sold and in due course the auction-purchaser would get possession of the property through Court. Both the plaintiff and the purchaser will claim possession. The result would be that there would be a multiplicity of proceedings in future. It is therefore absolutely necessary that before the matter goes further, the dispute regarding title to this property should be settled once for all. It cannot be seriously disputed that as the plaintiff's right has been established the property is going to be wrongfully sold; the plaintiff's right to restrain the defendant from selling the property therefore follows as a matter of course. In view of the concurrent findings of the Courts below that the decree which the defendant is trying to execute is a collusive decree and cannot in any way affect the interest of the plaintiff, it cannot be said that the order for injunction passed by the Courts below is not proper.

As regards the fourth point, it is very difficult to appreciate the argument of the learned advocate. It is argued that the plaintiff has an equally efficacious remedy for preventing the sale of his property, as he can pay up the decretal amount and prevent the sale. No authority in support of this contention was cited before me and I am not aware of any principle or precedent which compels a person whose interest is not at all affected by a decree and against whom the decree is not at all binding to satisfy that decree. Under these circumstances, I cannot accept the contention of the learned advocate, that the plaintiff's prayer for injunction should be refused unless he pays the decretal amount. The point taken by the learned advocate for the appellant therefore fails. The appeal is accordingly dismissed with costs. Leave to appeal under S. 15, Letters Patent, has been asked for in this case and is refused.

S.R./v.v.

Appeal dismissed.

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LORT-WILLIAMS AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

L. E. Renny and others—Accused—Respondents.

Govt. Appeal No. 4 of 1934, Decided on 31st January 1935.

(a) **Public Gambling Act (1867), S. 13—Prosecution must prove that accused are responsible for carrying on game and were gambling at time of offence.**

Before the prosecution can succeed in proving the case under S. 13, it must bring home clearly to the accused persons that they are responsible for carrying on the game and, therefore, are gambling at the time when the offence is alleged to have been committed. [P 184 C 2]

(b) **Public Gambling Act (1867), S. 13—Dart game—Side betting upon result of throwing darts on second board and table on which tickets are placed—That dart game by itself is not gambling does not affect question as to whether side betting is gambling.**

Where in addition to the dart games, there was also a side betting upon the result of throwing the darts by use of a second board and the table upon which the tickets were placed:

Held: that the fact that the dart game itself cannot be said to be a gambling game, did not in any substantial way affect the question whether what people who were alleged to have been doing amounted to gambling or not: 1933 Cal 8, *Expt.* [P 185 C 1]

Khundkar and Anil Chandra Roy Chowdhury—for the Crown.

Lort-Williams, J.—This is an appeal by the Remembrancer of Legal Affairs, Bengal, on behalf of the Government of Assam, against a decision of the Extra Assistant Commissioner of Dibrugarh, acquitting the respondents of an offence under S. 13, Public Gambling Act (Act III of 1867). It appears that on some carnival ground in Dibrugarh, a kind of game was played which, the prosecution alleged, was a gambling game. There were employed in the game an ordinary dart board with numbers upon it, another board with corresponding numbers in rows, and a table with corresponding numbers upon it. It was alleged that people bought tickets, which they placed upon one or other of the numbers upon the table. Then one of them was given a dart or darts which he aimed at the dart board and, according as the darts hit particular numbers on the dart board which corresponded with the same numbers on the table, the person who had placed tickets on the table won or lost, that is to say, the winners received some payment

from the person who was the owner and organiser of the game and the implements used for carrying it on. The evidence shows that such a game was carried on in this carnival grounds, and that the respondent Renny was either the owner of the implements or the organiser of the game, and that the other two respondents, in some way or other, assisted him in carrying it on. All this evidence is rather vague and insufficient in its present form. Before the prosecution can succeed in proving the case alleged they must bring home clearly to the three accused persons that they were responsible for carrying on the game and, therefore, were gambling at the time when this offence is alleged to have been committed. There is also evidence to show that certain persons bought tickets and placed them on the table, and that one or other of them threw a dart. There is no evidence to show that any of these persons won anything on this occasion. But there is a suggestion that, according to the rules, if a dart had hit some particular number or numbers, then the persons who paid for the tickets and placed them on the table would have received money, that is to say, would have won their bets.

The evidence leads me to think that the police stepped in too soon and before they had obtained sufficient evidence to prove the case against these three accused persons. But Mr. Khundkar has suggested that the note of the evidence, which we have, may not be complete. The case was tried summarily and consequently the Magistrate may not have taken down every word that was given in evidence. He has, however, recorded a fairly full note. Thus, Mr. Khundkar suggests, and has supported his suggestion by an affidavit sworn by a Sub-Inspector of Police, that witness 4 Shamsul Huda deposed that Suren and Renny used to give prizes to the winners including himself. Whether that ought to be considered to be sufficient evidence to prove that the backers, so to speak, had a chance of winning money, will have to be decided hereafter. The learned Commissioner seems to have misdirected himself in law, and has acquitted the accused, not because the evidence was defective, but upon the ground that what was described by the Inspector did not amount to gambling within the meaning of S. 13, Act III of 1867. I think that he was misled by certain decisions

of this Court upon the question whether the dart game is a gambling game or a game of skill. It was decided in the case of 37 C W N 24 (1) that the dart game is not a gambling game because it is a game in which there is a considerable element of skill. But that decision was not altogether relevant upon the question which had to be decided in this case. The accused were not charged with gambling by playing the dart game, but with gambling by side betting upon the result of throwing the darts in the manner described by the witnesses, coupled with other elements in the game arising from the employment of the second board and the table upon which the tickets were placed. The fact that the dart game itself cannot be said to be a gambling game, does not in any substantial way affect the question whether what these people are alleged to have been doing amounted to gambling or not. It seems, therefore, that the learned Commissioner was misled by the decision to which I have referred, and did not apply his mind to the different facts of the present case, and the different way in which it is alleged that the respondents committed an offence under the Public Gambling Act. The case therefore must go back to be retried, and the order of dismissal must be set aside. The prosecution must appreciate what are the essential facts which must be proved bearing in mind the points to which I have drawn attention. The accused, who are on bail, will remain upon the same bail.

Jack, J.—I agree.

K.S./R.K.

Retrial ordered.

1. Saligram Khettry v. Emperor, 1933 Cal 8=1933 Cr C 28=141 I C 593=34 Cr L J 168=37 C W N 24.

A. I. R. 1936 Calcutta 185

NASIM ALI, J.

Sabhapati Dubey — Accused — Petitioner.

v.

Ram Kissen Kumar—Complainant—Opposite Party.

Criminal Revn. No. 1282 of 1934, Decided on 29th January 1935.

(a) Criminal P. C. (1898), S. 520—"Court of appeal" means any Court to which appeals ordinarily lie from decision of Magistrate by whom case was tried.

The Court of appeal mentioned in S. 520 is a Court of appeal as contemplated by Ch. 31. The words "Court of appeal" in S. 520 do not mean only a Court to which either of the parties to the criminal case has appealed or could appeal. The Court of appeal is any Court which has powers of appeal, that is any Court to which appeals ordinarily lie from the decision of the Magistrate by whom the case was tried: 3 Cal 379; 1929 Rang 97 (F B); 9 Mad 448 and 1932 Bom 534, Ref. [P 185 C 2; P 186 C 1]

(b) Criminal P. C. (1898), Ss. 9 and 520—Additional Sessions Judge is Court of Session and Court of appeal within meaning of S. 520.

An Additional Sessions Judge is also a Judge of the Court of Session and is a Court of appeal within the meaning of S. 520: 1931 Cal 190, Ref. [P 186 C 1]

(c) Criminal P. C. (1898), S. 520—Sessions Judge or Additional Sessions Judge is not Court of revision within meaning of S. 520.

A Court of revision within the meaning of S. 520 must be a Court of revision as contemplated by Ch. 32 of the Code. A Sessions Judge or Additional Sessions Judge is not a Court of revision within the meaning of S. 520: 1935 P C 35 and 1932 Bom 534, Rel. on. [P 186 C 1, 2]

Holiram Deka—for Petitioner.

Gopal Chandra Banerjee—for Opposite Party.

Order.—This Rule was issued against the Deputy Commissioner of Sibsagar and the complainant opposite party in a certain criminal case to show cause why the order of the Additional Sessions Judge of the Assam Valley Districts, in Criminal Appeal No. 12 of 1934, dated 10th October 1934, setting aside under S. 520, Criminal P. C., an order of a first Class Magistrate of Golaghat, under S. 517 of the Code and restoring a certain elephant to the complainant opposite party, should not be set aside on the ground that the Additional Sessions Judge was not the Court of appeal, confirmation, reference or revision within the meaning of S. 520, Criminal P. C. S. 520 is in these terms:

Any Court of appeal, confirmation, reference or revision may direct any order under S. 517, S. 518 or S. 519 passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

Evidently the Court of appeal mentioned in the section must be a Court of appeal as contemplated by Ch. 31. There is nothing in terms of S. 520 justifying the view that the words "Court of appeal" in that section means only a Court to which either of the parties to the criminal case has appealed or could ap-

peal: see 3 Cal 379 (1) and 7 Rang 345 (2). The wording of the section rather indicates that the Court of appeal is any Court which has powers of appeal, that is any Court to which appeals ordinarily lie from the decision of the Magistrate by whom the case was tried: see 9 Mad 448 (3) and 56 Bom 369 (4). It is not disputed by the learned Advocate for the petitioner that the Court of Session is the Court of appeal in the present case. Under S. 9, Criminal P. C., the Local Government is empowered to establish a Court of Session for every Sessions division and to appoint a Judge of such a Court and Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in such Court and to direct at what place or places the Court of Session shall sit.

Now :

There is only one Court of Session in each sessional division, sitting at different places and manned by a number of Judges. The Court is the Court of Session. It is not accurate to refer to the "Court of the Sessions Judge" and the "Court of the Additional Sessions Judge" and so on, except colloquially: see 58 Cal 1117 (5).

Therefore an Additional Sessions Judge is also a Judge of the Court of Session. Consequently the Additional Sessions Judge of the Assam Valley Districts sitting at the time at Jorhat was the Court of appeal in the present case within the meaning of S. 520, Criminal P. C. It may be pointed out here that when the petitioner appeared before the Additional Sessions Judge after he got notice about this case, he did not raise the question that the Additional Sessions Judge had no jurisdiction to entertain the appeal or that he was not authorized by the Sessions Judge to hear the appeal. Again the Court of revision within the meaning of S. 520 must be a Court of revision as contemplated by Ch. 32 of the Code. Under S. 535, Criminal P. C., the Ses-

sions Judge can call for the record in the case. Under S. 436 he can order further enquiry. Under S. 438 he can refer the matter to the High Court after examination of the record. In 56 Bom 369 (4), Beaumont, C. J., observed as follows:

The Sessions Court has no general power of making orders in revision. It can only under S. 435 enquire into the matters, before Subordinate Courts and if necessary refer to the High Court for orders under S. 438. But S. 520 seems to make it unnecessary for a subordinate Court of revision to adopt that course in matters within that section. If an application is made to the Sessions Court as the Court having powers of revision in respect of the trial Court in regard to orders relating to property made under S. 517, 518 or 519, then in my opinion the Sessions Court can itself make a proper order and need not refer the matter to the High Court.

In *Chunbiya v. King-Emperor* (6) decided by their Lordships of the Judicial Committee on 6th December 1934, Lord Atkin has made the following observation :

The powers relating to appeals under S. 423, Criminal P. C., are given to the appellate Court and the appellate Court may include a Court subordinate to the High Court and the appellate Court as such has no power to enhance the sentence differing from the provision which was in the old Criminal Procedure Code of 1872. On the other hand the powers of revision are given to the High Court alone and the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to his knowledge.

In view of the observations of the Judicial Committee it is difficult to hold that Sessions Judge or Additional Judge is a Court of revision within the meaning of S. 520. But as I have held that the Additional Judge is a Court of appeal within the meaning of S. 520 of the Code, I discharge the rule.

R.M./R.K.

Rule discharged.

6. 1935 P C 35=1935 Cr C 199=153 I C 936
=57 All 156 (P C).

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LORT-WILLIAMS AND JACK, JJ.

Nabi Khan and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 882 of 1934, Decided on 19th June 1935.

(a) Criminal Trial—Jury trial—It is not sufficient if Judge informs the jury to consider case of each accused separately—He himself should do so—Charge should not be long, rambling repetition of evidence without marshalling facts or sifting evidence—He should

1. *Empress v. Joggesur Mochi*, (1877) 3 Cal 379.
2. *U Po Hla v. Ko Po Shein*, 1929 Rang 97=115 I C 901=30 Cr L J 540=7 Rang 345 (F B).
3. *Queen-Empress v. Ahmad*, (1886) 9 Mad 448=2 Weir 672
4. *Walchand Jasraj v. Hari Anant*, 1932 Bom 534=1932 Cr C 789=199 I C 433=33 Cr L J 807=56 Bom 369=34 Bom L R 1203 (FB).
5. *Superintendent and Remembrancer of Legal Affairs, Bengal v. Ijjatulla Paikar*, 1931 Cal 190=1931 Cr C 254=132 I C 160=32 Cr L J 842=58 Cal 1117=35 C W N 400=53 C L J 177.

not go into unnecessary details of matters of little importance.

The Judge should give the jury the help and guidance which they are entitled to expect from the Judge, and which it is his duty to give. The charge should not consist of a long, rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads, or to assist the jury to sift and weigh the evidence, so that they will be in a position to understand which are the really important parts of the evidence and which are of secondary importance. The Judge should deal with the case of each of the accused separately, that is to say, he must point out to the jury exactly the evidence against each of the accused separately, and it is not sufficient if he simply asks the jury to consider. It is his duty to consider the case of each accused separately and to describe to the jury the evidence against each of the accused. It is, of course, necessary in every criminal case for the Judge carefully, properly and efficiently to charge the jury, but if there is any case in which it is more important that this duty should properly be performed, it is in a case of murder. He should not go into unnecessary details with regard to such aspects of the case, which are really of very little importance. [P 187 C 2]

(b) Criminal Trial—Jury trial—Charge of conspiracy to murder—Letter by some person to complainant that certain accused were conspiring to kill him and had offered him bribe to murder complainant—Judge not explaining evidential value of this letter but leaving jury to imagine it to be substantive evidence of conspiracy to murder—Non-direction held amounted to misdirection.

Where in a trial by a jury into a charge under S. 302 read with S. 120-B, the Judge did not explain the proper evidential value of a letter written by certain person to the complainant that the accused were conspiring to kill him and had offered him (writer) money to murder complainant, but left the jury to imagine that this was substantive evidence of the conspiracy to murder the complainant:

Held: that this by itself was a non-direction which amounted to a misdirection. [P 188 C 1]

(c) Criminal Trial—Jury trial—Judge should make reference to specific accused person and not merely use word accused.

In his charge to the jury the Judge should not merely use the word accused leaving the jury in considerable doubt as to which accused he refers. He should make reference to specific accused persons. [P 189 C 1]

Sures Chandra Talukdar and Radhika Ranjan Guha—for Appellants.

Harideo Chatterji—for the Crown.

Lort-Williams, J.—In this case the appellants were charged with two others under Ss. 364 and 302/120-B, I. P. C. Two of the accused were acquitted by the jury and the others, who are the present appellants, were found guilty under both sections by a majority of 6 to 3. This is a case in which, though it cannot be said that there is any actual misdirection of

the jury, the Judge has failed almost entirely to give the jury the help and guidance which they are entitled to expect from the Judge, and which it is his duty to give. The charge consists of a long, rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads, or to assist the jury to sift and weigh the evidence, so that they will be in a position to understand which are the really important parts of the evidence and which are of secondary importance. Especially, the learned Judge has failed altogether to deal with the case of each of the accused separately, that is to say, he has omitted to point out to the jury exactly the evidence against each of the accused separately. Almost the last words of his charge were that they would consider the case of each accused separately. That however is not sufficient. It is his duty to consider the case of each accused separately and to describe to the jury the evidence against each of the accused. It is of course necessary in every criminal case for the Judge carefully, properly and efficiently to charge the jury, but if there is any case in which it is more important that this duty should properly be performed, it is in a case of murder, and especially, in this case was great care necessary on the part of the Judge, because it was a case in which the police had originally reported against any proceedings being taken, and after a Naraji petition had been filed, the case was inquired into by a Deputy Magistrate who dismissed it under S. 203, Criminal P. C. Thereupon the complainant moved the Sessions Judge and it was not until the third attempt made by the complainant that he succeeded in getting the case sent back for a fresh inquiry out of which the present prosecution resulted.

In addition to failing to give any assistance to the jury, the learned Judge handicapped them by going into unnecessary details with regard to certain aspects of the case, which were really of very little importance. Yet he told the jury that it was necessary for them to come to a finding with regard to these secondary matters. With regard to the evidence generally, all that the learned Judge did was to repeat shortly what each witness had said, and then to tell the jury again and again ad-nauseum that it was for them to consider whether they would

believe or disbelieve that witness, without attempting to guide or help them in considering what facts there were in his evidence which would lead them either to one conclusion or the other.

The facts shortly were that Kazi Sarip Hossain was a Collectorate Amin and he was the complainant. He had purchased a property and a rent decree against the accused Nabi Khan and had purchased Nabi Khan's homestead in execution and attached his moveables. There had been resistance to the peon who went to attach the goods, and Nabi Khan, Mofez, Ful Khan and others were implicated in a criminal case for resisting the peon, and Nabi Khan, Mofez, Chinta Haran Das and one Kasemali had threatened the complainant. This Kasemali seems to be intended for the accused Hashemali, though there is no explanation in the charge about this discrepancy. The complainant's son, Momin, gave evidence against these accused in the criminal case. After stating these facts to the jury, the Judge then went on to describe certain letters written by one Abdul Kader to the complainant, in which he stated that Nabi Khan, Mofezaddi, Khorshed and Chintaharan, the accused, and others were conspiring to kill him. These letters were admissible only in corroboration under S. 157 of the statement of Abdul Kader, that some of the accused had offered him money to murder the complainant. Nowhere in the charge has the Judge explained this to the jury. He has left them to imagine that this was substantive evidence of a threat by these accused to murder the complainant, or substantive evidence of a conspiracy on their part to murder him. This, in itself, was a non-direction which amounted to misdirection.

On 7th December 1933, the complainant's son, Momin, went out to buy some provisions and his father became anxious about him when he did not return by nightfall. The complainant and his sons went out and searched in the neighbourhood and discovered that Momin had been to the shop and purchased the things he was sent to get. This was at about 8 o'clock at night. When near Ful Khan's house the complainant heard whispers in the houses of Hashem and Ful Khan and, in the light of the room, he saw all the accused in the yard, carrying lejas and lathis. He also heard a

groaning sound coming from Hashem's ghar. The learned Judge, throughout the charge, repeatedly told the jury that the complainant heard the voice of his son Momin groaning in Hashem's bari. There is no evidence to show that it was Momin groaning. It was a mere inference to be drawn from other evidence. But the statement repeated to the jury that it was actually Momin who was heard groaning, was undoubtedly sufficient to mislead the jury upon this part of the evidence. After that the learned Judge went into a somewhat rambling account of the attempts of the complainant to get the police to take the matter up, and a great deal of unnecessary detail was gone into by him in describing the various steps by which the complainant eventually got the police to take up the enquiry.

There was a great deal of evidence to show that the police were very negligent over the matter, and their negligence may have been one of the causes of the death of this unfortunate man, because if it be true that Momin was groaning when the complainant was outside Ful Khan's house, there might have been time to save him if the police had taken action immediately. But this was not a matter for the jury to enquire into. The learned Judge however told them that they would have to decide whether the police had been negligent in the matter, a question which it was quite unnecessary for them to consider, except perhaps upon the point whether the complainant was guilty of any delay in making a complaint. On the next morning, one of the accused, Chinta Haran Das, made a complaint at the thana that there had been a burglary in his house and that he had stabbed a thief with a dao. On the following Sunday morning, a dead body was found floating in the Kalijira river, and later some blood was found near Hashemali's bhita, and two legs were found amputated at the knee near Kashemali's bhita, which were identified by the complainant as those of his son, Momin. The learned Judge then went on to say that these accused were parties to a criminal conspiracy, meaning all the seven accused. Immediately afterwards, he stated the evidence in the case shortly and said that Kashemali and Apserali saw these accused throwing a gamcha around Momin's neck and dragging him towards

Hashem's house. Presumably, he meant all the seven accused.

This Kashemali was a witness, but no attempt was made to draw a distinction between Kashemali, mentioned as an accused, and Kashemali, the witness. Another witness saw Momin being assaulted in the house of Hashemali in the evening. The Judge does not say by whom the assault was made. One Baseraddi saw the accused Tomejuddin and Mofez carrying a dead body near Majid, and Amjadali saw these accused, (presumably, the Judge meant Tomejuddin and Mofez, carrying a dead body in a boat and going towards Raipura. All this kind of description appears to have been very carelessly done, and lacks the precision which is most necessary in a criminal case and, especially, in a case of murder. It leaves me, and probably left the jury, in considerable doubt about which of the accused were referred to, whenever the Judge mentioned the word 'accused', without making any reference to specific accused persons. It is unnecessary for me to describe the case in further detail. I have indicated sufficient to show that the learned Judge failed properly to direct the jury. There was however considerable evidence upon which if a proper direction had been given and, if believed by the jury, these men or some of them might have been convicted under these charges. In these circumstances, the only appropriate course is to set aside the convictions and send the case back for retrial.

Jack, J.—I agree.

K.S./R.K.

Retrial ordered.

A. I. R. 1936 Calcutta 189

MUKERJI AND S. K. GHOSE, JJ.

Mahommed Mayenuddin Mea and others—Defendants—Appellants.

v.

Prodyot Kumar Tagore and others—Plaintiff—Respondents.

Appeal No. 143 of 1930, Decided on 8th April 1935, from original decree of Sub-Judge, 3rd Court, Mymensingh, D/- 22nd April 1930.

Landlord and Tenant—Tenancy—Nature of—Purpose for which tenancy was originally acquired should be determined—Tenancy existing prior to Bengal Tenancy Act—It must be found that tenant was in occupation by cultivation and payment of rent—If nothing is known, except that tenant was in

cultivating possession of portion of land for few years and then went on increasing cultivation, at same time letting in sub-tenants in rest of land, position is different—All other circumstances must be investigated to find whether such person was ryot or tenure-holder—It may be profitable to examine subsequent use of tenancy—Use during entire period of tenancy should be taken into account—Presumption under S. 5(5) is statutory presumption under Act—It has existed even prior to Act as presumption of fact.

Where the question is as to the nature of the tenancy, under the Bengal Tenancy Act, what has to be seen is the purpose for which the right of tenancy was originally acquired. And as regards a tenancy which existed from before, there having been no definition of 'ryot' in any earlier enactment, to give a person the status of a ryot, it will have to be found that he was in occupation by cultivation and payment of rent (vide: S. 6, Act 10 of 1859 and S. 6, Act 5 of 1869), a contract conferring the status of a ryot being deducible from such circumstances. It is possible that with reference to a tenancy of the latter kind if nothing else is known than that the entire tenancy since its inception was in the cultivating possession of the tenant for a number of years, the tenant was a ryot even though he may have subsequently let in sub-tenants in portions of the lands of the tenancy. But if all that can be gathered in respect of an old tenancy of unknown origin is that during the first few years the tenant was in cultivating possession of a portion of lands of the tenancy, and then went on increasing his own cultivation and at the same time letting in sub-tenants on the rest of the lands, the position is very different and it would require investigation of all other attendant circumstances in order to find out whether such a person was a ryot or a tenure holder. There may also be cases where it would be profitable to examine the subsequent use of the tenancy but only to the extent that such use throws light upon the attendant circumstances and in that way on the original purposes of the tenancy. And where such examination is justified, the use during the entire period of the existence of the tenancy has to be taken into account. In the Bengal Tenancy Act of 1885 there is the presumption contained in sub-s. (5) of S. 5. It is a statutory presumption under that Act; but a presumption depending upon the largeness or smallness of the area of the tenancy, being founded on reason, had all along existed even before that Act as a presumption of fact.

[P 191 C 2, P 192 C 1]

Gunada Charan Sen, Prafulla Chandra Nag and Himanshu Chandra Choudhury—for Appellants.

Bijan Kumar Mukherjee, Gopendra Nath Das, Hemendra Chandra Choudhury, Hira Lal Chakravarty and Satindra Nath Chatterjee—for Respondents.

Judgment.—The whole controversy in this appeal turns on the question of the status of the defendants who are the appellants and who claim to be occupancy raiyats as against the contention

of the plaintiffs respondents which ascribe to them the status of non-permanent tenure holders holding over on the expiry of their lease. The defendants have to start with a double presumption against them. They have been recorded in the record of rights, finally published in 1913, as possessors of Fazal Jote Joynal Abedin, tenure holders—non-permanent, enhancible: the subordinate interests are recorded as Chukani; the total area of the lands let out to tenants is stated to be 539 acres, and the total area in direct possession as 11.96 acres of which about 5 acres consist of low lands and bunds and the rest are in the possession of the public as Halots. And the total area of the tenancy is 550.96 acres. The question to be considered is: "Has the presumption been rebutted?" The area consists mostly of Chur lands in Mouzah Gaibandha in the District of Mymensingh which are subject to fluvial action of the river Brahmaputra. The last lease in favour of the defendant's predecessor, one Joynal Abedin, was dated 1313 (1907). It was a dowl settlement. A prior lease, also a dowl, dated 1282 (1875) is also in evidence. Each of these dows was for seven years, the description being that it was a Fazal Dowl or Dowl of Fazal land. In the prior one the area of the land, as on measurement, was stated to be 1262 Big. 4 Cottas and rent Rs. 858-8-0; and in the later one the area as measured was given as Bigha 1399-11 Cottas 1 Chhitak out of which 8 Cottas with rent As. 4 was said to be Hajat and the rest of the area was assessed with a rental of Rs. 990-2-0. No particulars as regards the nature of the tenancy can be gathered from the terms of either of these documents except that the Jote was a Fasal Jote which evidently means 'for purposes of cultivation' nor any as regards the status of the tenant except that in the dowl of 1313 (1907), Joynal Abedin, the person in whose favour the settlement was made, was described as Malguzardar or rent paying holder.

It has been found, and about that matter there is no longer any dispute, that the origin of the tenancy is lost in obscurity. Unknown though its origin is, it has been alleged on behalf of the defence that the jote was first taken some 150 years ago by the great great grand-father

of defendant 1 Maynuddin. The pedigree of the defendants helps us to find out who the successive holders of the jote could have been; and taking the evidence on the defendants' side to be true they must have been defendant 1's great great grand-father Anwar Sheikh, great grand-father Abdul Mati Sheikh, grand-father Khajeru-uddin, father Joynal Abedin, and then the present defendants. Khajeru-uddin died in 1280 or 1281 B. S. and Joynal Abedin died in 1315 B. S. No document of Khajeru-uddin's time has been produced and the Judge below is correct in observing that if any history prior to 1280 B. S. is to be gathered the oral evidence that has been adduced is all that one has to look to. Of such papers that have been produced on behalf of the parties of Joynal Abedin's time and later, the only two documents of any importance as bearing on the question before us are two Chittas, one of 1286 B. S. (Ex. 24) and the other of 1309 B. S. (Ex. 12). A good deal of discussion appears to have been let in in the Court below on the question of the truth or sufficiency of the defendants' explanation for non-production of papers of any earlier dates, the explanation being that there was a fire and also an earthquake, and such discussion has also been repeated before us to some extent. But nothing has been made out which would justify us in holding that the explanation is untrue or that it is not adequate. Nor, on the other hand, are we satisfied, as apparently the Court below also was not, that the plaintiff has withheld any relevant papers. The fact remains, but only as a fact, that there are no earlier papers to go upon. The learned Judge has come to a finding on the evidence as regards the origin of the jote which he has recorded in these words:

From the evidence and from the Chitta of 1286 it may safely be inferred that the jote was of Khajeru-uddin's time. But there is absolutely no dependable evidence in the record to show that the jote existed from before Khajeru-uddin's time. Any statement to that effect is merely speculative.

The finding is unassailable, if dependable evidence in the shape of documentary evidence is meant, and oral evidence of matters relating to such ancient times is recorded as speculative. Mr. Sen in his arguments on behalf of the appellants has strenuously sought to make a great point of the fact that in no papers of the

plaintiff prior to 1327 B. S. were the defendants described as tenure holders and that it was only in that year and later that in the talab bakis and the dakhilas the tenancy was described as a non-permanent tenure: (vide Ex. 2 Series Dakhilas, one of which Ex. 2-D, appears to have been received by defendant 1 himself, his signature appearing on the original though not in the paper as printed; and Ex. 3 Series Talab Bakis, one of which, Ex. 3, has been wrongly printed.) From this he has argued that the plaintiff was not bold enough to put forward such a case as regards the defendants' status. We see no force whatsoever in this argument, for long prior to that date the record-of-rights had declared the defendants as non-permanent tenure holders, and it is idle to suggest that the defendants were not aware of that fact.

Another argument which was addressed to the Court below and also to this Court was based upon the use of the word 'Chasak' as regards some of the plots of the tenancy, the Chittas of 1286 B. S. and 1309 B. S. The Chitta of 1286 B. S. is called an Ekandaj Chitta, which means Chitta of an entire village, in this case of village Gaibandha, in which the tenancy is situate. The portion which was available and has been produced is only a fragment, torn and worm eaten; and it is said that there are references in it to earlier Tankhi Chittas, that is to say, Chittas of parts of the village dated 1267 B. S. and later. In most of the entries in the Chitta of 1286 B. S. and in a few of the entries, the Chitta of 1309 B. S. the occupants are called 'Chasak' while many of those who are called 'Chasak' in the former Chitta are differently described by the use of the word 'Abad' in the latter Chitta. It was contended on behalf of the defendants that the word 'Chasak' means that the occupants were Bargadars or servants or hired labourers while the word 'Abad' signifies cultivation by ryots. On behalf of the plaintiff on the other hand it was contended that both words referred to cultivators. The learned Judge has accepted the plaintiff's contention and has explained the use of the two words in the above mentioned way by suggesting that by the date of the latter Chitta the word 'Chasak' had gone out of use, and the word 'Abad' having come into use, found more frequent mention.

The defendants have given some oral evidence as regards the meaning of the word 'Chasak', but that evidence is obviously unreliable, as the learned Judge has pointed out. Whether there was any real distinction between the two words, even though both may have implied cultivation, one cannot say with certainty. But it is obvious, on a close examination of the two Chittas, that the meaning which the defendants seek to put upon the word 'Chasak' cannot be its true meaning. For this view several reasons may be given. In the paper book a comparative table has been printed, which is very much misleading, being incomplete and intended to help only the appellants themselves. Even there are entries showing that the same persons, with reference to whom the word 'Chasak' was used in Chitta of 1286 B. S., were described by the use of the word 'Abad' in the Chitta of 1309 B. S., a state of things which upon the defendant's interpretation can only be explained on the supposition which is highly improbable, that during the interval that elapsed between the two Chittas the same person had transferred himself from a Bargadar or servant or hired labourer to a tenant. Again in that table there is one entry showing that certain persons with reference to whom 'Chasak' was used in the Chitta of 1286 B. S. were described in the Chitta of 1309 B. S. as former tenants in respect of the plot. Furthermore Mr. Mukherjee has drawn our attention to the fact that there are innumerable entries in the Chitta of 1286 B. S. describing the plots as "Fasal Ijara Joynal Sheikh Chasak so and so" clearly showing that Joynal Sheikh was Ijaradar and not a ryot. The contention of the defendants based upon the Chitta of 1286 B. S. that at that date Joynal Abedin, the holder of the tenure was a cultivating ryot and not a tenure holder, cannot be regarded as valid.

On the question of the nature of the tenancy, it cannot be disputed that under the Bengal Tenancy Act 1885 what has to be seen is the purpose for which the right of tenancy was originally acquired: vide S. 5, sub-s. (4), Cl. (b), Beng. Ten. Act. And as regards a tenancy which existed from before, there having been no definition of "ryot" in any earlier enactment, to give a person the status of a

ryot, it will have to be found that he was in occupation by cultivation and payment of rent: vide S. 6 of Act 10 of 1859 and S. 6 of Act 8 of 1869; a contract conferring the status of a ryot being deducible from such circumstances. It is possible that with reference to a tenancy of the latter kind, if nothing else is known than that the entire tenancy since its inception was in the cultivating possession of the tenant for a number of years, the tenant was a ryot even though he may have subsequently let in sub-tenants in portions of the lands of the tenancy. But if all that can be gathered in respect of an old tenancy of unknown origin is that during the first few years the tenant was in cultivating possession of a portion of lands of the tenancy, and then went on increasing his own cultivation and at the same time letting in sub-tenants on the rest of the lands, the position is very different and it would require investigation of all other attendant circumstances in order to find out whether such a person was a ryot or tenure holder. There may also be cases where it would be profitable to examine the subsequent use of the tenancy but only to the extent that such use throws light upon the attendant circumstances and in that way on the original purposes of the tenancy. And where such examination is justified, the use during the entire period of the existence of the tenancy has to be taken into account. In the Bengal Tenancy Act of 1885 there is the presumption contained in sub-s. (5), S. 5. It is a statutory presumption under that Act; but a presumption depending upon the largeness or smallness of the area of the tenancy, being founded on reason, had all along existed even before that Act as a presumption of fact.

Bearing these principles in mind we have now to examine the oral evidence that is on the record, for there is no document by reference to which the terms of the tenancy may be ascertained, and such documentary evidence as is on the record, the earliest of which as already stated in Chitta of 1286 B. S., far from showing that the defendants or their predecessors were ryots, point clearly to their having occupied the status of tenure holders. The defendants rely on such oral evidence as they have been able to adduce as regards the user of the tenancy in the time of Khaje-

ruddin, who died in 1280 or 1281, B. S., and of his predecessors, Bishu, Abdul Mali and Anwar. This evidence consists of the testimony of defendant 7 Sonabhan Bewa, who is a daughter of Khajiruddin, and of six other witnesses, viz. D. Ws 4, 5, 6, 9, 20 and 21, who are the older amongst the witnesses in this case. The learned Judge has examined the evidence of each one of these witnesses with care and has expressed the view that the evidence is of a very unsatisfactory and unconvincing nature. No other view indeed is possible. Sonadban Bewa herself has made a statement which, if it is taken to be true, goes against the case which the defendants seek to make out, namely that it was only after Joynal Abedin came in that tenants began to be settled on the lands and that up to Khajiruddin's time, the lands used to be cultivated in Barga. She said:

Abdul Mali settled some tenants at first. The lands proved too large in extent for cultivation. So some tenants were settled. He brought the tenants at his own expense and settled them; they did not come and settle themselves.

But perhaps this statement is just as untrue as the rest of her evidence where she endeavoured to establish that her grandfather Bishu cultivated the lands with his own ploughs and cattle and with 30 or 40 servants. She admitted that Bishu Mandal died when she was a child, and that her knowledge of what used to be done in Bishu Mandal's time was acquired from what her father Khajiruddin had told her. As regards her father's time she has deposed that her father's officers used to bring paddy and rice of the Abad and to realise rents also, which latter fact must mean that there were tenants on the land. P. W. 4 Abdul Majid Mandal, P. W. 5 Mandu Sardar, and P. W. 6 Abdul Alim Sardar, have taken advantage of their ages to attempt to support the story of Khas cultivation in Khajiruddin's time, but as the learned Judge has demonstrated in his judgment, their evidence cannot be trusted. The same remark applies to P. W. 9 Darbari Mandal who has made it clear in his cross-examination that he really knew nothing about the tenancy. D. W. 20 Kanai Sarcar is an old officer of the defendants who entered their service in 1284 B. S., but has spoken of large cultivation prior to that date, and in Khajiruddin's time. He has tried his very

best to support his master's cause, but it is unthinkable to rely on his evidence. D. W. 23 Mayenuddin is defendant 3 himself. He has of course deposed that the Jote was taken for cultivation and that his predecessor had all along cultivated the lands in Barga or by servant until 1285 or 1286 B. S., when tenants first began to be settled. But such evidence as he himself has given, in the absence of any reliable corroboration, would hardly suffice to prove the case which he has sought to establish.

There are a few other matters worth mention. In the plaint of a suit instituted in 1922 on behalf of the plaintiff against the present defendants for rent of this tenancy, it was most definitely asserted that they are ordinary non-permanent tenure holders at a variable rent (Ex. D). In their written statement in that suit (Ex. 25) the defendants controverted that assertion by saying: "The rent land is not a permanent tenure. It is permanent and rent thereof is not enhancible." The suit ended in a compromise in which the settlement records were referred to without challenge and the rent was admitted to be variable (Ex. 40). Here was a definite assertion of the defendants' status which was not repudiated. Then again in 1913 defendant 3 had deposed in a certain proceeding that his father, that is to say Joynal Abedin, had no Khamar land at any time. This last-mentioned fact of course is not conclusive and is perhaps capable of being explained; but there it is. On a consideration of all evidence that the defendants have adduced or called in their aid, it is impossible to hold that the presumption which they have to meet has been rebutted. The result is that we must hold that the appeal cannot succeed. It is accordingly dismissed with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1936 Calcutta 193**

MCNAIR, J.

Probodh Lal Mukerjee—Plaintiff.

v.

Nilratan Adhikary—Defendant.

O. O. C. J. Suit No. 2204 of 1932, Decided on 27th August 1934.

Civil P. C. (1908), O. 1, R. 9—Necessary party to suit not brought on record—Defendant taking objection at earliest moment—No amendment asked for by plaintiff—Suit must be dismissed—Suit on promissory note

1936 O/25 & 26

—Widow of deceased executant governed by Bengal School of Hindu Law is necessary party.

Order 1, R. 9 does not do away with the necessity for bringing a necessary party on the record. If a necessary party is not on the record the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record the suit as against him is barred by limitation, the suit will be dismissed especially where the defendant has taken the objection even at the earliest possible moment and the plaintiff has not asked for amendment of the plaint for bringing on record such party: 1914 Cal 132, *Applied*; 1930 Mad 930, *Disting.*; 1921 Cal 622, *Rel. on.* [P 195 C 2]

An executant of a promissory note governed by the Bengal School of Hindu Law died leaving two widows. Plaintiff impleaded one of them as defendants in his suit on the note. Even at the earliest moment, the impleaded widow pleaded that the other widow was a necessary party but the plaintiff did not implead her:

Held: that she was a necessary party and as she was not on record, the suit should be dismissed. [P 195 C 2]

Judgment.—The plaintiff in this suit seeks to obtain a decree for a sum of Rs. 6,866 against the estate of Krishna Kishore Adhikary, deceased, in the hands of the persons whom he has impleaded as defendants. On 25th September 1929 Krishna Kishore Adhikary executed a promissory note for the sum of Rs. 5,000 payable to the plaintiff on demand with interest at the rate of 12 per cent per annum. On 29th April 1930 Krishna Kishore died leaving two widows as his heiresses. In his suit the plaintiff states in para. 2 of his plaint that Krishna Kishore had died leaving defendant 3, his widow, surviving him. He then states in para. 3 that he is informed that Krishna Kishore had left a will and appointed defendant 2 as his executor. In para. 4 he says the plaintiff has ascertained that defendants 1 and 2, the brothers of the deceased and defendant 3, his widow, are in possession of the assets of the deceased. He then sets out particulars of his claim and asks for a decree against the assets in the hands of the defendants, and if necessary, for administration. The plaint was filed on 14th November 1932. The brothers Nilratan Adhikary and Gopesh Chunder Adhikary filed a written statement in which they deny knowledge of execution of the promissory note and state in para. 2 of their written statement that Krishna Kishore died intestate leaving him surviving two widows

as his heiresses and legal representatives under the Bengal School of Hindu Law by which he was governed. They deny that they or either of them is in possession of the assets, but they admit that they are in possession of certain properties which were formerly their joint properties and which they say no longer form part of the assets of their deceased brother. In para. 5 of their written statement they take a definite plea that the second widow, Sm. Indumati Debi is a necessary party to the suit and that the suit is bad as framed.

The widow Sm. Saratbala Debi, who has been impleaded, has put in no defence. The defendant Nilratan Adhikary, one of the brothers, has died and there has been no substitution of his heirs on the record. Issue 1 which was framed was: "Is the suit bad for non-joinder or misjoinder of parties?" and this matter has been argued by way of demurrer. On behalf of the plaintiff, it is urged that the suit has been brought bona fide against those persons whom he thought were representing the estate. He admits that he has not used the word "representative," but he contends that from the way in which his plaint is framed and the allegation that defendant 3, the widow is in possession of part of the assets that widow is sued in a representative capacity. It seems to me that this is stretching the language a great deal further than is legitimate. In support of his contention he relies on 54 Mad 212 (1). That case however is not really an authority for the proposition which the plaintiff is trying to set up here, for in that case a creditor had brought a suit against the widow whom he considered to be the sole legal representative of the debtor and had obtained an ex parte decree for the payment of the debt out of the assets in her hands and the Court held that the widow sufficiently represented the estate to make the decree binding on a residuary legatee under the debtor's will. One of the learned Judges in that case in delivering his judgment says at p. 232:

I do not think it necessary to discuss cases of the Bombay High Court or other Courts which adopt the view that the crucial question is whether the right heir or successor is on record, not whether the deceased's estate is

sufficiently represented. And to my mind the question whether a representative on record is actually in possession of any of the deceased's property is not of importance, except as throwing light on the question of the plaintiff's good faith.

The learned Judge then considers the argument which has sometimes been put forward that a change has been brought about by the Code of Civil Procedure of 1908 and that some of the older cases are therefore not in point. He says:

The words of the Code of 1882 and that of 1859 may perhaps be taken to have given more freedom to a plaintiff in bringing on record the representatives he chooses and the words of the present Code to throw more responsibility in the matter on the Court. But that certainly cannot make a decree obtained after impleading a representative approved by the Court of less effect against the deceased's estate.

Those final words make it quite clear that the matter which that Court was considering was not a matter such as is being considered here, namely whether the proper parties have been impleaded before the decree is sought, but that the Courts were considering whether after a decree had been obtained and a representative approved by the Court had been impleaded the deceased's estate would be bound. The question here is whether a plaintiff who knew more than a year before his suit came to trial that he had impleaded the wrong parties should be entitled to continue his suit in spite of that knowledge. The provisions of the Civil Procedure Code which are really in point are contained in O. 1, R. 3; 8, 9 and 10. R. 3 mentions the persons who may be joined as defendants, and R. 8 states that one person may sue or defend on behalf of all in the same interest. R. 9 says that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and R. 10 provides, that the Court may strike out or add the name of any party who ought to have been joined as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Sub-R. 4, O. 1, R. 10, states that where a defendant is added the plaint is to be amended, and sub-r. 5 says :

Subject to the provisions of the Indian Limitation Act, 1877, S. 22, the proceedings as against persons added as defendants shall be deemed to have begun only on the service of the summons.

1. Chaturbhujadoss Kushaldoss & Sons v. Raja Manicka Mudali, 1930 Mad 930=129 I O 469 =60 M L J 97=54 Mad 212.

It was suggested early in the hearing that it would be advisable for the plaintiff to amend his suit and bring on the record persons who appeared from the written statement to be the proper persons representing the estate of the deceased debtor. It was then admitted by the learned counsel for the plaintiff that there was a difficulty in his way because the suit had been brought only shortly before the period of limitation expired and were the amendment to be made the suit would be barred. The question which now arises is whether the persons on the record are the proper persons, and whether all the necessary parties have been brought on the record. The matter which the Court has to consider is whether an effective decree can be passed against those persons who are on the record. The defendant points out that he took the objection as to parties at the very earliest moment as he is called upon to do under O. 1, R. 13, Civil P. C., that is to say, he took the objection on 16th January 1933 when he filed his written statement. In support of this contention, that the Court cannot pass a decree against the estate in the absence of the legal representatives, he has referred me to the judgment of this Court in 25 C W N 249 (2), which was a suit for a declaration of a right of way, and one of the persons interested in the servient tenement had not been made a party to the suit. In that case it was pointed out that although under the provisions of O. 1, R. 9, Civil P. C., it is provided that no suit shall be defeated by reason of misjoinder or non-joinder of parties yet the Court will not in certain cases proceed to make a decree if that decree when made will be infructuous. Reliance was also placed on the case of 18 C W N 464 (3). That was a suit for accounts of a partnership in which the plaintiff and defendants 1, 2 and 4 had been members; the remaining partner died after the partnership business came to an end but before the suit was brought and left two sons who were defendants 3 and 5. Of those two sons only defendant 3 was originally impleaded and objection was taken in the written statement, as has been done in this case, that

the deceased partner was not properly represented. The plaintiff after waiting some time then brought the other son of the deceased partner on the record and by that time the period of limitation prescribed for such a suit had expired.

In that suit it was held that all the partners or their representatives were necessary parties, and further, on the facts of that case, it was held that the two sons of the deceased partner were both necessary in order to represent the estate of their deceased father. Referring to O. 1, R. 9, the learned Judges said :

That rule, however, properly understood (O. 1, R. 9,) does not do away with the necessity for bringing a necessary party on the record. If a necessary party is not on the record the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record the suit as against him is barred by limitation the suit will be dismissed.

They held that the plaintiff there ought to have impleaded all the legal representatives of the deceased defendant and that in the absence of one of the sons of the deceased partner the estate was not fully represented and the suit was not properly brought and must be dismissed. The reasoning in that case seems to me to be entirely applicable here. It is true that this is not a question of partnership, but the circumstances are much the same. As I have already pointed out the defendants took the objection at the earliest possible moment and definitely pleaded that the other widow was a necessary party to this suit. In my opinion, that was a correct submission, and in view of the fact that no amendment has been asked for, and that the necessary parties are not on the record, the suit must be dismissed. The defendants are entitled to their costs on scale No. 2.

K.S./R.K.

Suit dismissed.

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GUHA AND BARTLEY, JJ.

Chittagong Cotton Mills, Ltd.—Defendant—Appellant.

v.

Amar Krishna Choudhury and others—Plaintiffs—Respondents.

Appeal No. 98 of 1933, Decided on 23rd January 1936, from original decree of Sub-Judge, First Court, Chittagong, D/-27th February 1933.

2. Haran Sheikh v. Ramesh Chandra, 1921 Cal 622=62 I C 425=25 C W N 249.

3. Amrita Oharan Guha v. Tarini Charan, 1914 Cal 132=19 I C 963=18 C W N 464.

Practice—Remand—Procedure adopted by lower Court in disallowing question in cross-examination unjustifiable—Judge's manner of dealing with points for determination unsatisfactory—Case remanded for retrial.

Where the procedure adopted by the lower Court in disallowing question in cross-examination was wholly unjustifiable regard being had to the nature of the issues raised in the suit, and the Judge's manner of dealing the points arising for consideration in the case on the pleadings of the parties and on the issues raised for determination in the suit was wholly unsatisfactory, the High Court, on appeal remanded the case for retrial in accordance with law. [P 196 C 2]

Pugh, S. C. Basak, Narendra K. Das, Bhupendra N. Das and Gobinda Ch. Dutta—for Appellant.

Atul Ch. Gupta and Bhagirath Ch. Das—for Respondents.

Judgment.—This is an appeal by the defendant in a suit for recovery of arrears of rent in respect of land situated within the Municipality of Chittagong, on the basis of a registered kabuliati. The case of the plaintiffs in the suit was that the Chittagong Cotton Mills, Ltd., the defendant in the suit, by their Managing Agents, the Chittagong Trading Company, Ltd., and two of its Directors took a lease of the lands described in the plaint, by executing a kabuliati on 8th October 1926, and have been in possession as lessees thereafter. That in spite of repeated demands there was failure on the part of the defendant to pay rent due; and that the defendants were in terms of the lease liable for rent due at the date of the institution of the suit with interest at 25 per cent per annum till realization. The claim of the plaintiffs was resisted by the defendant; and on the pleadings of parties, five distinct issues were raised on the merits of the case before the Court. The learned Subordinate Judge appears to have considered three issues bearing upon the merits of the claim by the plaintiffs together, and the other two issues separately. The decision of the Court below was arrived at on the material points involved in the case, disallowing questions during the cross-examination of one of the principal witnesses examined on the side of the plaintiffs. The decision of the lower Court was in favour of the plaintiffs, so far as the liability of the defendants in the suit for rent was concerned, but the rate of interest claimed by the plaintiffs was reduced to 12 per cent from 25 per cent as provided in the

lease. The defendant appealed to this Court and the plaintiffs preferred cross-objections.

It appears to us to be clear that the procedure adopted by the Court below in disallowing questions in cross-examination was wholly unjustifiable, regard being had to the nature of the issues raised in the suit; furthermore, the Judge's manner of dealing with the points arising for consideration in the case, on the pleadings of parties, and on the issues raised for determination in the suit was wholly unsatisfactory. The two issues, Nos. 1 and 2, raised questions relating to the validity of the lease which was the basis of the claim before the Court and the right of plaintiff 1 to bring the suit. These issues were raised in view of the statements of the defendant before the Court, contained in paras. 8 and 4 of their written statement, in which the validity of the lease and the right to claim rent were distinctly challenged. In the written statement, there was a specific claim for abatement of rent on grounds stated. In our judgment none of the material points arising for consideration in the case, in view of the averments made by the defendants in their written statement, were properly considered by the Court below, and that the decision given by the Court followed upon the unjustifiable procedure of shutting out material evidence in the case. It may also be mentioned that the reason given by the Judge in the Court below for reducing the rate of interest from 25 per cent to 12 per cent simply on the ground of equity and justice does not commend itself to us, in view of the clear stipulations contained in the lease, as to payment of interest on arrears of rent.

In the above view of the case, before us, the appeal by the defendant and the cross-objections preferred by the plaintiffs must be allowed; and we direct accordingly. The decision and decree of the Court below are set aside, and the case is remanded to the lower Court for a retrial of the same in accordance with law after the parties concerned have been given opportunity of placing further evidence before the Court if they desire to do so. The costs in the case, including the costs in this appeal, will abide decision after remand.

R.M./R.K.

Case remanded.

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R. C. MITTER, J.

Kalipada Bhandari—Auction-purchaser—Petitioner.

v.

Panchkari Mandal—Judgment-debtor and others—Opposite Parties.

Civil Rule No. 388 of 1935, Decided on 4th February 1936, from order of Dist. Judge, Birbhum (Suri), D/- 7th March 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 148-A (9)—Rent suit decreed—Decree becomes final as between parties to suit—Question as to compliance or non-compliance with provisions of sub-s. 9 cannot be subsequently raised.

Where a decree is passed in a rent suit it becomes final as between the parties to the suit and the question of compliance or non-compliance with the provisions of sub-s. (9) of S. 148-A cannot be raised subsequently. Even a suit to have that decree declared as a nullity would not lie : 1936 P C 46, *Foll.* [P 198 C 1]

(b) Bengal Tenancy Act (8 of 1885), Ss. 173 (3), 174 (3) (b)—Application under S. 173 (3)—Proper time for Court to ask for deposit under S. 174 (3) (b), is after it has come to conclusion that sale should be set aside.

The deposit which is required to be made under the provisions of proviso (b), to sub-s. (3) of S. 174, Ben. Ten. Act, has to be made not along with the application under S. 173 (3), but has to be made before that application is allowed, that is to say, the proper time for the Court to call for the deposit under that provision, is after the Court has come to the conclusion that the sale ought to be set aside. Then the Court should make a conditional order requiring the applicant to put in the money required under the said provisions within certain time, and on the money being put in make the final order setting aside the sale, but in default to reject the application. [P 198 C 1]

Gopendra Nath Das—for Petitioner.

Baidya Nath Banerji—for Opposite Parties.

A. Quasim—for Deputy Registrar.

Order.—This rule is directed against an order of the learned District Judge of Birbhum dated 7th March 1935 passed in Misc. Appeal No. 141 of 1934. The appeal was directed against an order of the learned Munsiff dated 4th October 1934 made on an application filed under the provisions of S. 174 (3), Ben. Ten. Act. The following facts are material for the decision of this rule. Opposite party No. 1 was a tenant in respect of a holding held under opposite parties Nos. 2 to 7. On the same day three sets of the co-sharer landlords filed three suits for rent for the same period, viz., suits Nos. 1608/32, 1616/32 and 1628/32. All these

suits were filed under the procedure laid down in S. 148-A, Ben. Ten. Act, that is to say, the co-sharer landlords who had not joined as plaintiffs were made defendants. All the suits were taken up on the same day and decreed on 29th November 1932. It does not appear that any of the defendants appeared and the decrees were ex parte. The decree in suit No. 1616 was executed first but opposite party No. 1 paid down the money and that decree was satisfied on 19th June 1933. Then the decree in suit No. 1628 was put in execution on 23rd February 1934, the execution case being No. 333/34. The tenancy was sold on 5th June 1934 and purchased by the petitioner before me for Rs. 250. On 4th July 1934 opposite party No. 1, the judgment-debtor, filed an application under S. 174 (3), Ben. Ten. Act, to set aside the sale. The application was not accompanied by a deposit in Court of the decretal amount. The case of the opposite party No. 1 was that the decree passed in the rent suit No. 1628/32 was not a rent decree and the sale was not a rent sale under the provisions of Ch. 14, Ben. Ten. Act. This question was taken up as a preliminary point by the learned Munsiff and by his order dated 4th October 1934 he held that it was a rent decree. He did not consider the question as to whether there was any irregularity in the sale or not. The learned Munsiff held that the decree was a rent decree and the sale was a rent sale and he made an order in the following terms:

that the judgment-debtor Panchkari Mandal be called upon to deposit the decretal dues by 6th October 1934 or else the application filed for setting aside the sale shall stand dismissed.

Against this order Misc. Appeal No. 141/34 was preferred by the judgment-debtor to the District Judge. At the time of the hearing of the appeal, a preliminary objection was taken that no appeal lay inasmuch as the suit in which the decree was passed was valued at less than Rs. 50 and the Munsiff had final jurisdiction under S. 153, Ben. Ten. Act. On that the learned District Judge treated the memorandum of appeal as an application in revision under the provisions of S. 153 and heard the matter as a civil motion. He held that the provision of S. 148-A, sub-s. (9), was a mandatory provision, that the co-sharer landlords, plaintiffs in suit No. 1628/32, were bound

to claim rent due to their share by only becoming co-plaintiffs in one or the other of the rent suits No. 1608, or 1616. He held that the decree passed in suit No. 1628/32 was a nullity because it was against the clear statutory provisions contained in sub-s. (9) of S. 148-A. He further held that the said decree being a nullity the proceedings in execution of that decree were nullities and the sale in execution thereof was a nullity. In my judgment both the orders of the learned District Judge and of the learned Munsiff are wrong and must be set aside. The question of compliance or non-compliance with the provision of sub-s. (9) cannot be raised at this stage. After the decree had been passed in the rent suit No. 1628/32, the decree became final as between the parties. Even a suit to have a decree declared as a nullity would not lie. This is what I gather to be the principle laid down in 40 C W N 289 (1). For these reasons, I hold that the decision of the learned District Judge is erroneous. I do also hold that the order passed by the learned Munsiff is erroneous.

Apart from the dissentient note in one of the judgments of this Court, the course of decisions of this Court is that the deposit which is required to be made under the provisions of proviso (b) to sub-s. (3), S. 174, Ben. Ten. Act, has to be made not along with the application under S. 173 (3), but has to be made before that application is allowed, that is to say, the proper time for the Court to call for the deposit under that provision is after the Court has come to the conclusion that the sale ought to be set aside. Then the Court should make a conditional order requiring the applicant to put in the money required under the said provisions within certain time and on the money being put in, make the final order setting aside the sale, but in default to reject the application. I accordingly set aside the orders of both the Courts below, and in substitution of the order of the learned Munsiff, make the following order: that the learned Munsiff is to go into the merits of the controversies between the parties and if he is of opinion that the sale ought to be set aside he will then make an order requiring the deposit of

the decretal amount to be made by the applicant within a certain time. If the applicant complies with the order the final order for setting aside the sale will be made. If the order is not complied with the final order will be to dismiss the application. If the Court comes to the conclusion that the sale ought not to be set aside, no such preliminary order is to be made. The result is that the rule is made absolute on these terms, and the case is sent back to the learned Munsiff for trial on the merits. There will be no order for costs of this Court.

R.M./R.K.

Rule made absolute.

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S. K. GHOSE AND EDGLEY, JJ.

Ashutosh Sanyal and others—Appellants.

v.

Ram Sankar Ghose and others—Respondents.

Appeal No. 1296 of 1933, Decided on 5th February 1936, from appellate decree of Addl. Dist. Judge, Hughli, D/- 28th February 1933.

Bengal Land Revenue Sales Act (11 of 1859), S. 33—Suit for declaration by reversioner that sale did not affect his reversionary interest—Fraud alleged—Suit is not barred.

Section 33 does not bar a suit by a reversioner for a declaration to the effect that the revenue sale held under the Act did not affect his rights as reversioner in respect of the property sold, when such a suit is based on the allegation that the sale was a fraudulent transaction, and the reversioner will be entitled to the relief if he proves that fraud had been committed and the reversionary right residing in him had been adversely affected: 1930 Cal 621, *Foll.* [P 199 C 2]

Jagat Ch. Bose—for Appellants.

Bijan Kr. Mukerji—for Respondents.

Edgley, J.—Defendant 1 is the appellant in this case and the appeal arises with reference to a suit brought by Kali Das Ghosh, the original plaintiff, for setting aside a revenue sale and for a declaration to the effect that the sale in question did not affect adversely his rights as reversioner in respect of certain property. The plaintiff alleged that his sister-in-law Rajanibala Dasi, in order to defeat his reversionary rights, had defaulted in the payment of Government revenue in respect of Tauzi No. 305/1 of the Hughli Collectorate and that in consequence this property was put up to auction and purchased by her Gomasta

1. Bindeswari Charan Singh v. Bageshwari Charan Singh, 1936 P C 46=160 I C 68=40 C W N 289 (P C).

Ashutosh Sanyal who acted as her benamidar with reference to this matter. It was contended that the sale was fraudulent and collusive and was a benami transaction. The suit in the Court of first instance was contested by defendant 1 Ashutosh Sanyal, and his case was supported by defendant 2 Rajanibala Dasi. They maintained that the sale was a bona fide transaction. It was held by the first Court that the sale which took place on 25th March 1925 could not be set aside, but the plaintiff was granted a declaration to the effect that it was a collusive and benami sale and would not be binding on the reversioner upon the death of Rajanibala Dasi. On appeal the learned Additional District Judge accepted the findings of the Court of first instance and dismissed the appeal.

It has been contended before us by the learned Advocate for the appellant that, having regard to the provisions of S. 33, Act 11 of 1859, the declaration granted by the Court of first instance and affirmed by the lower appellate Court should not have been made inasmuch as such a declaration really has the effect of nullifying the revenue sale which was held on 25th March 1925. The learned Advocate also placed reliance upon an order passed by the Commissioner dated 8th June 1925 in which it was held that the plaintiff, who was the appellant in that case, had no locus standi in the matter of setting aside the revenue sale. With regard to this point however it must be remembered that the revenue sale dated 25th March 1925 has not actually been set aside although the plaintiff has obtained a declaration to the effect that the sale was benami and not binding on him in his capacity as reversioner. It is further urged by the learned Advocate for the appellant that no allegation to the effect that the sale was a fraudulent transaction was made until the plaint was amended as a result of an application which was filed on 13th July 1928. The relevant portions of the pleadings have, however, been placed before us and it seems to be clear that, when the case first went to trial the plaintiff's case was that the sale, to all intents and purposes, was a fraudulent, collusive and a benami transaction and adversely affected the plaintiff's reversionary rights. The law with regard to this matter has been clearly stated in the judgment of Mr.

Justice Costello, in 34 C W N 809 (1), the facts of that case being very similar to those connected with the case which is now before us. In *Anantlal's* case (1) Mr. Costello pointed out that:

It does not appear upon the authorities that a person who has a substantial interest which is liable to be affected by the sale is debarred from bringing a suit by anything which appears in S. 33, Act 11 of 1859.

He further held that when such a suit was based on a definite allegation of fraud that was of itself sufficient to entitle the plaintiff to relief provided that he proved that fraud had been committed and that the plaintiff's right residing in him had been adversely affected. Having regard to the state of the pleadings in the case out of which this appeal arises and the findings of both Courts, it is clear that the plaintiff had an interest in the property which was sold on 25th March 1925 and that this interest was adversely affected by the sale. It is also clear that he based his case on the allegation that the sale was a fraudulent, collusive and benami transaction. This being the case, we are of opinion that there is nothing in S. 33, Act 11 of 1859 which debars him from bringing the suit out of which this appeal arises. It is next contended by the learned Advocate for the appellant that in any case it has not been established that the sale was in fact fraudulent and collusive and it is argued that the findings of the lower appellate Court are insufficient to enable such an inference to be drawn. With regard to this point, it must be remembered that, having regard to the state of the pleadings, the plaintiff is clearly entitled to the declaration that he has obtained if it is clear that in the matter of the sale of 25th March 1925 Ashutosh Sanyal merely acted as the benamidar of Rajanibala Dasi. On this point there are clear concurrent findings of fact in both Courts to the effect that the purchase by Ashutosh Sanyal was of a benami character and these findings are based on inferences which, in our opinion, are correctly drawn from the circumstances of the case, for instance, it has been found that Rajanibala had a sufficient income to pay the comparatively small amount of revenue which was due in respect of the property sold.

1. *Anantlal Sarkhol v. Saudamini Guha*, 1930 Cal 621=129 I C 401=34 C W N 809.

It has also been found that she was on bad terms with the plaintiff and that the property had been purchased ostensibly by her Gomasta Ashutosh Sanyal on whom she could depend to reconvey it to her later on. There is also a finding with regard to the spurious nature of certain accounts filed by Ashutosh Sanyal. We are of opinion that the findings with regard to the character of the transaction are based on proper inferences from the facts and circumstances of the case and that the plaintiff is clearly entitled to the declaration which he has obtained. In this view of the case the decision of the lower appellate Court must be affirmed and this appeal is dismissed with costs.

S. K. Ghose, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 200

R. C. MITTER, J.

Raj Mohan Das—Defendant—Petitioner.

v.

Sarada Charan Chaudhury—Plaintiff—Opposite Party.

Civil Rule No. 1175 of 1935, Decided on 27th January 1936, from order of Munsif, Second Court, Patiya, D/- 24th May 1935.

(a) **Transfer of Property Act (1882), Ss. 83, 84 and 76—Mortgagee in possession—Tender or deposit refused—Suit for redemption or possession—Effect of refusal considered—Separate suit for mesne profits is barred.**

Where a mortgagee in possession resists the right of the mortgagor to get release of the mortgaged property and to give up possession, even after valid tender made by the latter has been refused by the former or a deposit made by the latter under S. 83 has not been accepted by the former and the mortgagee refused to withdraw the same, the suit which the mortgagor has to institute is a suit for redemption, and the mortgagor must include in such a claim his claim for overpayments to the mortgagee or excess profits received by him; and if he does not include the said claim he would be debarred from claiming the same in a subsequent suit. The mortgagee does not become a trespasser from the moment of the tender or from the moment that he receives the notice of the deposit, and a suit for mesne profits after a suit for possession or redemption for a period anterior to the date of the institution of the suit for possession or redemption will not lie. After a tender or deposit mortgagee still continues as a mortgagee; the only effect is that interest ceases to run and that a heavier burden in the matter of accounts is thrown on the mortgagee: 25 Bom 115; 26 Bom 661; 31 Bom 527; 30 All 36; 34 Cal 223; 14 C W N 1001; 1925 Rang 13; 1926 Oudh 113 and 34 Cal 223, Ref.

[P 201 C 2; P 202 C 1, 2]

(b) Civil P. C. (1908), S. 11—**Erroneous decision on point of law is res judicata.**

An erroneous decision on a point of law is res judicata between the parties: 1928 Cal 777 and 1936 P C 46, Foll. [P 202 C 2]

Rohini Binod Rakshit—for Petitioner.
Chandra Sekhar Sen—for Opposite Party.

Order.—This rule has been obtained by the defendant in a suit instituted in the Court of Small Causes at Patiya for recovery of mesne profits from November 1931 to November 1934. This suit was filed on 5th December 1934. The question involved in this Rule is whether this claim is maintainable in law. On 15th April 1917 Nobin Chandra Chowdhury and three other persons, who may be called the Chowdhurys, executed a mortgage for a sum of Rs. 100 in favour of Tarini Charan Dass (since deceased), the father of the petitioner. The mortgagee was given possession, the stipulation in the bond being that the usufruct of the property mortgaged would be taken in lieu of and in complete satisfaction of the claim for interest. Tarini accordingly went into possession and remained in possession of the mortgaged lands till November 1934. The opposite party, Sarada Charan Chowdhury, purchased in execution of money decree the interest of the Chowdhurys in the mortgaged land, and deposited in Court the mortgagee's dues on 12th December 1930 under the provisions of S. 83, T. P. Act. Notice of the deposit was served on Tarini Charan Das, the mortgagee, by the Court on 25th December 1930. Tarini did not withdraw the money nor did he deliver possession to the opposite party.

Thereafter the opposite party instituted a suit against Tarini Charan Chowdhury being No. 200 of 1932. In the suit he prayed for a declaration that by his aforesaid deposit the mortgage had stood redeemed, for recovery of possession of the mortgaged property and for a reconveyance from the mortgagee. The Chowdhurys did not appear but Tarini appeared and contested the suit. Besides challenging the title of the opposite party he pleaded that the plaintiff in the suit was not entitled to any of the reliefs claimed by him without paying him money due on another simple mortgage executed in his favour by the Chowdhurys for Rupees 2,500. The pleas taken by Tarini

were overruled by the learned Munsif. The material part of the decree passed by the Munsif is as follows :

That it be declared that the plaintiff has the right to redeem and he do get khas possession ; that defendant 1 (Tarini) do execute within three months from this date a reconveyance in favour of the plaintiff.

Tarini preferred an appeal (No. 66 of 1934). One passage in the judgment pronounced in the said appeal is material and in my judgment the learned Small Cause Court has gone wrong by misjudging the effect of the said passage in the said judgment. The said passage is as follows :

I have been asked by the defendant-appellant to give him six months' time more. In view of my finding that the plaintiff is not liable to redeem the simple mortgage for Rs. 2,500 for this and other lands and defendant may be put to further trouble, he may be allowed to take the paddy grown on the land by him ; so I allow him time till Aughrayan 1341 B. S. (November 1934). The suit is decreed with costs. The mortgage is declared to be redeemed by the deposit and notice. Plaintiff do get khas possession of the mortgaged property by the end of Agrahayan 1341 B. S.

These observations were made by the Subordinate Judge in dealing with the question as to what relief the plaintiff was entitled to get. The mortgagee gave up possession by the end of Agrahayan 1341 to Sarada Charan Chowdhury, who has instituted the present suit against the heir of Tarini. In the plaint he states that he became entitled to mesne profits from the date of service of the notice of deposit under S. 83, T. P. Act, on Tarini till he got back possession and as his claim for mesne profits for about one year has been barred by limitation he is suing for mesne profits from November 1931. His suit has been decreed by the Small Cause Court Judge. The defendant complains of this decree and his ground is that the decree is not sustainable at all. The reasons given by the learned Small Cause Court Judge for overruling the aforesaid defence may be summarised thus : (i) O. 2, R. 2, Civil P. C., is not a bar, taking Suit No. 200 of 1932 to be a suit for redemption, as a mortgagor had only the right to get possession of the lands from a usufructuary mortgage after a decree passed under O. 34, R. 7, and that the plaintiff's cause of action for mesne profits did not arise before the institution of the said suit but thereafter. (ii) that the possession of the mortgagee became wrongful from the date of the

notice on him of the deposit made under S. 83, T. P. Act, and the plaintiff is accordingly entitled to get mesne profits from that date ; and (iii) that at the request of the mortgagee the Court gave him time and allowed him to remain on the land till Agrahayan 1341 B. S. and to reap the paddy grown by him, and that the order of the appellate Court (in appeal No. 66 of 1934) implying that all the profits till 1341 B. S. is to be taken by the mortgagee is "ultra vires and without jurisdiction" as that "Court could not override the clear provisions of law.". In my judgment all the reasons given by the learned Small Cause Court Judge are wrong and the Rule must be made absolute. Where a mortgagee resists the right of the mortgagor to get a release of the mortgaged property and give up possession, where he is in possession, the suit which the mortgagor has to institute is a suit for redemption.

It would still be a suit for redemption, if the tender made by the mortgagor has been refused or if he deposits the money under S. 83, T. P. Act, and the mortgagee has refused to withdraw the same, or if the mortgagee being in possession, the amount of the usufruct received by him has satisfied his dues or where by such receipts he had overpaid himself. If a suit for redemption is brought the accounts must be gone into in ordinary cases. If any money is found due to the mortgagee on such accounting a preliminary decree must be made directing the mortgagor to pay the same within a certain time, and then on the passing of the day of default, a final decree whether for redemption, foreclosure, or sale must be made, according as the money found due to the mortgagee is paid by the mortgagor or not. The date of default fixed in the preliminary decree can be extended by the Court. Where on an account being taken no money is found to the mortgagee or where the mortgagee has been overpaid or has overpaid himself from the usufruct, in the case where he was in possession, two decrees, namely the preliminary and the final decree, has not to be passed, but there would be one decree, a final one, in terms of O. 34, R. 9 of the Code. The intention of the legislature is that a suit for redemption must include the entire accounts between the parties in relation to the

mortgage up to the date of default mentioned in the preliminary decree. Where no preliminary decree has to be passed the entire account up to the date of the final decree passed in the suit for redemption must be taken. The claim of the mortgagor for overpayments to the mortgagee or excess profits received by the mortgagee up to these dates mentioned above must be included in the suit for redemption, and if he does not include the said claim he would be debarred from claiming the same in a subsequent suit. This rule is deducible from a series of cases, namely 25 Bom 115 (1); 26 Bom 661 (2); 31 Bom 527 (3); 30 All 36 (4); 34 Cal 223 (5); 14 C W N 1001 (6); 2 Rang 382 (7) and other cases reviewed in the case of 91 I C 258 (8). The rule has been based in these decisions on one of two principles, namely (i) that the mortgagor might and ought to have included such a claim in his suit for redemption, and accordingly Expln. 4 to S. 2, Civil P. C., bars a subsequent suit for the same; (ii) that O. 2, R. 2 of the Code bars such a suit as the liability of the mortgagee to account for such payments or profits is a statutory liability attached to the mortgage contract.

These principles in my judgment also apply to the case where the mortgagor has sued the mortgagee even after a valid tender made by the former has been refused by the latter or a deposit made by the former under S. 83, T. P. Act, has not been accepted by the latter. In both these cases the relation of the mortgagor and mortgagee still subsists after the tender or deposit. The mortgagee does not become a trespasser from the moment of the tender, or from the moment that he receives the notice of the deposit, and the analogy of those classes of cases, where it has been held that a suit

for mesne profits against a trespasser lies, even after a suit for possession, for a period anterior to the date of the institution of the suit for possession, does not apply : 34 Cal 223 (5). After the tender or deposit the mortgagee still continues as a mortgagee if he is in possession; he does not become a trespasser. The only effect is that interest ceases to run and that a heavier burden in the matter of accounts is thrown on the mortgagee : Ss. 84 and 76, Cl. (b), T. P. Act. For these reasons, I hold that the first and second reasons given by the learned Small Cause Court Judge are wrong.

The third reason given by the learned Judge also does not appeal to me. In the passage of the judgment pronounced by the learned Subordinate Judge in Appeal No. 66 of 1934 which I have quoted above, there is a clear direction that the mortgagee is to have the profits of the land up to Augrahyam 1341 B. S., without any question of his being made liable to account for the same in future. I am not convinced that therein the learned Subordinate Judge had violated any clear provision of law. He had jurisdiction to settle the rights of the parties in that suit and has settled it in the aforesaid manner. Even if he had gone wrong on a point of law, which I do not say he has, his decision on the point is final between the parties. It is now settled by a Full Bench of this Court and by the Judicial Committee of the Privy Council that an erroneous decision on a point of law is *res judicata* between the parties : 56 Cal 723 (9); 40 C W N 289 (10). For this reason, I make this Rule absolute and discharge the decree passed by the Court below. The result is that the plaintiff's suit is dismissed. The defendant must have his costs of the Court below and of this Court. Hearing fee assessed at one gold mohur.

V.B./R.K. *Rule made absolute.*

1. Kachu v. Lakshman Singh, (1901) 25 Bom 115=2 Bom L R 781.
2. Vinayak v. Dattatraya, (1902) 26 Bom 661=4 Bom L R 492.
3. Rukhminibai v. Venkatesh, (1907) 31 Bom 527=9 Bom L R 958.
4. Kashi Pershad v. Bajrang Prasad, (1907) 30 All 36=4 A L J 763=1907 A W N 281.
5. Satyabadi Behara v. Harabati, (1907) 34 Cal 223=5 C L J 192.
6. Sahari Dutt v. Ainuddy, (1910) 14 C W N 1001=6 I C 336.
7. Ma Nyo v. Maung Hla Bu, 1925 Rang 13=84 I C 395=2 Rang 382.
8. Abu Jaffar v. Raghoindra Partab Shahi, 1926 Oudh 113=91 I C 258=2 O W N 826.

9. Tarini Charan v. Kedar Nath, 1928 Cal 777=115 I C 593=56 Cal 723=48 C L J 327 (F B).
10. Bindeswari Charan Singh v. Thakur Bageswari Charan Singh, 1936 P C 46=160 I C 68=40 C W N 289 (P C).

S. N. Das

Advocate High Court
Jammu & Kashmir

Srinagar.

A. I. R. 1936 Calcutta 203

NASIM ALI AND HENDERSON, JJ.

Hrishikesh Law and another—Plaintiffs—Appellants.

v.

Satish Chandra Paul Srichandan Mari Sultan—Defendant—Respondent.

Appeals Nos. 1721, 1722, 1917 and 1918 of 1932 and 450 and 905 of 1933, Decided on 16th January 1936, from appellate decrees of Dist. Judge, Midnapore D/- 26th April 1932.

Bengal Choukidari Act (6 of 1870)—Choukidari Chakran lands—Mokarari grants—Resumption of lands under Act 6 of 1870 and settling them with proprietor—Proprietor claiming fair and equitable rent—Pesh Khas being included in jama—Mokararidars given right to realize Pesh Khas—Proprietor can ask for fixing fair rent.

The plaintiff was the proprietor of estate to which the Choukidari Chakran lands appertain. The defendant was a Mokararidar in respect of these lands by virtue of some grants made by the predecessor in interest of the plaintiff. The lands were resumed and were settled by the Collector under Choukidari Act 6 of 1870 with the plaintiff. The plaintiff after taking settlement from the Collector made new settlement of these lands with certain persons and instituted suits for settlement of fair and equitable rent in respect of these lands. It was contended on behalf of the defendant that in the Mokarari grants in respect of the lands, the Pesh Khas of Choukidari Chakran lands was taken into consideration in fixing the jama of the mokarari and consequently the Zamindar is not entitled to get any additional rent for the Chakran lands:

Held: that the mere fact that Pesh Khas which was being paid by the Choukidars to the Zamindars, was included in the jama and the Mokararidar was given the right to realise it from the Choukidars, would not go to indicate that the Zamindar at the time of the grants gave up his right to get fair rent for these lands arising out of events which were not contemplated then. The grants do not take away the right of Zamindar to get fair and equitable rent for the disputed lands after they have been resumed: 1918 P C 85 and 1925 P C 226, Ref. [P 204 C 2]

Narendra Krishna Basu, Nalin Chandra Pal and Amarendra Narayan Bagchi—for Appellants.

Sarat Chandra Bose and Bijoy Kumar Bhattacharjee—for Respondent.

Nasim Ali, J.—These six appeals arise out of three suits: Suits Nos. 66 and 67 of 1929 and Suit No. 7 of 1931 of the First Court of the Subordinate Judge of Midnapore. They were instituted for assessment of fair and equitable rent in respect of some lands which appertained

to Touzi No. 1991 of the Midnapore Collectorate. Suits Nos. 66 and 67 were heard together. The trial Judge held that the plaintiff was entitled to fair and equitable rent for the lands in question and fixed as fair rent Rs. 69-4-3 pies for the lands of Suit No. 66 and Rs. 74-3-10 pies for those of Suit No. 67. The defendants appealed to the lower appellate Court and the learned District Judge has reduced the rent to Rs. 39-14-2 pies in Suit No. 66 and Rs. 40-5-4 pies in Suit No. 67. In Suit No. 7 of 1931 the trial Judge held that the plaintiff was entitled to fair and equitable rent settled and fixed Rs. 38-14-1 1/2 pies as fair rent. The plaintiff appealed to the lower appellate Court. The defendants also filed cross-objections. The cross-objections were dismissed, but the appeal was allowed in part and the fair rent was assessed at Rs. 53-11-3 pies. Hence these second appeals. The plaintiff is the appellant in S. A. Nos. 1721 and 1722 of 1932 and 450 of 1933. The defendant has filed Second Appeals Nos. 1917 and 1918 of 1932 and 905 of 1933.

The point for determination in these appeals is whether the plaintiff is entitled to have fair and equitable rent assessed for the lands in suit and, if so, for what amount. The facts which are relevant for the purposes of the present appeals are these: the disputed lands are Choukidari Chakran lands. The plaintiff is the proprietor of estate to which the lands appertain. The defendant is a Mokararidar in respect of these lands by virtue of some grants made by the predecessor in interest of the plaintiff in favour of his predecessor in interest. The lands were resumed and were settled by the Collector under the Choukidari Act (Act 6 of 1870) with the plaintiff and his co-sharers whose share has ultimately vested in the plaintiff. The plaintiff after taking settlement from the Collector made new settlement of these lands with certain persons. That tenant, defendant's predecessor in interest instituted certain suits against the proprietor for recovery of khas possession of these lands on the ground that they were Choukidari Chakran lands. In those suits khas possession was disallowed but the mokararidar right to recover rent from the tenants settled by the proprietor was declared. The present suits were thereupon instituted by the proprietor

for settlement of fair and equitable rent in respect of these lands.

Four points were raised in support of the appeals by the Mokraridar: (1) that the disputed lands were in fact not Choukidari Chakran lands and were never resumed; (2) that even if there was any resumption it was not done under the Choukidari Act (Act 6 of 1870); (3) that the plaintiff acquired no title whatsoever on the basis of settlement from the Collector as the disputed lands were not included in the settlement; (4) that assuming that there had been resumption of the disputed land under the Choukidari Act and plaintiff acquired valid title to these lands by settlement from the Collector, the terms of the Mokararigrant precluded plaintiff from claiming any rent in addition to what was fixed by the terms of the grant. There is no substance in the first two points. These questions were not put into issue and discussed in the Courts below. The learned Judge has rightly pointed out that the Mokararidar's case throughout had been that the resumption of the suit lands by the Collector was under the Choukidari Act and in the previous litigation the Mokararidar succeeded on that basis. As regards the third point, much reliance was placed by the learned Advocate upon certain judgments in the previous suits. It is true that in the previous litigation plaintiff failed to prove that the settlement from the Collector covered the disputed lands. But it appears that the decision of the Court in the previous litigation was not based on this finding and the finding on this point was not necessary for the purposes of that litigation. The decision in the previous litigation on the question whether the settlement by the Collector included the disputed lands or not cannot, therefore, operate as res-judicata in the present litigation. In this case, the trial Judge has come to the conclusion that the disputed lands were included in the settlement made by the Collector under the Choukidari Act. On appeal to the lower appellate Court, this finding does not appear to have been challenged. Under these circumstances, I am unable to give effect to this contention. I now come to the fourth point. In 45 I A 162 (1), Lord Buckmaster observed as follows :

1. *Ranjit Singh v. Babadur Singh*, 1918 P C 85 =48 I C 262=45 I A 162=46 Cal 173 (P C).

It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of S. 51 (of the Choukidari Act VI of 1870) they are therefore rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the patni grants were made the resumption of the Choukidari Chakran lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession. Upon resumption of such possession the rights of the Patnidar were those conferred on him by the estate and interest created by the putni leases, and it was these rights that were kept alive by S. 51 of Act VI of 1870 of the Bengal Council.

Again in 53 Cal 6 (2), it was laid down that when Choukidari Chakran lands included in a putni settlement have been resumed and transferred to the zamindar under Bengal Act VI of 1870, he is entitled to the payment of a fair and equitable rent in respect thereof. It is contended on behalf of the tenant that in the Mokarari grants in respect of the lands of Suit Nos. 66 and 67, the Pesh Khash of the Choukidari Chakran lands was taken into consideration in fixing the jama of the Mokarari inams, and consequently the zamindar is not entitled to get any additional rent for the Chakran lands. In these two cases the grants were made before the Choukidari Act. The parties to the contract could not possibly have contemplated the resumption of these lands under the Choukidari Act which was not then even passed. The mere fact that Pesh Khash which was being paid by the Choukidars to the zamindars, was included in the jama and the Mokaridar was given the right to realise it from the Choukidars, would not go to indicate that the zamindar at the time of the grants gave up his right to get fair rent for these lands arising out of events which was not contemplated then. So far as the grant in Suit No. 7 of 1931 is concerned, Pesh Khash was admittedly not taken into consideration in settling the rent of the grant. The grants in all these cases, in my opinion, do not take away the right of the zamindar to get fair and equitable rent for the disputed lands after they have been resumed and the zamindar has been made liable to pay additional revenue for the same. I am, therefore,

2. *Bhupendra Narayan Singh v. Narapat Singh*, 1925 P C 226=90 I C 607=52 I A 355=53 Cal 6 (P C).

unable to accept this contention of the learned Advocate. As regards the appeals by the landlord plaintiff, the only point raised by the learned Advocate is that the learned Judge in settling fair and equitable rent has not correctly applied the principle applicable in such cases. It was contended that the learned Judge has wholly overlooked the principle that the assets of these lands should be fairly and equitably distributed between the landlord and the tenant. There may be some room for a criticism like this. But it appears to us that the landlord has got about 30 per cent. of the assets in suit No. 66, about 40 per cent. in suit No. 67 of 1929 and about 48 per cent. in Suit No. 7 of 1931. Under these circumstances, we are not prepared to interfere with the amount of rent settled by the learned Judge. The result therefore is that all the appeals are dismissed. The parties will bear their own costs in all these appeals.

Henderson, J.—I agree.

B.D./R.K. *Appeals dismissed.*

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Special Bench

MUKERJI, ACTG. C. J., LORT-WILLIAMS
AND S. K. GHOSE, JJ.

*In re, Ramesh Chandra Sen Gupta, a
pleader, Patuakhali.*

Decided on 10th January 1936.

(a) Legal Practitioners Act (1879), S. 6(a)—Meaning of word 'proper' and "to be" in S. 6(a)—Pleader has to do administrative work in connection with his case and to appear as advocate—Court has power to control activities of pleader.

The word 'proper' in S. 6 (a) implies that apart from educational and other qualifications that may be insisted on, there may be other conditions laid down in order to entitle a person to be admitted as a Pleader; and the expression "to be" denotes that his continuance as a Pleader may be made dependent on such conditions. A Pleader in conducting the litigation for which his services are requisitioned, has to do some administrative work arising out of the litigation in the offices of the Court and appears as advocate in the Court as well; in other words, he combines in his own person the two duties which are performed in England by Attorneys and Barristers. And it is only in the fitness of things that the Court should be in a position to control his activities in such a way as would ensure the proper discharge of his duties as Pleader: 15 Cal 638, *Ref.*

[P 207 C 2]

(b) Legal Practitioner — Meaning of any other cause in S. 13(f), Legal Practitioners

Act—Cases of moral turpitude may come within S. 13(f)—Rules restricting pleader from engaging in trade, business, etc., are dictated by public policy and are in force in many provinces—New R. 951 of Calcutta High Court—Pleaders can engage in trade, business, etc., unless such occupation is derogatory and is likely to interfere with his professional duties—Making of such rules is within competence of High Court.

Cases of moral turpitude unconnected with the discharge by a legal practitioner of his professional duty may come within the expression 'any other reasonable cause;' yet, in the absence of definite rules to that effect, engagement in trade or business or other occupation, however derogatory to the dignity of the profession or detrimental to the due discharge of the duties of a legal practitioner, would hardly come within the expression. But rules restricting the liberties of pleaders in these respects are dictated by public policy and are, in one form or another, in force in other provinces as well. The new R. 951, Calcutta High Court, was framed with the object of softening the rigour of such rules as were in existence before and it professes not to preclude Pleaders and Mukhtars while practising as such from holding any appointment, or engaging themselves in any occupation, trade or business unless such appointment occupation, trade or business should appear to be derogatory to a practising member of the legal profession or is likely to interfere with the due discharge of his professional duties. The provision in the rule as regards previous notice to the Court is a provision evidently made for the benefit of the practitioner himself, so that he may not be in a state of uncertainty as to what the consequences of his proposed action may be. The rule was certainly within the competence of the High Court to make: 1914 *Mad* 512 (F B); 29 *Cal* 890 and 1922 *P C* 351, *Ref.* [P 207 C 2, P 208 C 1]

(c) Legal Practitioners Act (1879), S. 13 (f)—New R. 953 of Calcutta High Court—Rule imposing fine in addition to suspension or dismissal of pleader—Fine cannot be imposed by judicial authority—Provisions of fine inconsistent with Act and Rule is ultra vires.

The fine prescribed by R. 953 cannot be realised as a fine imposed by the Court in a judicial proceeding. By that rule it was apparently intended that the fine would be imposed by the Court acting administratively, and further that it should provide an alternative to the more rigorous penalty of suspension or dismissal. There is however no process by which the fine can be realised, except as a voluntary payment. But an alternative to suspension and dismissal by way of penalty is not provided for in the Legal Practitioners Act and would not be consistent with its provisions. In fact R. 953 as it stands speaks of the fine as a liability in addition to the liability to suspension or dismissal. Both liabilities would have to be enforced by the same authority, viz., by the Court in a judicial proceeding. Since the fine cannot be imposed as a judicial fine the provision relating to it is ultra vires.

[P 210 C 1, 2]

H. D. Bose, Suresh Ch. Talukdar, Nagendra Nath Ghose and Bama Prosanna Sen Gupta—for the pleader.

Sarat Chandra Basak—for the Crown.

Mukerji, Ag. C. J.—Babu Ramesh Chandra Sen Gupta, a Pleader practising at Patuakhali in the District of Bakarganj, was on 22nd September 1929 elected a Director of the Patuakhali Loan Office Limited, a Company incorporated under the Indian Companies Act, and has been acting as such Director from the date of his election. On 3rd February 1935 he was also appointed Assistant Secretary of the said Company and in that capacity he receives an allowance of Rs. 25 per month. Since 1929 he has been a member of the Committee of Management of the Patuakhali Urban Co-operative Bank Ltd., and also its Secretary; and in April 1935 he has, in addition, been appointed its Insurance Director; but as regards any of these appointments no question arises now. It is his connection with the Patuakhali Loan Office Limited as a Director, and also as its Assistant Secretary, that has given rise to the present matter. The appointments in the Loan Office aforesaid having come to the notice of this Court, the following letter was eventually addressed by the Registrar of the Appellate Side of this Court to the District Judge of Bakarganj on 20th August 1935:

Sir,

With reference to the correspondence ending with your Letter No. 3694-c, dated 6th August 1935, Babu Ramesh Chandra Sen Gupta, Pleader, Patuakhali, has been acting as a Director of the Patuakhali Loan Office Ltd., since 22nd September 1929, and as Assistant Secretary of the said concern since 3rd February 1935, I am directed to say that it appears that he has infringed the old R. 27, Chap. 11, (revised), Vol. 1 of the Court's General Rules and Circular Orders, Civil, in not bringing duly to the notice of the Court the fact of his acceptance of the first appointment, and has also infringed the new R. 27, *ibid* in not informing the Court of his intention to accept the second appointment before he accepted it. I am, therefore, to request that you will be so good as to call upon him to show cause why he should not be dealt with under the new R. 29, *ibid* read with the note thereto, and a fine imposed on him thereunder as a condition precedent to his being allowed to practise as a pleader.

Pursuant to a notice issued on him as required by the letter aforesaid the Pleader had appeared in this Court and has shown cause. As the letter speaks of old and new rules, it is necessary to

see what they are. In 1884 certain rules were enacted and they were since then embodied in the Court's General Rules and Circular Orders, Vol. 1, Ch. 11, where they appeared as the following:

31. Any person who shall hold any appointment under Government or shall carry on any trade or other business, at the time of his application for admission as a Pleader or Muktear, shall state the fact in his application for admission; and the High Court may refuse to admit such person, or may pass such orders thereon as it thinks proper.

32. Any person who, having been admitted as a pleader or Muktear, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the High Court who may thereupon suspend such Pleader or Muktear from practice or pass such orders as the said Court may think fit.

34. Any wilful violation of any of the above Rules shall subject a Pleader or Muktear to suspension or dismissal.

By February 1934 the Rules of Ch. 11 had undergone some alterations and additions; but for our present purposes, it would be sufficient to state that Rr. 31, 32 and 34 appeared as Rr. 26, 27 and 29 respectively. The Rules as they stood then are the old rules referred to in the latter. In July 1934 the Rules were again revised and the form they then took will appear from the following Rr. 950, 951 and 953 as they have been published in the New Edition of the Courts General Rules and Circular Orders, Civil, and which correspond respectively to Rr. 26, 27 and 29. These revised rules are the new rules referred to in the letter. They run as follows:

950. Any person who shall hold any appointment or be engaged in any occupation, trade or business, at the time of his application for admission as a Pleader or Muktear, shall state the fact in his application for admission; and the High Court may refuse to admit such person or may pass such other orders on it as it thinks proper. 951. Pleaders and Muktears shall not, while practising as such, be debarred thereby from holding any appointment or engaging themselves in any occupation trade or business, but a person who having been admitted as a pleader or Muktear intends to accept an engagement or engage himself in an occupation, trade or business, shall, prior to accepting such appointment or so engaging himself, by letter addressed to the Registrar, inform the High Court through the District Judge or the Chief Judge, Court of Small Causes, Calcutta, as the case may be, of his intention and shall state whether or not he prays for leave to suspend practice as a Pleader or Muktear, and the High Court may either grant such leave or may, if such appointment, occupation, trade or business shall appear to be derogatory to a practising member of the legal profession or likely to interfere with the discharge of his professional

duties as a Pleader or Muktear require him to suspend practice while holding such appointment or so engaged, or may make such other order or orders as may seem fit.

Note.—The intimation provided for by this rule shall be given by Muktears if any, practising in the Court of the Presidency Magistrate through the Chief Presidency Magistrate, Calcutta.

953. Any wilful violation of Rr. 950 and 951 shall render the Pleader or Mukhtear concerned liable to a fine which shall not in any case be less than Rs. 50 and may also render him liable, in addition, to suspension or dismissal.

Note.—This Rule shall also apply to such infringements of Rr. 950 and 951 as they stood prior to the publication of these Rules in the local Official Gazette, as may have been or may thereafter be brought to the notice of the Court.

Put quite shortly, the charge against the pleader is that he has infringed old R. 27 by not bringing to the notice of the Court the fact of his acceptance of office as Director since 22nd September 1929, and that he had also infringed new R. 27 by not informing the Court of his intention to accept the office of Assistant Secretary before he accepted it on 3rd February 1935. The first contention urged on behalf of the pleader is that R. 951=new R. 27 of July 1934 and its predecessors, namely R. 32 of 1884 as well as old R. 27 of February 1934 are all ultra vires. The argument in this connexion is that under S. 6, Legal Practitioners Act (18 of 1879) the High Court is competent to frame rules relating to the qualifications, admission and certificates of Pleaders Cl. (a), the fee to be paid for their examination and admission Cl. (c), and their suspension and dismissal Cl. (d): that after a pleader has been admitted the renewal of his certificate is governed by S. 7 of the Act; and that while holding a certificate his suspension or dismissal is regulated by Ss. 12 and 13 of the Act and in no other manner. In other words, it is argued that though the High Court can lay down tests or requirements to be fulfilled by a person to entitle him to be admitted as a pleader, yet once these tests or requirements are fulfilled there can be no rules framed by the High Court suspending or dismissing him from practice while the certificate issued to him is in force, but the question of renewal of his certificate and the question whether he should be dismissed or suspended are questions which have to be dealt with under Ss. 12 and 13 of the Act and that no rules can be framed by the High

Court of the nature of the Rules in question. It has been complained that the Rules, such as they are, lay down a restriction which is wholly unwarranted and contemplate an enquiry of an inquisitorial character which is to be deprecated. The contention in our opinion is not well founded. In the first place, it overlooks the words 'proper' and 'to be' appearing in Cl. (a), S. 6. The former word implies that apart from educational and other qualifications that may be insisted on, there may be other conditions laid down in order to entitle a person to be admitted as a pleader; and the latter expression denotes that his continuance as a pleader may be made dependent on such conditions. A Pleader in conducting the litigation for which his services are requisitioned, has to do some administrative work arising out of the litigation in the offices of the Court and appears as advocate in the Court as well; in other words, he combines in his own person the two duties which are performed in England by Attorneys and Barristers: 15 Cal 638 (1). And it is only in the fitness of things that the Court should be in a position to control his activities in such a way as would ensure the proper discharge of his duties as Pleader. Nextly, to give effect to the contention would land us in this absurdity, that even if a person fulfils all the requirements on the day that he is admitted, he may make himself thoroughly ineligible the next day and will continue with impunity to practise as a Pleader until the question of renewal of his certificate arises, which will ordinarily arise only at the expiry of each year and not oftener.

Moreover though Cl. (f), S. 13 of the Act need not be read ejusdem generis with the other clauses of the section: 29 Cal 890 (2), 49 Cal 845 (3) and cases of moral turpitude unconnected with the discharge by a legal practitioner of his professional duty may come within the expression 'any other reasonable cause,' yet in the absence of definite rules to that effect, engagement in trade or business or other occupation, however derogatory to the dignity of the profession or detrimental

1. In the matter of Khoda Bux Khan, (1888) 15 Cal 638.
2. *La Mesurier v. Wajid Hossein*, (1902) 29 Cal 890=6 C W N 556.
3. *Sanker Ganesh v. Secretary of State*, 1923 P C 351=69 I C 367=49 I A 319=49 Cal 845 (P C).

to the discharge of the duties of a legal practitioner, would hardly come within the expression.

Rules restricting the liberties of Pleaders in this respect are dictated by public policy and are in one form or another, in force in some of the other provinces as well. As far as I have been able to ascertain there are such rules in Madras, Patna, N. W. Provinces, Punjab and the N. W. Frontier Provinces. And in the Madras Full Bench decision in 37 Mad 238 (4) at pp. 257-258 some of the rules there in force are referred to. The new R. 951 was framed with the object of softening the rigour of such rules as were in existence before, and it professes not to preclude Pleaders and Mukhtears while practising as such from holding any appointment or engaging themselves in any occupation, trade or business, unless such appointment, occupation, trade or business should appear to be derogatory to a practising member of the legal profession or is likely to interfere with the due discharge of his professional duties. The provision in the rule as regards previous notice to the Court is a provision evidently made for the benefit of the practitioner himself, so that he may not be in a state of uncertainty as to what the consequences of his proposed action may be. I am clearly of opinion that the rule was entirely within the competence of the High Court to make. It has been contended next that R. 953, corresponding to old and new R. 29, in so far as it provides a penalty in the shape of a fine is ultra vires. It is obvious that this provision was also intended to operate for the benefit of the delinquent practitioner who under Rr. 32 and 34 of 1884, was liable to suspension or dismissal. Though that is so, yet what we have to consider is whether such a provision is permissible. S. 6 of the Act enables the High Court to make rules consistent with the Act as to the suspension and dismissal of the Pleader [Cl. (d),] and say nothing about imposing a penalty in the shape of a fine. 'Fine' it is really not, though the word itself is used in the rule. It is, as stated in the notice, the imposition of a condition precedent, namely the payment of a sum of money, the fulfilment of which is de-

manded by the rule to enable the Pleader to resume his practice. It is also to be noted that there is no provision in the Act or anywhere else under which the amount may be realised, unless it is voluntarily paid by the Pleader himself. Even then, the question is whether it is competent to the High Court to impose a condition of this description by framing a rule under its powers under S. 6 of the Act. It has been argued on behalf of the Government that when S. 6 gives the High Court power to "make rules consistent with the Act as to the following matters (namely) "the suspension and dismissal" etc. it authorises the High Court to make a rule which has only this effect: that unless a certain condition namely as to the payment is complied with, the pleader remains suspended. This is a very ingenious argument and is perhaps the only way in which the provision can be sought to be justified. But the difficulty in accepting this argument is, in my opinion, overwhelming.

In the first place, call it by whatever name, it is to all intents and purposes a penalty for a breach of a rule and nothing else, and the intention is that on this payment the breach is to be condoned; and regarded in that light, it means to create an offence in the shape of a misconduct and provides for a penalty, which are unknown to the Act itself. Next, regarded as a condition, it is in my opinion, an unjustifiable and unreasonable one; because although the holding of an appointment or the engaging in an occupation, trade or business may be derogatory to the dignity of the profession or detrimental to the due discharge of professional duties and so may be justly punished with suspension or dismissal, it is impossible to think of mere omission to give previous notice of the fact that an employment would be accepted or an occupation, trade or business would be engaged in, however unexceptionable they may be in their character, would attract the operation of such a condition. Thirdly the enforcement of the rule would, in my opinion be impossible, in view of the provisions of the Act. I am of opinion that as regards a Pleader who holds a license to practise as such, no order of suspension or dismissal can be made except by the Court itself and except as a result of a judicial proceeding contemplated and provided for by the Act itself.

4. Muni Reddi v. Venkata Row, 1914 Mad 512=17 I C 544=13 Cr L J 800=37 Mad 238=23 M L J 447 (F B).

If it is a case of first enrolment or of renewal of certificate, the position is different, the administrative machinery of the Court being competent to deal with it in respect of any such cases as covered by the Act or the Rules. Possibly also in cases where the pleader himself applies for suspension the matter need not come before the Court as a judicial matter. But in cases of the present description, I do not see how an order of suspension or dismissal can be made otherwise than under Cl. (f), S. 13 of the Act, and unless it be held that non-compliance with Rules framed by the Court in this respect is a misconduct and is a reasonable cause within the meaning of that clause. As observed by Hill, J., in the Full Bench decision of this Court in 29 Cal 890 (2), there is no other machinery provided for the dismissal and suspension of pleaders and mukhtears than that which is prescribed by the Act. And it is perfectly clear that no imposition of a condition of the present nature, and nothing else than suspension or dismissal would be permissible under the Act itself. It follows, therefore, that such action as has to be taken cannot be taken as an administrative measure. In my judgment, therefore, for the breaches specified in the notice issued on the pleader, the only proceedings that may be taken against him are proceedings under S. 13, Cl. (f) of the Act. The view I take receives support from the decision of the Full Bench in 37 Mad 238 (4), in which it was held that a pleader who engages himself in a trade but does not intimate the same to the Court as required by a Rule framed by the Madras High Court is guilty of misconduct within the meaning of S. 13 of the Act.

We therefore come to the question of the merits of the case in order to have to consider whether any such proceedings should be taken. On the notice as issued such proceedings obviously cannot be taken. So far as the facts are concerned, it seems to me that old R. 27 was violated because the pleader did not give the required notice on accepting office as Director to the Patuakhali Loan Office Limited on 22nd September 1929. The word "business" is quite a comprehensive word and it should be noted that the Rule does not speak of a business carried on for the benefit of the pleader himself. It is also clear, to my mind,

that new R. 27 was violated because no previous intimation to the Court was given by him as regards his appointment as Assistant Secretary to the said Loan Office which he took up on 3rd February 1935. So far as the former appointment is concerned, however, it does appear that there was a genuine doubt in the mind of the pleader as to whether by being a Director, he had entered into a business within the meaning of the Rule. And as regards the second appointment, it is clear upon the papers before us that this new Rule was not sufficiently known to the public at the relevant date and that the pleader, on coming to know of it, communicated with the Court as early as possible. I am unable to hold, therefore, that there was any such wilful violation of the Rules as would merit action under the Act. I am also of opinion that the pleader's connexion with the Loan Office, such as it is, is neither derogatory to the dignity of a practising lawyer nor likely to interfere with his duties as such to any appreciable extent, and so no further action need be taken in respect of the matter. The notice issued on the pleader is discharged.

Lort-Williams, J.—I agree.

S. K. Ghose, J.—I am in agreement with the judgment of Mukherji, J., and I may add a few words with regard to the question whether R. 953 corresponding to the old and new R. 29, in so far as it prescribes a fine, is ultra vires. I have no doubt that the High Court has the power to make a Rule requiring a person, who has been admitted as a pleader or mukhtear, to notify the High Court of his intention to accept an engagement or engage himself in an occupation, trade, or business. Such a Rule is perfectly consistent with the Legal Practitioners' Act and comes under Cl. (a), S. 6. The argument, that once a certificate has been issued under S. 7 the Court cannot do anything until the expiration of the period of the certificate does not impress me at all. It is for the Court to Judge whether a person is a "proper person to be" a pleader, &c., and this refers not merely to the time of admission, but also to the period of continuance as pleader i. e. the period of the certificate; otherwise "suspension and dismissal" would be meaningless. This is consistent with the decision of the Full Bench in 29 Cal 890 (2), and so far

as I know, it is in accordance with the rules made by other High Courts in India. If then the Court has the power to make a rule requiring a person, who has already been admitted as pleader, to give notice of his intention to engage in some other occupation, the Court surely has the power to enforce such a rule by providing a penalty. Otherwise a person wilfully omitting to give notice would be in no worse position than one giving notice. S. 13 provides for suspension and dismissal, and consistently therewith the Court may make rules under Cl. (d), S. 6. Such rules would have the force of law and be enforced in a judicial proceeding. Omission to give notice may itself make the pleader liable under S. 13, as pointed out by Sankaran Nair, J., in 37 Mad 238 (4) at p. 265.

It is here that the provision as to fine in the new R. 953 has troubled me. Apart from the fines prescribed by way of penalties under Chap. 7, S. 16 of the Act specifically empowers the Court to impose a fine for infringement of rules, and such fine may be recovered as if it had been imposed in the exercise of the High Court's ordinary original criminal jurisdiction. This section relates only to mukhtears on the appellate side of the High Court. But in the case of pleaders, the provision as to fine is absent. No doubt under the Legal Practitioners' Act the Court acts in many matters in an administrative or disciplinary capacity as was pointed out by Dawson Miller, C. J., in 1 Pat 590 (5). In the connected case, 1 Pat 104 (6) at p. 138, it was pointed out that proceedings relating to the admission of pleaders are administrative and not judicial. In the rules on the appellate side of this Court, vide R. 6 (d), the Judge in the English Department is empowered to pass orders on applications and routine, references connected with the admission and enrolment of pleaders and mukhtears. But the imposition of a fine cannot be administrative and the fine prescribed by R. 953 cannot be realised as a fine imposed by the Court in a judicial proceeding. By that rule it was apparently intended that the fine would be imposed by the Court acting

administratively, and further that it should provide an alternative to the more rigorous penalty of suspension or dismissal. There is however no process by which the fine can be realised, except as a voluntary payment. The Registrar in his letter dated 20th August 1933 speaks of it as a condition precedent to the pleader being allowed to practise. But it seems to me that an alternative to suspension and dismissal by way of penalty is not provided for in the Act and would not be consistent with its provisions. In fact R. 953, as it stands, speaks of the fine as a liability in addition to the liability to suspension or dismissal. Both liabilities would have to be enforced by the same authority, viz. by the Court in a judicial proceeding. Since the fine cannot be imposed as a judicial fine it seems to me that the provision relating to it is ultra vires.

B.D./R.K.

Notice discharged.

A. I. R. 1936 Calcutta 210

NASIM ALI AND HENDERSON, JJ.

Hemendra Nath Roy Chowdhury —
Petitioner.

v.

East Bengal Commercial Bank, Mymensingh and others—Opposite Parties.

Civil Rule No. 1582 of 1935, Decided on 30th January 1936, from order of Sub-Judge, 3rd Court, Mymensingh, D/- 4th November 1935.

Civil P. C. (1908), S. 73—Decree as heir and in personal capacity are against same judgment-debtor.

If one decree is obtained against a man as heir of a deceased person, and another decree against him in his personal capacity, the two decrees are against the same judgment-debtors within the meaning of S. 73: 25 Bom 494; 33 Mad 465 and 1930 Cal 454, Foll.; 26 All 28; 1914 L B 191; 1919 Oudh 326 and 1920 Mad 403, Dissent; 1915 Cal 658, Ref. [P 211 C 1; P 212 C 1]

Atul Chandra Gupta and Gunendra Krishna Ghose—for Petitioner.

Amarendra Nath Bose, Dwijendra Krishna Dutt, Prafulla Chandra Nag and Bansori Lal Sarkar—for Opposite Parties.

Nasim Ali, J.—The petitioner and opposite parties 6 and 7 obtained certain money decrees against opposite parties 2 to 5 personally. Opposite party 1 sued them for a debt incurred by their father

5. In re *Miss Sudhansu Bala Hazra*, 1922 Pat 603=70 I C 172=1 Pat 590=4 P L T 229.

6. In the matter of *Miss Sudhansu Bala Hazra*, 1922 Pat 269=64 I C 636=1 Pat 104=3 P L T 69.

Prosanna Krishna Saba and obtained a decree against them on 13th February 1935. In execution of the decree certain properties belonging to Prosanna Kumar have been sold. The petitioner and opposite parties 6 and 7 applied for rateable distribution of the same proceeds under S. 73, Civil P. C. The learned Subordinate Judge has rejected these applications. This rule was thereupon obtained by the petitioner. Opposite party 1 opposed this rule, while opposite parties 6 and 7 supported the rule. The learned Subordinate Judge has rejected the application under S. 73 on the ground that the judgment-debtors in the decree obtained by opposite party 1 are not the same as in the decree obtained by the petitioner and opposite parties 6 and 7.

Now judgment-debtor means any person against whom a decree has been passed: S. 2, Cl. 10, Civil P. C. The word "person" has not been defined in the Code. The definition of "person" in the General Clauses Act (Act 10 of 1897) throws no light on the present question. Person in law does not simply mean a human being. There may be persons in law who are not human beings, e. g., a Joint Stock Company or a Municipal Corporation. Again a human being may have a double personality. He may be one man but two persons in the eyes of the law. In order to give a man double personality, he must possess two different capacities so that in one capacity he may have legal relations with himself in his other capacity (Salmond's Jurisprudence, p. 278, Edn. 5). It is argued on behalf of opposite party 1 that if one decree is obtained against a man as heir of a deceased person and another decree against him in his personal capacity, the two decrees are not against the same judgment-debtors within the meaning of S. 73, Civil P. C. This contention is based on a ruling of the Allahabad High Court in 26 All 28 (1), in which it was held that a decree obtained against a man as heir of a deceased person is different from a decree against him in his personal capacity, and the two decrees are not against the same judgment-debtor within the meaning of S. 295 of the Code of 1882. This ruling was followed in

1. Bholanath v. Maqbul-un-nissa, (1903) 26 All 28=1903 A W N 184.

24 I C 476 (2), 1919 Oudh 326 (3) and 1920 Mad 403 (4).

The principle underlying the decision of the Allahabad High Court is that the assets of a deceased person are liable in the first place to satisfy the debts of the deceased and, subject thereto, belong to the heir inasmuch as the debts constitute a general charge upon the assets although such a general charge would not defeat a bona fide purchaser or mortgagee from the heir. It was observed in that case that it would be inequitable to make one man's property pay the debt of another. It appears therefore that the nature of the liability under the decree was taken as one of the essential conditions for the application of S. 295 of the old Code. In the Code of 1908 for the words "decrees for money" "the decrees for the payment of money passed" have been substituted. Now the provisions of S. 73 of the Code which have replaced S. 295 bearing on the question before me are as follows:

Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realization shall be distributed among all such persons.

In 42 Cal 1 (5) this Court observed :

It is essential for the application of the section that the decree should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in S. 295 of the Code of 1882.

In 25 Bom 494 (6), Jenkins, C. J., observed:

It is useless to speculate as to any other test than that which the section (295 of the Code of 1882) itself provides and that test is stated in the plainest terms. So far as the present case goes, it is enough to say that the money decrees must be against the same judgment-debtor. Here however one decree is against Bhati Babaji Jangam and the other is against his son Kashinath. It is true that the second decree is expressed to be against Bhau Babaji Jangam, deceased by his son Kashinath, but this incorrect mode of expression can make no differ-

2. Toola Ram v. Abdul Gafur, 1914 L B 191=24 I C 476.

3. Munshi Lal v. S. Mohammad Amir Mirza Beg, 1919 Oudh 326=52 I C 305=22 O C 194.

4. Abdulla v. Abdul Latif Sahib, 1920 Mad 403=57 I C 854=39 M L J 91.

5. Balmer Lawrie & Co. v. Jadunath Banerjee, 1915 Cal 658=27 I C 644=42 Cal 1=19 C W N 1202.

6. Govind Abaji v. Vinayak, (1901) 25 Bom 494=3 Bom L R 407.

ence. It is due to the erroneous practice which prevails in the mofussil Courts of the Presidency according to which a dead man is expressed to be a party to a suit by his heir. . . . A dead man cannot be a party to a suit. It cannot too in this case make any difference that the decree is expressed further to be "against the deceased's estate:" that does not make Bhau, a judgment-debtor in respect of a decree in a suit commenced after his death. The interpretation of judgment-debtor in S. 2 and the phraseology of S. 234 (S. 50 of the Code of 1908) of the Civil Procedure Code leave no doubt on the point.

In the same case Chandavarkar, J., has observed that "S. 295 does not make the nature of liability under the decrees contemplated by it one of the essential conditions for the application of the section." In 33 Mad 465 (7) it was laid down that the decree against the legal representatives of a deceased person is not against the estate of the deceased but the legal representatives are judgment-debtors within the meaning of S. 295. In 1930 Cal 454 (8), Rankin, C. J., followed these rulings. The decree obtained by opposite party 1, the judgment-debtors, are described as follows: on the death of Prosonna Kumar Saha his sons and heirs, Surendra Narayan Saha, Upendra Narayan Saha, Jatindra Narayan Saha and Narendra Narayan Saha. In the other decree the same men are mentioned without the words "on the death of Prosonna Kumar Saha, his sons and heirs." All the decrees in this case are against the same man. The judgment-debtors in the decree obtained by opposite party 1 can be said to be different from those in other decrees only on the principle that Prosonna Kumar Saha or his estate is judgment-debtor in the decree of opposite party 1. In view of the principle laid down in 25 Bom. 494 (6), 33 Mad 465 (7) and 1930 Cal 454 (8), I am not prepared to hold that the judgment-debtors in the decree of opposite party 1 are different from those in the decrees obtained by the petitioner and opposite parties 6 and 7. They are the same judgment-debtors within the meaning of S. 73 of the Code. The rule is therefore made absolute with costs to be paid to the petitioner by opposite party 1. The order of the learned Subordinate Judge rejecting the applications of the petitioner and

opposite parties 6 and 7 are set aside. The learned Subordinate Judge is directed to distribute the assets rateably amongst the petitioner and opposite parties 4, 6 and 7 according to law. The hearing-fee is assessed at 3 gold mohurs.

Henderson, J.—I agree.

V.B./R.K.

Rule made absolute.

* A. I. R. 1936 Calcutta 212

MCNAIR, J.

In the matter of *Girish Chandra Seal*.

Suits Nos. 154 of 1927 and 143 of 1928,
Decided on 18th November 1935.

(a) **Presidency Towns Insolvency Act (1909), S. 55—Onus is on Official Assignee.**

The onus lies on the Official Assignee to prove that the transactions were not made in good faith and for valuable consideration: 1931 P C 75, *Foll.* [P 214 C 2]

(b) **Registration—Transfer which ought to be registered in Book I registered in Book IV bona fide—Transfer is not invalidated.**

Where a transfer which ought to be registered in Book I is registered in Book IV but done so bona fide, the transfer is not invalidated by such error in registration: 1935 P C 165, *Foll.* [P 214 C 2]

* (c) **Insolvency — Transfer before insolvency held to be void on application of Official Assignee—Transfer by transferee after adjudication is void even if subsequent transferee acts bona fide (*Obiter*).**

Obiter.—Where a transfer by an insolvent prior to adjudication is held to be void on the application of the Official Assignee, a subsequent transfer by such transferee is also void even if the subsequent transferee acts bona fide: *In re Hart, Ex parte Green*, (1912) 3 K B 6 and *In re Gunsbourg*, (1920) 2 K B 426, *Rel on.* [P 214 C 2]

(d) **Presidency Towns Insolvency Act (1909), S. 55 — Official Assignee should be scrupulously accurate in statements he makes (*Obiter*).**

Obiter.—The Official Assignee who seeks to set aside transfers on ground that they are not bona fide should be scrupulously accurate in the statements by which he hopes to establish his title. [P 215 C 1]

B. C. Ghose and N. C. Chatterjee—for Official Assignee.

J. N. Majumdar, Sambhu Banerjee, D. N. Sinha and H. N. Bhattacharjee—for different parties.

Order.—Two applications have been made by the Official Assignee to set aside a series of transactions by which the insolvents Manindra Chandra Seal and Girish Chandra Seal have parted with property, as the Official Assignee contends, in defraud of their creditors. The questions for determination in each application are similar and it has been agreed that this

7. Srinivas Aiyangar v. Kanthimathi Ammal, (1910) 33 Mad 465=5 I C 917.

8. Jahar Lal Saha v. Lalita Sundari Dassi, 1930 Cal 454=130 I C 227=34 C W N 294.

judgment shall control the rights of the parties in both cases. The insolvents Manindra and Girish are two of the sons of Durgadas Seal who died in September 1925 leaving seven sons. By his will dated 28th April 1924, Durgadas appointed his sons Ashutosh and Umesh as his executors. The only other son who is remotely concerned with these transactions is named Jadab. Durgadas died on 19th September 1925 having made a will dated 28th April 1924 under which each of the insolvents Manindra and Girish became entitled to a one-eighth share in the rest and residue of his father's estate. In order to appreciate the extent of their interest in that estate it is necessary to refer shortly to the earlier history of the family. In 1866 Madhub Chandra Seal died after dedicating by will his property in Madan Dutt Lane. In 1884 Madhub's nephew Kalidas dedicated properties numbered 100 to 105, Bowbazar Street, as an addition to the earlier bequest but confined the shebaitship of the endowment to his direct descendants. Litigation ensued between the rival branches of the family and it is contended that in the result the Bowbazar properties have been declared to be secular and each of the insolvents is entitled to a 1/16th share therein. The insolvent's father Durgadas was a son of Kalidas. The interests to which the insolvents become entitled under their father's will fall into three categories:

- (1) Jewellery.
- (2) A share in half the residue.
- (3) A life estate in certain property.

Durgadas died in September 1932.

The insolvent Manindra, on 29th April 1927, assigned his right to the jewellery to Gour Chand Mullick for Rs. 1,800. The insolvent Girish, on 2nd May 1927, assigned his share in the jewellery to Gour Chand Mullick for Rs. 1,700. The Official Assignee contends that Gour was a person who made it his business to prey on the sons of wealthy parents, to lead them into a dissolute life, to advance them the money to indulge in dissipation and to induce them to part with their patrimony on ruinous terms in order to repay his advances. The acquisition of their interest in the jewellery to which they were entitled under their father's will was, so it is contended, the first step in the acquisition by Court of the insolvent's property. The value of the insolvent's in-

terest in the jewellery is said to be largely in excess of the consideration which the insolvents are alleged to have received. On 4th May 1927, Manindra, and on 11th May 1927 Girish, assigned their respective interests in the rest and residue of their father's estate to Gour Chand Mullick for Rs. 1,000 each. The Official Assignee alleges that in each case the consideration was grossly inadequate even if it was in fact paid which he denies. Manindra, on 28th May 1927, mortgaged his life interest in his father's estate to Gour for Rs. 15,000. The payment of the alleged consideration is denied. Girish was adjudicated an insolvent on 3rd August 1927 and Manindra on 13th July 1928. By March 1930 Gour had obtained in all a 6 annas share in the estate of Durgadas, for he bought the two annas share of Jadub Chandra Seal through Phani Lal Mullick.

This 6 annas share Gour sold on 17th March 1930 to Umesh Chandra Seal for an alleged consideration of Rs. 10,000 in cash and Rs. 37,000 secured by a mortgage on the premises conveyed and on Umesh's 4 annas share in the residuary estate of Durgadas. On 29th March 1930 the Official Assignee advertised the sale of Manindra's interest in the Bowbazar Street property, whereupon Gour and Umesh both objected on the ground that the insolvent's interest in that property had ceased. Gour and Umesh were then examined under S. 36, Presidency Towns Insolvency Act, and the Official Assignee applied under S. 55 for the annulment of the transfers. On the hearing of that application before my learned brother Panckridge, J., Counsel for Gour stated that he was not in a position to establish full payment in cash of the consideration for the transfers and the transfers to Gour were accordingly set aside and declared void. Similarly counsel for Umesh declared his inability to prove that the consideration had in fact been paid, and with regard to the transfer on 17th March 1930 from Gour, he admitted that he had notice of the adjudication of Girish and Manindra. The learned Judge held on the authority of (1912) 3 K B 6 (1), that the transfers to Gour being void they were void as from the date when his transferors were adjudged insolvent; and in the circumstances

1. *In Re Hart, Ex parte Green*, (1912) 3 K B 6 = 28 T L R 482 = 56 S J 615.

Umesh, his subsequent transferor, did not acquire a good title. On appeal from this decision it was held following the recent Privy Council decision in 58 I A 115 (2) that the onus lay on the Official Assignee to prove that the transactions were not made in good faith and for valuable consideration, and that as there was no evidence to support the decision of the trial Judge his order should be set aside and the matter should be retried in the insolvency jurisdiction. The appellate Court held however that the order of the trial Court setting aside, in the presence of Gour and his assignee Phani Lal Mullick, the mortgage of 28th May 1927 of Manindra's life estate under his father's should stand. The order of the appellate Court was made on 8th January 1932.

On 18th January 1932 Gour assigned to his father Bolai Chand Mullick the mortgage of 17th March 1930 by Umesh in favour of Gour to secure the sum of Rs. 37,000 and on 19th July 1932 Gour was adjudicated insolvent. In accordance with the directions of the Court of appeal the matter has come before me in the insolvency jurisdiction and the procedure directed by that Court has been followed. The first question for decision is whether the Official Assignee has discharged the onus which lies upon him of proving that the transfers by the insolvents were not made in good faith and for valuable consideration. (After examining the evidence, his Lordship proceeded.) The result is that the Official Assignee has to rely entirely on the admissions of Gour and the evidence of his accomplice to prove his case. As I have already pointed out, they are both witnesses whose past record alone makes their testimony unworthy of belief. I am unable to say, in these circumstances, that the Official Assignee has discharged the onus which lay upon him and I am unable to declare as prayed that the assignment of 29th April 1927, 4th May 1927 and 17th June 1927 between Gour and Manindra, and the assignments of 2nd May 1927, 11th May 1927 and 21st June 1927 by Girish, are void. The question of registration which was raised before my brother Panckridge was argued before me at some length namely that the assignments by the insolvents of their residuary shares in their

father's estate would not operate as a transfer of any immovable property inasmuch as they were registered in Book IV and not in Book I.

This question was not decided at the previous hearing, but in view of my decision that the lack of consideration has not been proved, it now becomes of importance. There can be little doubt that the registration in Book IV was bona fide, for prior to the decision of the Appeal Court in 34 C W N 177 (3), the parties were unaware that the residuary estate would include immovable property. In those circumstances the recent decision of the Privy Council, reported in 39 C W N 1191 (4), seems to me to establish quite clearly that such an error in registration would not invalidate the transfer. On my finding that the transfers in favour of Gour were valid it follows that the title of Gour's transferees is good and the other questions which have been argued do not arise, but as this matter may go further, I will deal with the arguments which have been raised on the assumption that the transfers to Gour are void. Dealing first with the transfer in favour of Umesh of 17th March 1930. This transfer was made after the adjudication of the insolvents, and with notice of that adjudication and on the English cases to which I have been referred, viz. (1912) 3 K B 6 (1) and (1920) 2 K B 426 (5), I am of opinion that the title of the Official Assignee accrued on the dates in 1927 and 1928 when Girish and Manindra were adjudicated insolvent respectively and that on 17th March 1930 Gour had no title to the property which he purported to transfer to Umesh. Even if it is conceded that Umesh was a bona fide purchaser for consideration he could acquire no title from Gour if the transfers in favour of Gour were in fact inoperative. The same considerations would be applicable to the assignment of 18th January 1932 by Gour in favour of his father Balai of the mortgage received by Gour from Umesh as part of the consideration in the transaction of 17th March 1930.

Finally it is argued on behalf of Umesh and Bolai, the transferees from Gour,

2. *Official Receiver v. Chettyar Firm*, 1931 P C 75=131 I C 767=58 I A 115=9 Rang 170 (P C).

3. *Ashutosh Seal v. Benode Behary*, 1930 Cal 495=128 I C 82=51 C L J 80=34 C W N 177.
4. *Satindra Nath v. Jatindra Nath*, 1935 P C 165=157 I C 419=62 I A 265=63 Cal 1=39 C W N 1191 (P C).
5. *In re Gunsburg*, (1920) 2 K B 426=89 L J K B 725=36 T L R 485=64 S J 498.

that the Official Assignee is estopped from challenging the validity of the transfers owing to his failure to challenge them in earlier litigation. The earlier litigation to which reference is made is an administration suit brought by Gour on 14th June 1927 against Umesh and Ashutosh Seal as executors of Durgadas's estate. In that suit there was a decree in favour of Gour on 12th July 1929 and an order that the executors should hand over the shares of Manindra and Girish to the plaintiff. The Official Assignee was not a party to that suit, but it is contended that he was the successor in interest to persons who were parties and that so long as the decree remains it is not competent for the Official Assignee to obtain an order under S. 55, Presidency Towns Insolvency Act, which would in effect set aside that decree. In my opinion this decree which was obtained after Manindra and Girish were adjudicated insolvent to the knowledge of the plaintiff cannot operate as *res judicata* against the Official Assignee who was never made a party. The other proceeding on which reliance is placed is an originating summons brought on 1st February 1928 by Ashutosh and Umesh as executors of Durgadas. To this summons the Official Assignee was a party and inasmuch as he failed to challenge the transfer by the insolvents it is contended that he is estopped from challenging them now. It is not apparent from the record what order if any, was made on this summons, but the Official Assignee entered appearance, and in my opinion there is considerable force in the argument that his failure to raise any objection to the transfer justified Umesh, one of the plaintiffs, in assuming that the transfers were good. In this connexion it is worthy of note that the Official Assignee must have had notice in 1928 of the transfers and his statements in para. 13 of his affidavit in the matter of Manindra and para. 14 of his affidavit in the matter of Girish are evidently untrue. It is urged with some justification that this Court is a Court of equity and that the Official Assignee who seeks to set aside transfers on the ground that they are not bona fide, should be scrupulously accurate in the statements by which he hopes to establish his title. In view of my finding, that the Official Assignee has failed to establish the invalidity of the transfers of which he complains, the ap-

lications must be dismissed with costs including costs of the previous hearing before Panckridge, J. The costs will be as of a hearing of a defended suit. The hearing occupied five days. In the matter of Girish there will be costs as of a motion. Gour Chand Mullick will bear his own costs.

K.S./R.K. *Applications dismissed.*

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S. K. GHOSE AND EDGLEY, JJ.

Gurupada Haldar — Defendant — Appellant.

v.

Manmohan Mukherjee and others — Respondents.

Appeal No. 1597 of 1933, Decided on 10th February 1936, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 25th May 1933.

(a) **Hindu Law—Religious endowment—On failure of shebait, question of appointment reverts to founder's family—But this is subject to the condition that such appointment should not be inconsistent with founder's intention.**

On failure of shebait, the question of appointment will revert to the family of the founder. But this is subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. [P 217 C 2; P 219 C 1]

(b) **Hindu Law — Religious endowment — Fundamental change in devolution of office inconsistent with terms of original foundation is not valid.**

A fundamental change in the devolution of the office of shebait, which is inconsistent with the terms of the original foundation, cannot be valid. Even the founder cannot alter the line of succession unless he has reserved that right to himself: 1930 Cal 495, *Rel. on.* [P 218 C 1]

(c) **Hindu Law—Religious endowment—A de facto shebait or even stranger can sue to recover possession of idol's property—But persons who file such suit at instigation of their father who though parties to a lawful compromise want to get rid of it by subterfuge have no locus standi to file such suit.**

It is possible for a de facto shebait or even a stranger to bring a suit to recover possession of the idol's property. But where two persons who were parties to a lawful compromise in order to get rid of such compromise by resort to a subterfuge set up their sons to sue for recovery of possession and challenge the compromise :

Held : that the sons had no locus standi to do so and that the defendant was entitled to raise the question as to whether the plaintiffs had any locus standi to bring such suit. [P 219 C 1, 2]

Sarat Chandra Basak, Ram Ch. Mukherjee and Subodh Ch. Basak—for Appellant.

Sarat Chandra Roy Chowdhury, Saroj Kumar Maity and Ralindra Nath Bhattacharjee—for Respondents.

Judgment.—This second appeal arises out of a suit for declaration of title to and recovery of possession of about 5 cottas of land together with a house and a Siva temple standing thereon. The property originally belonged to one Pran Krishna Haldar who died in 1868 leaving him surviving his widow Nitambini Debi and his mother Biswamoyi Debi. Nitambini died in 1919 and Biswamoyi died in 1899. On 26th March 1868, Nitambini mortgaged the disputed property reciting in the mortgage deed that she had to pay the decretal debt of Pran Krishna Haldar amounting to Rs. 200 and to raise Rs. 250 for her own maintenance. Subsequently the mortgagee brought a suit and obtained a decree and on 30th December 1870, Biswamoyi auction-purchased the property in execution and obtained possession on 2nd March 1872. In September 1889 she executed a deed of gift or endowment in respect of the disputed property in favour of the Siva idol established by her and appointed one Jadu Nath Mukherjee as the first shebait. In 1901, Jadu Nath executed another deed by which he appointed his two sons Lal Gopal Mukherjee and Kalipada Mukherjee shebait and also laid down the line of succession in his family. It may be noted here that Biswamoyi had already died. Gurupada Haldar who is defendant 1 in the present suit became the reversioner to the estate of Pran Krishna Haldar on the death of Nitambini and in 1923 he instituted Title Suit No. 203 to recover possession of the disputed property alleging that Nitambini had only a widow's interest and Biswamoyi had purchased only that interest.

The suit was brought against Lal Gopal and Kalipada who were in charge as shebait of the idol. The suit ended in a compromise on 21st January 1927 and the result was that the property was divided about half and half, Gurupada taking one half and Lal Gopal and Kalipada taking the rest in the name of the idol. The present plaintiffs, who are the sons of Lal Gopal and Kalipada, allege that their fathers were unduly influenced by the relatives of defendant 1, Gurupada

Haldar and the neighbours, and that they had acted improperly as shebait in entering into the compromise. The plaintiffs further allege that they took their fathers to task, whereupon the latter ceased to act as shebait and permitted the plaintiffs to act as shebait. By the said compromise decree the title of the Siva Thakur to the suit land has been clouded and so the plaintiffs have brought the present suit. Lal Gopal and Kalipada have been made pro forma defendants 2 and 3; they have filed a short joint written statement supporting the plaintiffs' case. The suit is contested by Gurupada Haldar, defendant 1. His defence is that the plaintiffs have no locus standi to sue, that Nitambini had only a widow's interest which was purchased by Biswamoyi and the latter's right ended when Nitambini died in 1919, and further that the compromise in the suit of 1923 is binding on the plaintiffs.

The trial Court found that Nitambini had mortgaged for legal necessity and that she intended to bind the entire estate, but that there was nothing to show that the mortgagee intended to enforce the liability against the entire estate. On the contrary, only the right, title and interest of the judgment-debtor Nitambini were sold and not the entire estate of Pran Krishna Haldar. Therefore Biswamoyi did not acquire absolute title to the property. Gurupada inherited it after the death of Nitambini and the endowment was no longer valid. At the same time the Subordinate Judge held that the plaintiffs were validly appointed shebait and that the solenama was not binding on them. In the view that he took of the auction-purchase, the Subordinate Judge dismissed the suit. On appeal the District Judge agreed with the Subordinate Judge on all the points except with regard to the auction-purchase. He held that the entire estate passed to the auction-purchaser. In that view he decreed the suit. The present second appeal is preferred by defendant 1.

The first question in this appeal is whether the plaintiffs have locus standi to bring the suit. Both the Courts below have found that the plaintiffs are validly appointed shebait. The plaintiffs are four in number. According to the cause title in the plaint, plaintiff 1 is the son of Lal Gopal Mukherjee and plaintiffs 2, 3 and 4 are the minor sons of Kalipada

Mukherjee represented by their guardian mother Nagendra Bala Debi and they are described as shebait of the Siva Thakur established by Biswamoyi. In para. 13 of the plaint it is alleged that the plaintiffs are the validly appointed shebait according to the original deed of endowment of Biswamoyi. The reliefs that they asked for are first: A declaration that the property belongs to the idol Siva established by Biswamoyi, secondly that the solenama decree in Title Suit No. 204 of 1923 is not binding on the idol and that defendant 1 may not possess any part of the suit property under the said decree and, thirdly, that the plaintiffs are to recover possession. The learned District Judge has given a decree in these terms:

That the suit be decreed with costs, it being declared that the title and possession of the property in suit is in Siva, and in the plaintiffs as shebait of Siva; that the decree in Title Suit No. 204 of 1923 is not binding against the deity Siva and against the property in suit. It is further ordered that the plaintiffs as shebait of the deity Siva may take delivery of possession of such part of the property in suit as has been occupied by defendant-respondent 1 in pursuance of the decree in Suit No. 204 of 1923.

It is conceded by the learned advocate appearing for the plaintiffs-respondents in this Court that this decree is really in excess of the reliefs asked for in the suit, inasmuch as it gives to the plaintiffs a declaration of their shebaiti right which was not asked for in the plaint. To understand the question of locus standi, it will be necessary to refer to the original deed of endowment, Ex. 1 which was executed by Biswamoyi Debi. The material part of the document runs as follows:

But having it in my mind to dedicate the house to Siva Thakur, I dedicate today the said house to the idol of Siva by this deed of gift. Whatever right, title and possession I had in the said house vest from this date in the idol of Siva and now I have become old and afflicted with various diseases and unable to perform the seva of the idol of Siva, so I appoint Jadunath Mukhopadhyaya, son of late Shambhu Chandra Mukhopadhyaya, as shebait. The said shebait will keep the said house in his own right, title and possession, let out the same and perform the seva and repair the house from the proceeds of the rent of the house and from the income from my jajmans (disciples). May God forbid, if during my life time the said shebait dies, then I shall again appoint another shebait. If the said shebait becomes aparag (incapacitated) to perform seva, he will be entitled to appoint another shebait in the same manner, but he shall not be entitled to do any injurious act such as gift, sale,

mortgage or transfer, etc. (of the said property) obstructing the seva work. Be it expressed further that my heir shall have no connexion with this house. . . .

It is apparent from the above that Biswamoyi divests herself and her heirs and vests the property in the idol Siva. Next she appoints Jadunath Mukhopadhyaya as shebait in his own right, title and possession. Thirdly she provides for the succession in this way, namely, so far as Jadunath is concerned he is to appoint his successors if he should become incapacitated (अपारग) and further Biswamoyi reserves to herself the right to appoint another shebait in case Jadunath should die in her lifetime. The document does not go any further and does not make any provision for future appointments after Jadunath's successor. The learned District Judge remarks in his judgment that the

endowment deed provided expressly that the services to Siva would be continued without reference to the grantor's heirs after the grantee's death, and I agree with the learned lower Court that by implication Jadunath, the original grantee, was entitled to fix the succession to shebaitship provided that such succession fixed did not go against the law.

It seems to us that the learned Judge was in error in thinking that there was an express provision that the service to Siva would be continued with reference to the grantor's heirs. There is no reason, so far as the terms of the endowment go, why the ordinary law should not apply, namely that on failure of shebait, the question of appointment will revert to the family of the founder. Both the Courts however have found that it was the intention of the founder that Jadunath should have full authority in the matter of appointment of successive shebait. Considering that this was the intention, it must be read consistently with the terms of the endowment. It is perfectly clear from the terms that the founder intended first, that the shebait must be an effective shebait, that is one capable of performing the worship and, secondly, that he should appoint a successor only in the contingency of his being incapacitated. This brings us to the arrangement made by Jadunath by the deed of appointment, Ex. 2. By this deed he professed to act according to the terms of the deed of Biswamoyi and stated that he had become old and unable to perform the seva, etc., on account of illness, and then he proceeded to ap-

point his two sons Lalgopal and Kalipada Mukherjee. So far Dr. Basak, appearing for the appellant in this Court, has stated the appointment cannot be questioned even though it was of two shebaitis and not one. The deed then goes on to provide as follows :

I, according to the order in the said deed of gift, appoint you down to your sons, grandsons, heirs and representatives, as shebaitis to perform the daily seva work of the idol of Siva. From this date, as my representatives, you, down to your sons, grandsons, heirs and representatives, enjoy and possess the said debuttar house as shebait of Sri Sri Siva Thakur . . . etc.

It is contended that this laying down the rule of succession in the family is inconsistent with the terms of Biswamoyi's grant. I am not impressed by Dr. Basak's argument that the appointment of the plaintiffs would be repugnant to Hindu law on the ground that they were unborn at the time of the original grant and his reference to the case of 21 Bom 709 (1), cannot be accepted as that case may be distinguished on the facts. But there is authority for the proposition that a fundamental change in the devolution of the office of shebait, which is inconsistent with the terms of the original foundation, cannot be valid. Even the founder cannot alter the line of succession unless he has reserved that right to himself. In the case of 34 C W N 177 (2), there was an addition to the existing foundation, a subsequent shebait having by another deed of endowment dedicated certain additional properties. There it was pointed out that each case must be governed by the terms of the particular dedication subject to the principles laid down in 17 Cal 3 (3) which was a case of shebaitship remaining in the family of the founder. In the present case Jadunath by his deed of appointment Ex. 2 was not even making any addition to the existing foundation. On the other hand, he was adopting a course of personal aggrandisement by keeping the shebaitship in the family which was inconsistent with the terms of the original foundation. Since there is no dispute that, so far as Lalgopal and Kalipada are con-

cerned, their appointment was valid, the next step to see is whether the plaintiffs have been validly appointed. Looking back to the original conditions of the endowment, the first question is whether Lalgopal and Kalipada had been incapacitated. The plaintiffs' own case as stated in the plaint itself shows that that was not the reason for the appointment of the plaintiffs. The reason was that there was a quarrel over the compromise which was effected in T. S. No. 204 of 1923. This is confirmed by the deed of appointment which was executed by Lalgopal and Kalipada in favour of the plaintiffs in February 1931, vide Ex. 10, that is, subsequent to the institution of the suit which was on 16th May 1930. In this document the executant Lalgopal and Kalipada state:

Then while we were exercising our right of shebaitship in respect of the said god Siva peacefully, we, at the instigation of some wicked men, surrendered our said right of shebaitship in the month of January 1930 in your favour giving you full liberty to carry on the sheba of the said Siva . . .

Then they proceed :

In January 1930 we surrendered our right of shebaitship in your favour and since then you have been performing the said shebaiti work being invested with the right of a shebait of the said Siva Thakur according to the provisions of the deed by the late Biswamoyi Debi and Jadu Nath Mukhopadhyaya and our shebaiti rights have been completely extinguished . . .

Then comes the second question, was this an appointment of effective shebaitis, that is, of persons who are capable of performing the seva? Now we find that three of the plaintiffs are minors who are represented in the suit by their mother guardian; plaintiff 1 is stated to have been born in 1909 and therefore he was 21 years old at the time of the suit.

These certainly were not persons who were capable of performing the seva as evidently was intended by the original founder. The learned Subordinate Judge says :

The shebaitis were entitled to relinquish in favour of persons who would succeed after his death.

This might be in accordance with the terms of the deed of appointment executed by Jadunath Mukhopadhyaya, Ex. 2. But such an appointment is against the terms of the original grant. In the case of 35 All 283 (P C) (4) it was held that

1. Bai Motivahu v. Bai Mamubai, (1897) 21 Bom 709=24 I A 93=7 Sar 140 (P C).

2. Ashutosh Seal v. Benode Behari Seal, 1930 Cal 495=128 I C 82=51 C L J 80=34 C W N 177.

3. Gossami Sri Gridharaji v. Romanlalji Gossami, (1890) 17 Cal 3=16 I A 137=5 Sar 350 (P C).

4. Mohan Lalji v. Gordhan Lalji Maharaj, (1913) 35 All 283=19 I C 337=40 I A 97 (P O).

the rule that the heirs of the founder succeed to the shebaitship laid down in the case of 17 Cal 3 (3) is subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. We think the appointment of the present plaintiffs is opposed to this principle. It is not argued for the respondents that the plaintiffs are validly appointed shebait and in fact Mr. Roy Chowdhury appearing for the respondents has suggested that the question of valid appointment may be left open. It is contended that the plaintiffs have been given charge by the existing shebait and further that defendant 1, Gurupada, cannot question the appointment of the plaintiffs because Biswamoyi in her deed of endowment expressly excluded her heirs from any connexions with the house. This argument, however, overlooks the fact that defendant 1, Gurupada Haldar, does not profess to be an heir to Biswamoyi. He is heir to the estate of Pran Krishna Haldar on the death of Nitambini Debi. This is his defence and this was also his case in the plaint in T. S. 204 of 1923. No doubt it is possible for a de facto shebait or even a stranger to bring a suit to recover possession of the idol's property. See the case of 39 C W N 433 (5) which affirmed the principle laid down in 37 C W N 541 (6), namely that the plaintiff in actual possession as Mohunt is entitled to maintain a suit to recover property not for his own benefit but for the benefit of the math. These are cases of Mohunts in actual possession seeking to set aside a grant made by a predecessor, but there is the vital difference in the present case. The fathers of the plaintiffs are the validly appointed shebait and are still living. They made the compromise with Gurupada.

The argument is that in the suit, No. 204 of 1923, they were only defendants in their personal capacity and not as shebait. But if we look to the substance of the thing, this argument cannot be accepted. The terms of the sole-

5. Mahadeo Prasad Singh v. Karia Bharti, 1935 P C 44=153 I C 1100=62 I A 47=57 All 159=39 C W N 433 (P C).
6. Ram Charan Das v. Munshi Naurangi Lal, 1933 P C 75=142 I C 214=60 I A 124=12 Pat 261=37 C W N 541 (P C).

nama, vide Ex. D, shows that it was declared that the plaintiff Gurupada had no title to and possession in the portion obtained by the defendants and that the defendants were to possess the same down to their descendants as shebait of the Siva Thakur. The true position seems to be that Lalgopal and Kalipada now want to get rid of the compromise by resort to a subterfuge. They have set up their sons in their place, so that the compromise may be got rid of and it is open to the defendant Gurupada to raise the question whether the plaintiffs have any locus standi to bring the suit. It seems to us that the plaintiffs have no locus standi. It is next contended for the appellant that Biswamoyi did not purchase the entire estate. It is pointed out that even if it be held that there was legal necessity for the mortgage as stated in the deed of mortgage, the same deed shows that it was Biswamoyi's action that gave rise to the necessity; therefore it was not open to Biswamoyi to take advantage of her own wrong. On the other hand, there is the compromise by which Gurupada himself accepted the position that the endowment was valid even after the death of Nitambini. Whatever it may be, it is not necessary to decide the question, having regard to the fact that it is found that the plaintiffs have no locus standi to bring the suit. The suit must therefore be dismissed. The result is that the appeal is allowed, the judgment and the decree of the lower appellate Court are set aside, and the plaintiffs' suit is dismissed. The contesting defendant 1 is entitled to his costs in all the Courts.

K.S./R.K.

Appeal allowed.

* A. I. R. 1936 Calcutta 219

PANCKRIDGE, J.

Daulatram Rawatmull—Defendant—Applicant.

v.

Maharajlal and others — Plaintiffs — Opposite Parties.

Suit No. 869 of 1935, Decided on 20th August 1935.

* Letters Patent (Calcutta)—Cl. 12—Cause of action arising within jurisdiction being only assignment of promissory note on which suit is based—Leave should not be granted.

It is not right to grant leave in a case where the part of the cause of action on which the

jurisdiction depends is matter with which the defendants have nothing to do. [P 220 C 2]

Where, therefore, the only cause of action which arises within jurisdiction is the assignment of the promissory note on which the suit is based, leave under Cl. 12 should not be granted. When people take an assignment of promissory note, they should be prepared to enforce their claim either in the Court within whose jurisdiction the makers reside or in a jurisdiction where a part of the cause of action with which the matters are directly concerned has arisen. The balance of convenience also demands that the litigation should be conducted either in the Court within whose jurisdiction defendants reside or in the Court within whose jurisdiction the document sued upon was executed. [P 220 C 2; P 221 C 1]

K. P. Khaitan—for adult Defendant.

Sarat C. Bose, S. R. Das and D. N. Sinha—for Opposite Parties (Plaintiffs).

A. K. Dey—for infant Defendants.

Judgment.—This is an application on behalf of some of the defendants to revoke the leave given under Cl. 12 of the Charter to institute this suit, and to take the plaint off the file. The suit is on a promissory note and the sum claimed amounts to Rs. 11,684. The plaintiffs are described as a firm carrying on business in Calcutta. The defendants, who are 17 in number, are described as being landholders, residing at a village in the district of Mongyr. I take these descriptions from the cause title. In the body of the plaint the defendants are further described as members of a joint Hindu Mitakshara family. The plaintiffs' case is that certain of the defendants as kurtas and managers of the joint family borrowed moneys and purchased piece-goods and other commodities from one Ramcoomar Marwari. These accounts between the kurtas and Ramcoomar were adjusted from time to time and promissory notes were given and renewed. The last of such promissory notes is said to have been executed by the kurtas on 22nd March 1933 and is the promissory note on which the suit is brought. The payee of the promissory note died on 15th January 1934. His heir and legal representative was a minor and the District Court appointed guardians of his property. With the leave of the Court the guardians appointed assigned the promissory note in suit to one of their number, Rai Bahadur Lokenath Prosad Dandania of Baghalpur. On 8th April 1935 the assignee, in his turn, according to the plaint, assigned the promissory note in suit to the present plaintiffs,

some of whom, I am informed, are related to him, for valuable consideration. That assignment is said to have been made in Calcutta and it is common ground that it is the only part of the cause of action which has arisen within the jurisdiction. It is the plaintiffs' case that the loans and deliveries of goods which were the consideration for the successive promissory notes were made at Baghalpur and that the promissory note in suit was executed there.

My attention has been drawn to a recent judgment of mine where by I revoked leave under Cl. 12 of the Charter in a case where the only part of the cause of action which had arisen within the jurisdiction was the endorsement by the payee of the promissory note in suit. I think that the plaintiffs are fully justified in saying that the circumstances in that case were considerably stronger than in the case with which I am now concerned. I should not feel justified on the materials before me in holding as I did in the former case, that the assignment is *prima facie* collusive, in the sense that the circumstances indicate that it was effected in Calcutta largely for the purpose of giving jurisdiction to this Court and thereby embarrassing the defence. At the same time I am of opinion that usually, it is not right to grant leave in a case where the part of the cause of action on which the jurisdiction depends is a matter with which the defendants have had nothing to do. I do not lay this down by any means as a hard and fast rule, but generally speaking, it appears to me that when people take an assignment of a promissory note they should be prepared to enforce their claim either in the Court within whose jurisdiction the makers reside or in a jurisdiction where a part of the cause of action with which the makers are directly concerned has arisen.

The branch of the argument advanced by Mr. Bose which has attracted me most is his submission that if people choose to execute a negotiable instrument, they must be held to contemplate the possibility of its passing from hand to hand by endorsement and delivery and of its eventually getting, in the ordinary course of affairs, into the hands of some one who may elect to institute proceedings in a Court which does not suit the convenience of the makers of the

note. Were the defendants in this case a mercantile firm, I am not sure that this argument would not have turned the scale in favour of the plaintiffs, but they are described as land owners and it appears from the plaint that the consideration for the note took the form of advances of cash and the supply of goods for personal consumption. In these circumstances, the argument as to negotiability does not apply with the same force as it would in the case of parties engaged in mercantile transactions. Mr. Bose has also pointed out that by suing in this Court the plaintiffs avoid the necessity of paying a heavy initial Court fee on the institution of the suit. I do not think that that is a circumstance which should affect me one way or the other. It would be wrong for me to take into consideration whether my decision is likely to impoverish or to enrich the revenue. From the nature of things in whichever Court the suit is instituted, one party or the other will be put to a certain amount of inconvenience, and on the whole, I think that the balance of convenience demands that the litigation should be conducted either in the Court within whose jurisdiction the defendants reside or in the Court within whose jurisdiction the document sued upon was executed. I therefore revoke the leave given, but in the circumstances of this case, I direct that each party bear his own costs.

R.M./R.K.

*Leave revoked.***A. I. R. 1936 Calcutta 221**

MUKERJI AND S. K. GHOSE, JJ.

Mahammad Fateh Nasib—Plaintiff—Appellant.

v.

Saradindu Mukherjee — Defendant — Respondent.

Appeal No. 5 of 1933, Decided on 23rd January 1936, from original decree of Sub-Judge, First Court, 24-Parganas, D/- 16th August 1932.

(a) **Pauper Suit**—Suit registered as ordinary suit—Plaintiff failing to pay deficit court-fee though given time to do so—But subsequently applying for permission to continue suit as pauper—Application should not be rejected merely on ground that suit has been registered as ordinary suit but should be considered on merits.

Where a suit has been registered as an ordinary suit and the plaintiff does not pay deficit court-fee though given time twice to do so but

subsequently applies for permission to continue the suit as a pauper, the application should not be rejected merely on the ground that the suit has already been registered as an ordinary suit. It should be considered on merits: *Case law discussed.* [P 222 C 2]

(b) Civil P. C. (1908), S. 148 and O. 7, R. 11 (c)—Time for paying deficit court-fee can be extended.

In view of S. 148 the time granted to pay deficit court-fee can be enlarged from time to time. This section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. [P 223 C 1]

(c) Civil P. C. (1908), O. 7, R. 11 (c)—Court has inherent power to depart from procedure under this rule to suit exigencies of situation.

The mandatory provision contained in O. 7, R. 11 is intended for cases where no other complications intervene and the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. [P 223 C 1]

H. S. Suhrawardy, Jahnavi Charan Das Gupta, Diptendra Mohan Ghose and Jogesh Chandra Sinha—for Appellant.

S. C. Basak and Rajendra Bhusan Bakshi—for Respondent.

Judgment.—On 8th January 1930 the plaintiff applied for permission to institute a suit in forma pauperis for recovery of possession of a certain property with mesne profits on a declaration that the same was wakf property and that he was the mutawalli of the wakf. He valued the suit at Rs. 5,100. The application was entertained and notices were issued on the defendant and the Government Pleader. On 8th March 1930 the defendant filed an objection in which amongst other grounds it was alleged that the market value of the property was not less than Rs. 1,25,000. On 21st June 1930 the plaintiff filed the requisite court-fee on his plaint as framed, and on that the suit was registered as an ordinary suit. On 17th September 1930 the defendant filed his written statement, and on 6th November 1930 issues were framed, one of the issues being on the question of valuation of the suit. This issue was taken up as a preliminary issue; and evidence thereon being adduced the Subordinate Judge, on 31st March 1932, assessed the market value at Rs. 75,000 and directed the plaintiff to put in the deficit court-fees within one month. This time was extended twice, by a month on each occasion, on the plaintiff's application, once on 30th April and again on 30th May 1932. On 30th June 1932 the plaintiff applied for fur-

ther time and on that the Subordinate Judge ordered the petition to be put up for orders on 6th July 1932, on which date the plaintiff applied for permission to continue the suit as a pauper filing with the application a copy of the plaint he had already filed and valuing it at the figure which the Court had found as the value of the property. On 13th July 1932 the Subordinate Judge rejected the application of 30th June and 6th July 1932 and later on on 16th August 1932 passed two orders, one after the other, which ran thus:

No. 58. Plaintiff's application for permitting him to continue the suit in forma pauperis cannot be allowed in view of the decision of the Honourable High Court reported in 36 C W N 567 (1). This application is rejected.

No. 59. Deficit court-fees not paid. The plaint is rejected. The plaintiff has then preferred this appeal, as from an order dated 16th August 1932, in Title Suit No. 106 of 1930, that being the number given to the suit when it was registered. Obviously it was the second order of August 1932 which has been appealed from, the validity of the first order of that date being intended to be also challenged in the appeal.

It is apparent that as the deficit court-fees were not paid the second order was justified by the provisions of O. 7, R. 11 (c) of the Code. And the only question is whether the interposition of the application which the plaintiff made on 6th July 1932 for permission to continue the suit as a pauper makes any difference. It is also clear that if that application was rightly rejected and so was out of the way, the second order was a perfectly legitimate order passed in conformity with the provision of the Code referred to above, after the plaintiff had time, not once but three times, to put in the deficit court-fees. The correctness of the first order then is the only point for our consideration. For the first order no other reason has been given than that in view of the decision in 36 C W N 567 (1) the application to continue the suit in forma pauperis cannot be allowed. It seems fairly clear that it was on no question of merits that the learned Judge proceeded, but that he took it that having regard to the decision that he relied on, it was not open to him to allow the plaintiff to continue the suit in forma pauperis. The question to be considered is thus a pure question of law. Under

1. *Salima Sheehan v. Hafez Mahomed*, 1932 Cal 685=139 I C 520=36 C W N 567.

Act 8 of 1859 it was held by Pontifex, J., in 2 Cal 130 (2) that the power to allow a suit to be continued as a pauper suit was included in the power given to the Court to allow a suit in forma pauperis to be instituted. Under Act 14 of 1882, following the case aforesaid, the same view was expressed in 8 Bom 615 (3) and 20 Cal 319 (4). In the case of 36 C W N 567 (1), Costello, J., appears to have doubted the correctness of the view taken in the cases aforesaid but observed:

It is unnecessary for the purpose of the present case that we should express a definite opinion as to whether we agree with the decision in 20 Cal 319 (4).

Jack, J. who was a party to the decision in 36 C W N 567 (1) was also a member of the Court in the later decision in 60 Cal 827 (5), in which the view taken in 2 Cal 130 (2), 20 Cal 319 (4) and 8 Bom 615 (3) has been adopted. There is another decision of this Court, namely 36 C W N 1035 (6) in which the same view has been taken; so also in 53 Mad 43 (7). In our opinion, the correctness of this view which was obtained since 1877 need not be questioned. The Subordinate Judge therefore was in error if he was of opinion that because the suit had already been registered as an ordinary suit the application to continue it in forma pauperis could not be entertained. It has been contended on behalf of the defendant that even though the view aforementioned need not be doubted, yet in a case where in a suit commenced in the ordinary form circumstances may arise which bring the case within the provision contained in O. 7, R. 11 (c) of the Code, and that on such circumstances arising, it would no longer be open to the Court to allow the suit to be continued in forma pauperis, but the Court must proceed to deal with the suit in accordance with that provision; that the case of 36 C W N 567 (1) is an authority for that proposition; and that the Subordinate Judge has regarded it as such. It appears

2. *Nirmal Chandra v. Dyal Nath*, (1876) 2 Cal 130.

3. *Revji Patel v. Sakharam*, (1884) 8 Bom 615.

4. *Thompson v. Calcutta Tramway Co.*, (1893) 20 Cal 319.

5. *Hafez Mohammad v. Aminuddin*, 1934 Cal 25=147 I C 1189=60 Cal 827=57 C L J 441.

6. *Surendra Chandra v. Showdamini Roy*, 1933 Cal 238=141 I C 135=56 C L J 148=36 C W N 1035.

7. *Subba Rao v. Venkataratnam*, 1929 Mad 828=121 I O 857=53 Mad 43=57 M L J 677.

in 60 Cal 827 (5) and 36 C W N 567 (1) (supra) has been distinguished on such a ground. The question then arises, whether the case, though it must be taken to have been correctly decided on its own merits, can be treated as laying down any general principle or proposition of law of the nature contended for on behalf of the defendant. O. 7, R. 11 (c) of the Code says "within a time to be fixed by the Court." It has not been and indeed cannot be urged in view of S. 148 of the Code that the time so granted cannot be enlarged from time to time. Nor can it be doubted that that section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed.

In the present case the plaintiff's application for further time made on 30th June was pending on 6th July when he applied to continue the suit in forma pauperis. And in our opinion the Court not having up to that point of time made up its mind not to grant any further time, the provisions of O. 7, R. 11 (c) cannot be said to have operated ipso facto. If within one of the periods allowed, or even beyond it, but before the plaint is rejected or before circumstances have arisen under which it is bound to be rejected, an application is made to continue the suit as a pauper, is it obligatory for the Court to reject the plaint and relegate the plaintiff to a fresh application or is the Court competent to entertain the application and shape its proceedings in such a manner as would conduce to convenience and saving of time and costs? There is nothing in the Code that we can see which will force us to adopt a construction such as the defendant seeks to put upon the procedure. In our judgment, the mandatory provision contained in O. 7, R. 11 of the Code is intended for cases where no other complications intervene and that in a case of the present nature the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. There have been instances in which under similar circumstances, notwithstanding failure on the part of the plaintiff to put in deficit court-fees on the plaint within the time fixed and so attracting the operation of O. 7, R. 11 (c) of the Code, application to continue the suit in forma pauperis has been ordered to be entertained. One of

such cases is the case of 36 C W N 1035 (6) which though it purports only to distinguish the case of 36 C W N 567 (1) and does not dissent from it, does in our opinion, do so on a ground which is too narrow. Another case that may be cited in this connexion is that of 64 Mad L J 728 (8). The only point of difference between the present case and the cases just cited is that in those cases the application to continue the suit in forma pauperis was made at a time when a period allowed by the Court had not expired. But on principle we do not see why that should make any difference, so long as it is clear that an application for further time was pending consideration, at the time when the application to continue the suit in forma pauperis was made, and so long as it is also clear that the Court could, if it so wished, grant further time, thus repelling the operation of O. 7, R. 11 (c) of the Code. In our judgment the Subordinate Judge was in error in refusing to entertain the application. We accordingly allow the appeal and, setting aside the two orders referred to above, send the case back to the Court below with a direction that the application be entertained and dealt with on its merits. We decide no other point. Costs of this appeal will abide the result of the suit.

K S./R.K.

Appeal allowed.

8. Bava Sahib Miyan v. Abdul Ghani, 1933 Mad 498=147 I C 710=64 M L J 728.

A. I. R. 1936 Calcutta 223

R. C. MITTER, J.

Ramshashi Ghose—Petitioner.

v.

Mohendra Nath Sinha and another—
Decree-holder — Auction-purchasers —
Opposite Parties.

Civil Rules Nos. 1323, 1324 and 1325 of 1935, Decided on 7th February 1936, from order of Munsiff, Third Court, Khulna, D/- 22nd June 1935.

Bengal Tenancy Act (8 of 1885), S. 26-F—
A, B and C co-sharer landlords in respect of three holdings—Under Estates Partition Act two holdings allotted to A and third partly to A and partly to B and C—B and C instituting suit for rent of holding for period anterior to partition and obtaining decree and purchasing holdings in execution thereof—A held entitled to claim pre-emption.

A, B and C were co-sharer landlords in respect of three occupancy holdings. Later on, under a proceeding under the Bengal Estates

Partition Act, two holdings were allotted exclusively to A and the third holding was allotted partly to A and partly to B and C. B and C instituted a suit for rent for the three holdings for a period anterior to the partition without impleading A and obtained decrees and in execution thereof purchased the three holdings. A applied for pre-emption :

Held: that his application was competent.

[P 224 C 1]

Jogneswar Majumdar—for Petitioner.

Order.—In these three Rules the petitioner applied for pre-emption under the provisions of S. 26-F, Ben. Ten. Act. He and the opposite parties are co-sharer landlords in respect of three occupancy holdings which are the subject matters of the three pre-emption cases out of which these Rules arise. Later on there was a proceeding under the Estates Partition Act and two of the holdings were allotted exclusively to the allotment of the petitioner, but the third holding was allotted partly to the petitioner and partly to the opposite parties. The opposite parties instituted suits for rent for these three holdings for a period anterior to the partition. In those suits the petitioner was not impleaded as a party. Decrees were obtained and in execution thereof these three holdings were purchased by opposite parties Nos. 1 and 2. On that the present petitioner applied for pre-emption. These facts are not challenged and the decrees are therefore money decrees. In this view of the matter, I do not see how the application of the petitioner could be resisted. The opposite parties did not resist the application, but in spite of that the petitioner's applications have been dismissed. I, therefore, hold that the lower appellate Court was wrong in dismissing those applications. The Rule is accordingly made absolute and the order for pre-emption must be made in respect of the three holdings in favour of the petitioner. As there is no appearance on behalf of the opposite party, there will be no order for costs.

R.M./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 224

LORT-WILLIAMS AND JACK, JJ.

Mahammed Hossain and others —
Accused—Petitioners.

v.

Bholanath Das—Complainant—Opposite Party.

Criminal Revn. No. 637 of 1935, Decided on 22nd July 1935.

Criminal P. C. (1898), S. 561-A—Accused charged under S. 366, Penal Code, acquitted—Proceedings started under Ss. 497 and 498, Penal Code, on same facts, to defeat effect of acquittal—Proceedings being abuse of process of Court are liable to be quashed.

Where the accused charged under S. 366 are acquitted on appeal and a subsequent prosecution is started against them under Ss. 497 and 498 on the same facts with a view to defeat the effect of the previous acquittal, the proceedings being an abuse of the process are liable to be quashed. [P 224 C 2; P 225 C 1]

Sudhansu Sekhar Mukherji—for Petitioners.

Probodh Chandra Chatterjee and Biswanath Saha—for Opposite Party.

Jack, J.—This was a Rule calling upon the District Magistrate of Birbhum and upon Bholanath Das, the complainant opposite party to show cause why proceeding under Ss. 497 and 498, I. P. C., should not be quashed, or, in the alternative, the case should not be transferred from the Court of Mr. Iyengar to the Court of some Magistrate outside Rampurhat. Two of the petitioners were originally tried for kidnapping under S. 366 and were acquitted on appeal to the Court, on the grounds that the girl in question went of her own accord to the house of the accused and that there was no taking or sending. After the acquittal on appeal in that case, this prosecution has been launched against two persons Mahammed Hossain and Bulu Khan along with four other persons apparently on the same facts.

The ground upon which this application was made is that these proceedings are an abuse of the process of the Court, inasmuch as on the final finding in the appeal in this case, the facts on which this prosecution is based being the same, there could be no offence under S. 498. We find from the record that these two persons Mahommed Hossain and Bulu Khan, during the proceedings in the previous case, were for six months in jail as undertrial prisoners and subsequently served two months' sentence before they were finally acquitted. There can be no doubt that this prosecution has been undertaken, in order to endeavour to defeat the effect of the previous acquittal. The facts on which it is founded, are the same. It is urged that now that the girl is free and not under the influence of the other side, she will make statements which will support the prosecution case whereas her statements

made in the previous trial went against the prosecution. We find that in the meantime she has been prosecuted under S. 193 for giving false evidence in that connexion and it is not likely that much reliance can be placed upon her testimony. There might be something to be said on behalf of the prosecution as against the petitioner Mahomed Hossain who is the only one proceeded against under S. 497. But inasmuch as he has been already in jail for eight months on account of this occurrence, we think that if any offence has been committed, he has already been sufficiently punished. Moreover there has been a very great delay in prosecuting him. If the husband really intended to prosecute Mahomed Hossain for adultery, he should not have waited ten months to bring the complaint. The husband, in fact, was a witness in the first case and if he had made a complaint at the time, these charges could have been made then. In these circumstances, we are of opinion that these proceedings are an abuse of the process of the Court. We therefore think that this is a case in which the proceedings ought to be quashed under the provisions of S. 561-A, Criminal P. C. We would accordingly make the Rule absolute, quash the proceedings and direct that the accused petitioners be forthwith discharged from their bail bonds.

Lort-Williams, J.—I agree.

R.M./R.K. *Proceedings quashed.*

*** A. I. R. 1936 Calcutta 225**

GUHA AND BARTLEY, JJ.

District Board of Chittagong—Defendant—Appellants.

v.

Sasi Bhusan Pal and others—Plaintiffs—Respondents.

Appeal No. 997 of 1933, Decided on 7th February 1936, from appellate decree of Addl. Sub-Judge, Chittagong, D/- 17th December 1932.

*** Jurisdiction**—Public body passing resolution to acquire certain land—But doing so in bad faith and without regard to interest of owner of land concerned—Such owner is entitled to declaration that resolution is ultra vires and also injunction though he may have other remedy afterwards.

Public bodies should be kept within control. They may not exceed the limits of the authority committed to them by law; they must act in good faith and reasonably and with some regard for the interests of those who may suffer

for the good of the community. Even when a public body is acting within the limits of its jurisdiction, the Courts may and will interfere if it be shown that the discretion given by law has not been exercised bona fide. [P 226 C 2]

Where a District Board acted within its powers in passing the resolution to acquire certain land but there was a complete want of good faith, and an entire lack of regard for the interest of the owners of the land recommended for acquisition :

Held: that the Courts had jurisdiction to interfere, and to safeguard the interests of owners by declaring the resolution ultra vires and granting an injunction. It was immaterial that some future development of the situation might afford the plaintiffs a different remedy : *Westminster Corporation v. L. & N. W. Ry. Co.*, (1905) A C 426, *Appl.* [P 226 C 2]

Radha Binode Paul and Hamidul Huq Choudhury—for Appellants.

Brojolah Chakravarty and Chandra Sekhar Sen—for Respondents.

Bartley, J.—This is an appeal against the decision of the Additional Subordinate Judge, Chittagong, affirming a decree of the Munsif, Third Court, which declared a resolution of the District Board, Chittagong, dated 24th February 1931, to be illegal and ultra vires, and restrained the Board from taking steps to acquire lands in pursuance of the said resolution. The succinct history of the case, as found by the Courts below, is that rivalry between the Choudhuries of Chittagong and Paragalpur on the one side and the Roy Choudhuries of Dhoom on the other, resulted in the establishment by the former of a Hat called Santi Hati, close to a long established Hat owned by the Roy Choudhuries, known as Mahajan Hat. In 1928, the site of Santi Hat was moved to the Ganekchara Khal. There is a road, known as the Khan Saheb Serajuddin Road, which was khas mahal property, but enlisted as a Local Board Road in 1924, which runs from the road to Mahajan Hat to the Leake Road, a distance of 1½ miles. About 800 feet from the Mahajan Hat Road this road is intersected by the Khal, immediately beyond which is the site of Santi Hat. The resolution, with which the present suit is concerned, deals with the acquisition of this section of the Serajuddin Road and the adjacent land, which is the property of the plaintiffs.

In 1928 an attempt was made to widen this part of the road by force. The perpetrators, tenants of the Pargalpur Choudhuries, were convicted in the criminal Court. A Local Board contractor, who

claimed to be carrying out a contract to widen the road on behalf of the Board, was also convicted. Then a petition was filed before the Sadar Khas Mahal Officer, complaining of encroachments on the road. This petition was placed by the Chairman of the Local Board before the Collector who merely referred the Board to the civil Courts. The next step was a proposal by one Kobbad Ahmed whose brother had been convicted in the criminal proceedings that the land should be acquired at his expense. This proposal was adopted by the Board on 23rd August 1930, and the following resolution passed:

Resolved that the land be acquired at the expense of the party, and District Board be moved to take action in the matter as early as possible.

Rupees 400 out of an estimated acquisition cost of Rs. 687 was deposited by Kobbat in March 1931. The Local Board resolution was sent to the District Board, which passed a resolution recommending the acquisition, but omitting any reference to the source of the costs of it. This resolution, which was duly forwarded to the Commissioner, is challenged in the present suit. The Courts below on examination of the whole evidence have concurrently found in the first place that the proposed acquisition was not necessary for any public purpose. The first Court said :

The conclusion thus seems irresistible that these transactions were the outcome of conspiracy between the Chairman of the Local Board and the Sub-Overseer . . . to support the organizers of Santi Hat.

The finding of the lower appellate Court is that:

Everything leads to the irresistible conclusion that attempts were made by the Local Board authorities to accommodate the promoters of Santi Hat in their nefarious object to damage the rival Mahajan Hat.

In the second place, both Courts have found that the road in question is Khas Mahal property and does not belong to the Board which originally recommended acquisition. The position as summarised by the Court of appeal below, is that the entire project of land acquisition was conceived for a purpose other than a public purpose, and that an attempt was made to carry it out by persons who had no authority to move in the matter, with funds non-existent at the time but to be procured by private persons to serve their own purposes. On appeal before us, the contention urged was that the suit was maintainable, as the District Board

had no power to do more than recommend acquisition which must be carried out by Government. It was said in this connexion that under S. 5-A, Land Acquisition Act, any person aggrieved by the proposals could file objections, and that no other remedy was available to him. We are entirely unable to give effect to this contention. On the finding of the Courts below, there has been a definite threat to the plaintiffs, owners of the land, affecting their right to peaceful enjoyment of the lands, and emanating from a public body.

The principle immediately applicable in such a case is the necessity of keeping such bodies within control. They may not exceed the limits of the authority committed to them by law; they must act in good faith and reasonably and with some regard for the interests of those who may suffer for the good of the community. Even when a public body is acting within the limits of its jurisdiction, the Court may, and will interfere, if it be shown that the discretion given by law has not been exercised bona fide : see (1905) A C 426 (1). It remains to apply these well established principles to the facts of the present case as found by the Courts below. The position has not been challenged, and need not therefore be considered here, that the District Board acted within its powers in passing the resolution. What has been challenged is the good faith and reasonable character of the resolution itself.

The concurrent findings of the Courts below establish a complete want of good faith, and an entire lack of regard for the interests of the owners of the land recommended for acquisition. On these findings there can be no doubt that the Courts have jurisdiction to interfere and to safeguard the interests of the owners. It is immaterial that some future development of the situation might afford the plaintiffs a different remedy. On the facts found in their favour at this stage, they are entitled to claim protection from the Courts by way of injunction. In this view of the case, the decisions of the Courts below must be affirmed, and the present appeal dismissed with costs.

Guha, J.—I agree.

K.S./R.K.

Appeal dismissed.

1. Westminster Corporation v. L. & N. W. Ry. Co., (1905) A C 426 = 72 L J Ch 629 = 69 J P 425 = 54 W R 129 = 93 L T 143.

A. I. R. 1936 Calcutta 227

CUNLIFFE AND HENDERSON, JJ.

Bhakta Bhusan Pramanik and another
—Accused—Appellants.

v.

Emperor—Opposite Party.

Death Ref. No. 24, and Appeal No. 942 of 1935, Decided on 19th February 1936.

(a) Confession—Trial by jury—Judge has to determine whether it is admissible—Jury in considering whether it is true or not can consider voluntariness or otherwise of confession.

When the prosecution seek to put a confession into evidence it is the duty of the Judge to decide whether that evidence is admissible or not. When once it has been let into evidence and put before the jury, it is for them to say whether it is true or not, and in so doing the jury are not debarred from considering whether the confession which has been placed before them was voluntary: 1934 Cal 853, *Appr.*

[P 228 C 1]

(b) Confession—Judge directing jury as to whether it is admissible commits error of law—But failure of justice is necessary to vitiate trial.

Where a Judge directs the jury to decide whether certain confessions are admissible in evidence or not, he commits an error in law. But unless there is consequent failure of justice, the trial is not vitiated.

[P 229 C 1]

(c) Evidence Act (1872), S. 24—"Person in authority" (*Quaere*).*Quaere*—Whether a person who is merely the landlord of the village and a member of the Union Board is a person in authority within the meaning of S. 24.

[P 229 C 1]

(d) Confession—Voluntary or involuntary nature is mixed question of fact and law.

The voluntary or involuntary nature of a confession involves a mixed question of both fact and law

[P 229 C 1]

(e) Murder—Sentence—Argument that two lives should not be forfeited for one should be rejected.

The argument that two lives should not be forfeited for one should be rejected. The only way in which death sentence can be altered is by the exercise of the prerogative by the King-Emperor and it has got nothing to do with law at all.

[P 230 C 1]

Satindra Nath Mukerjee and Sudhansu Kumar Sen—for Appellants.*D. N. Bhattacharya*—for the Crown.*Henderson, J.*—The three appellants *Bhakta Bhusan Pramanik*, *Durgapada Modak* and *Jaladhar Kundu* have been convicted of offences punishable under Ss 302 and 392, I. P. C. The two former have been sentenced to death and their case has been referred to this Court by the learned Sessions Judge. The third has been sentenced to transportation for

life. All the three persons have appealed and the appeal and the reference have been heard together. Briefly the facts of the case are as follows: There was an old woman named *Saibalini* who had been living alone for sometime. On the morning of the 16th August last, her nephew went to her house to see her but found the door in the compound wall locked. He scaled the wall, made his way into the house and there found the old woman lying dead on her bed. Information was given to the Police who started to inquire into the matter as being the case of an unnatural death. *P. W. 2*, *Golak Behary Roy*, is the landlord of the village. He received certain information which aroused his suspicions. Amongst other things, he was told by *P. W. 6*, *Ranjan Pal*, that the three accused persons had been seen together talking in a suspicious manner on the night of the murder, and suggested that they might be in a position to give some information with regard to the old woman's death. This gentleman said that while he and *Ranjan Pal* were discussing the matter, the accused *Jaladhar* used to come and sit unnecessarily there and on two occasions actually followed him. On the second day he asked him if he had anything to say.

The boy then burst into tears and confessed that the old woman had been murdered by himself and the other two accused. Subsequently, similar confessions were made by the other two accused and *Durgapada* handed over to *Golak Roy* four gold earrings which, he said, were part of the stolen property. After consulting a friend, he sent information with the said earrings to the Police and the accused persons were arrested. *Jaladhar* and *Bhakta* then made confessions before a Magistrate. The earrings were identified by the daughter of the deceased as her own and she said that they had been left in the custody of the deceased. On these facts, the three appellants were placed on their trial before the learned Sessions Judge of *Burdwan* and a jury. All three of them were unanimously found guilty. It is clear from what has been said above that the most important evidence is that of the confessions made by the three appellants and it is therefore inevitable that the problem of the respective functions of the Judge and the jury in this matter

should have been agitated before us. On behalf of the appellants, Mr. Mookerjee has contended, firstly, that the Judge left the question of the admissibility of these confessions to the jury instead of deciding it himself; and, secondly, that the directions which he actually gave to the jury were not correct in law. Now, it could hardly be doubted that when the prosecution seek to put a confession into evidence, it is the duty of the Judge to decide whether that evidence is admissible or not. Hence, it is sometimes said succinctly that it is the duty of the Judge to decide whether a confession is voluntary and of the jury to decide whether it is true. But when one comes to examine the matter, I think it will become apparent that the first proposition is too broadly stated, while the second is too narrow.

When the Judge has to determine whether a confession is admissible, he has to see if it is hit by the provisions of S. 24, Evidence Act. This succinct use of the word "voluntary" is therefore rather unfortunate. A confession which is not hit by the precise terms of S. 24 may at the same time not be voluntary in the ordinary sense of the term. The duty of the Judge, however, is to decide whether he will allow the confession to go in, that is to say, he has to satisfy himself that it is not within the prohibition of that section. When once it has been let into evidence and put before the jury, it is for them to say whether it is true or not. Now, I am bound to say that I am unable to see how, when they have to decide that matter they can ignore the question whether it was voluntary or not. It would be almost impossible to decide the question without considering that matter. It is clear that if the jury are to perform their duty satisfactorily, they must consider all the circumstances under which the confession was made and it may well be that in many cases there may be circumstances which would support an inference that the confession was not voluntary.

The moment one comes to find that, it arouses a suspicion in one's mind whether a confession which is not voluntary is true, I am therefore of opinion that the jury are not debarred from considering whether the confession which has been placed before them was voluntary, I very much doubt if they were so debarred

whether such a legal prohibition would have the slightest effect on their minds and I find it difficult to believe that whatever a Judge might say, a jury would accept as satisfactory, a confession which they themselves thought had been induced. The matter was recently carefully considered by S. K. Ghose and Khundkar, JJ., in the case of 39 C W N 27 (1). In my opinion, that decision is both good law and commonsense and I respectfully agree with it. Turning to the facts of the present case, the learned Judge said this :

If you are satisfied that these confessions were made and were not obtained by any threat or inducement from Golak Babu, then they are admissible in evidence. It is nobody's case that they were obtained by threat or inducement, because the defence is that they were not made at all But if you are satisfied that they were made, then it would be well if you further see if you can feel satisfied that they were not obtained by threat or inducement If you think that they were obtained by threat or inducement (although there is no evidence), then they could not be admissible in evidence against them, because Golak Babu is the zamindar of the village and a member of the Union Board, and so a person in authority.

As regards the confessions to the Magistrate, the learned Judge said this :

The accused at that time were in police custody. But as these confessions were made in the immediate presence of the Magistrate, these are admissible in evidence. You have to consider whether these confessions made to the Magistrate were voluntary and whether they were true.

It was contended by the learned Deputy Legal Remembrancer, Mr. Bhat-tacharya, that what the learned Judge really meant to put before the jury was this: He had himself come to the conclusion that the confessions were admissible and having put them before the jury, he directed them, if they thought they were not voluntary, to refuse to believe them. He therefore contended that in fact these directions went too far in favour of the accused and the appellants could not possibly have suffered any prejudice thereby. I think that argument might apply to the directions with regard to the confessions made to the Magistrate. But I find it very difficult to interpret in that sense the directions with regard to the confessions made to Golak Roy. The plain meaning of the words used by the learned Judge is that

1. Kasimuddin v. Emperor, 1934 Cal 853=154
I O 273=1934 Cr O 1368=62 Cal 312=36
Cr L J 485=39 C W N 27.

he directed the jury to decide whether they were admissible in evidence or not. If this be so, there can be no doubt that he committed an error in law on this point and it is necessary to consider whether any failure of justice has been caused thereby. Now, there can be no doubt that the jury were satisfied that these confessions were both voluntary and true and it could not be said that any failure of justice has occurred, unless we are to hold that in fact these confessions were inadmissible in evidence and ought not to have been put before the jury at all. Mr. Mukerjee asked us to hold that they were. But we have carefully considered all the circumstances and are unable to reach such a conclusion.

As at present advised I should feel rather doubtful whether Golak Roy, who is merely the landlord of the village and a member of the Union Board, is a person in authority within the meaning of S. 24. But in the view we take of the confessions themselves, it is not necessary to decide this point. The appellants themselves never suggested that any inducement was offered. On the contrary, they deny that they ever made these confessions at all and suggested that the whole story had been concocted by this gentleman. There is no evidence to suggest that any inducement was offered. (His Lordship then examined the evidence and concluded.) To sum up: we have no doubt at all that the guilt of the three appellants has been most clearly established and the appeal accordingly must be dismissed.

Cunliffe, J.—I am of the same opinion on the facts of this appeal. I only wish to add a few observations in defence to the arguments which were addressed to us on the question of the consideration of the confessions in criminal cases tried before a Judge and a jury. There is no doubt that the question is not altogether free from difficulty and I think that the difficulty arises because it is sometimes forgotten that the voluntary or involuntary nature of a confession involves a mixed question of both fact and law. It was long ago decided in the Old Court of Crown Cases Reserved in England in 1 Den C C 329 (2), that if it is apparent from the evidence produced during the trial that a confession upon

which the prosecution originally relied is not a voluntary one, it is the duty of the Judge to make his decision at once and to withdraw that confession and everything contained in it from the consideration of the jury. So that the difficulty only arises when the Court has come to the conclusion that the confession under consideration is a voluntary one when the Court had heard the argument and the evidence to the contrary which it is unable to accept. In that position, it becomes a practical question. There is a presumption, of course, in the law of evidence that all confessions are voluntary. It is a presumption which can be rebutted and frequently is rebutted. But when we come to the position to which I have already referred, where an argument is addressed to the Court upon evidence adduced that a confession originally supposed to be voluntary and admitted *prima facie* is not voluntary and that argument and evidence is rejected, then the difficult question which had caused a good deal of controversy comes to light. Recently there has been a decision, which is still unreported, to which we were referred by the learned Deputy Legal Remembrancer. That is the case of *Badan Ali v. Emperor*. The learned Chief Justice of this Court, in delivering the leading judgment of the Bench of three Judges, relied upon a dictum of Mr. Justice Coleman, an American Judge, in 107 Ala 108 (3). During the course of the quotation from the American Judge's judgment, we find these words being used in reference to confessions which have been admitted by the Judge after argument against their admissible nature in evidence. The learned Judge said this:

The Jury have no authority to reject them (i.e., the confessions) as incompetent. But the Jury are the sole judges of the truth and weight to be given to confessions, as they are of any other fact. In weighing the confessions, the Jury must take into consideration all the circumstances surrounding them and under which they were made, including those under which the Court declared, as a matter of law, they were voluntary. In weighing confessions, the Jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the Jury to reject the confessions, as being incompetent, there is no power in the Court to control the Jury in the weight to be given to facts.

2. R. Gurner, 1 Den C C 329.

3. *Burton v. State*, 107 Ala 108.

That passage shows that the real difficulty is to distinguish in an involved question of this character where law ends and fact begins. But the American Judge has taken the broad line that whereas it is the function of the Judge to give his decision on the purely legal side of the question before the Court is safe to leave open the final decision of fact in their verdict to the Jury, even though that decision may involve some disagreement with the Judge in his decision of mixed law and fact on the preliminary question as to admissibility. That to me seems both good law and good sense, and as my learned brother has observed the question is an academic one. On the other hand it is not altogether academic, when one considers that any Judge trying a case with a jury can safely leave every question of fact to the jury, provided they are cautioned carefully and sufficiently enough. Finally, we must consider the question of sentence. All the three appellants were convicted of murder. Appellants 1 and 2, viz. Bhakta Bhusan Pramanik and Durgapada Modak, were sentenced to death. They are respectively aged 22 and 27 years. The third appellant, Jaladhar Kundu, who was a young boy of 16, was sentenced to transportation for life under the alternative power invested in Judges in India in murder cases. The learned Judge properly took into consideration the youth of the third appellant. We can see absolutely no reason why these first two appellants should not suffer the extreme penalty. That is no reason in law. I frequently had addressed to me the argument that two lives should not be forfeited for one. It is an argument which I completely reject. When persons are convicted for murder, the only way in which that sentence can be altered is by the exercise of the prerogative by the King-Emperor and it has got nothing to do with law at all. In these circumstances we confirm both the sentences of death.

K.S./R.K.

*Appeal dismissed.***A. I. R. 1936 Calcutta 230**

PANCKRIDGE, J.

Harnath Rai Binj Raj and others — Defendants—Petitioners.

v.

Sewi Prosad Singh and others—Plaintiffs—Opposite Party.

Suit No. 403 of 1934, Decided on 29th August 1935.

Letters Patent (Calcutta), Cl. 12—Leave under Cl. 12—Application for revocation—Defendant aggrieved by discretion exercised by Court in granting leave under Cl. 12—He should apply at earliest moment—Application made at stage when suit is ready for hearing cannot be granted.

Where a defendant feels aggrieved at the manner in which the Court exercised its discretion, which it admittedly has, in granting leave under Cl. 12 of Letters Patent, he should apply for revocation of such leave at the earliest moment and not allow what is *prima facie* a perfectly bona fide suit to proceed through the normal stages of litigation up to the stage of being ready for hearing and appearing in the warning list before he makes his application. Where therefore the defendant makes the application for revocation at the stage when the suit appears in the prospective and warning list, such application cannot be granted. [P 231 C 1]

N. C. Chatterjee and D. N. Sinha—for Petitioners—Defendants 2 to 4.

S. R. Das—Opposite Party.

Order.—This is a border line case. It is true that the case resembles two other cases in which I have recently revoked the leave granted under Cl. 12 of the Letters Patent in that the only part of the cause of action which had arisen within the jurisdiction is the assignment by the original holders of the negotiable instrument in favour of the plaintiffs. There is also this to be said on the side of the defendants, that the majority of the plaintiffs reside in the same place as the defendants, and so they will not be put to any inconvenience if the leave is revoked. If the suit had not reached the stage, which it has in fact reached, I should probably have considered that the circumstances justified me in revoking the leave. On the other hand I have no reason to suspect, as I suspected in one of the previous cases, that the assignment was deliberately made in Calcutta for the purpose of embarrassing the defendants in their defence to the suit. So far as I can recollect, in the other case with which I have recently dealt, there had been few, if any, preliminary steps taken

in the litigation. In this case, on the other hand, not only has there been discovery but the suit has appeared in the Prospective List, and also in the Warning List, on several occasions. It appeared on the Warning List on 18th July 1935 and on 22nd August 1935, and on those occasions it was adjourned by consent, the adjournment on the last occasion being over the long vacation. It is said that the defendants consented to the adjournment to accommodate the plaintiffs and that it is therefore inequitable that they should be in a worse position because they have treated their opponents with courtesy. I think there is something in that argument, but at the same time, where the defendant feels aggrieved at the manner in which the Court has exercised the discretion which it admittedly has, I think that he should apply at the earliest moment and not allow what is *prima facie* a perfectly bona fide suit to proceed through the normal stages of litigation up to the stage of being ready for hearing and appearing in the Warning List before he makes his application. In these circumstances I refuse the application with costs. Certified for counsel. The plaintiff will pay the costs of the guardian ad litem and add them to his claim.

R.M./R.K. *Application disallowed.*

A. I. R. 1936 Calcutta 231

LODGE, J.

Mohammad Gorib Hossain Mia—Petitioner.

v.

Sm. Halimannessa Bibi and others—Opposite Parties.

Civil Rule No. 1623 of 1934, Decided on 12th June 1935, from order of Munsif, Central Court, Comilla, D/- 30th August 1934.

(a) Bengal Tenancy Act (1885), Ss. 26-F and 188—S. 188 governs proceedings under S. 26-F.

Section 188 governs proceedings under S. 26-F for if S. 188 had no application to such a proceeding, the proviso to the section would not have been made applicable to a proceeding under S. 26-F (1): 1934 Cal 662, *Rel. on.* [P 232 C 1]

(b) Bengal Tenancy Act (1885), S. 26-F(1) and (4a)—Distinction pointed out.

The right to apply under S. 26-F (4a) to join as co-applicant in proceedings instituted under S. 26-F (1) by a cosharer is distinct from the right to institute the proceedings under S. 26-F (1). The right given under S. 26-F (4a) to join

in the proceedings is given to a landlord who does not desire to pre-empt unless his cosharers insist on doing so. If therefore the result of refusing to extend the time for joining in the application be to invalidate the original application under S. 26-F (1), the other cosharers who did not apply under S. 26-F (1) will not be prejudiced. [P 233 C 1]

(c) Bengal Tenancy Act (1885), Ss. 26-F (1) (4a) and 188—Notice of transfer served on cosharer—If such cosharer wishes to apply for pre-emption, he must give information of his application to all cosharer landlords known to him within such time that others can apply under Sub-S. 4a of S. 26-F—If he does not do so, his application should be rejected.

A cosharer landlord upon whom notice under S. 26 C or E of a transfer has been served, and who wishes to apply under S. 26-F (1), must give information of his application to all the cosharer landlords known to him, within such time that those cosharer landlords can, if they wish, make an application under S. 26-F (4a) and a deposit under S. 26-F (4a) within two months of the service of notice on the cosharer landlord who is applying under S. 26-F (1) or within one month of his application under S. 26-F (1) whichever is the later. If he does not give all of them the information within the time so described, his application under S. 26-F (1) should be rejected, not on the ground that it is barred by limitation, but on the ground that the conditions on which alone the application can be entertained, have not been fulfilled. [P 233 C 2, P 234 C 1]

Prakash Chandra Pakrashi—for Petitioner.

Ajit Mukar Dutt—for Opposite Parties.

Bireswar Chatterjee—for Deputy Registrar.

Order.—This rule arises out of an order passed in a proceeding under S. 26-F Ben. Ten. Act. Opposite party No. 1 is the transferee of an occupancy raiyati holding. Petitioner is one of the immediate cosharer landlords of that holding. On 14th May 1934 petitioner made an application under S. 26-F (1) praying that the holding be transferred to himself. The transferee and five of the petitioner's cosharers were made defendants in that application. On 21st June 1934 the transferee filed a petition of objection and pointed out therein that there were 23 cosharers of the petitioner of whom only 5 had been made parties.

On 30th July 1934 petitioner applied to add the 18 co-sharers named in the transferee's objection, as parties defendants and was permitted to do so. The Munsif who heard the application held that petitioner was well aware that he had co-sharers who were not made parties before 30th July 1934, and that as all the co-

sharers were not made parties within two months of the service of notice under S. 26-C, nor within one month of the date of application under S. 26-F (1), the application was time barred. The Munsif accordingly rejected the application under S. 26-F (1). Against that order the present rule has been obtained. It has been contended on behalf of the petitioner that no period of limitation has been prescribed within which cosharer landlords are to be made parties to the proceeding under S. 26-F (1), and that the Munsif was wrong in rejecting the application on the ground of limitation. The Munsif's decision is based on an interpretation of Ss. 26-F and 188, Ben. Ten. Act, and it is with those two sections that we are concerned. In the first place the advocate for the petitioner has argued that S. 188 has no application to a proceeding under S. 26-F. He argues that S. 188 applies only to proceedings in which action by the sole landlord or by the entire body of landlords acting together is contemplated: that it does not apply to proceedings in which a single cosharer is entitled to act. Inasmuch as S. 26-F (1) permits an application by a cosharer it is not necessary for the application to be made by the whole body of landlords. I am unable to accept this view. In the first place if S. 188 had no application to such a proceeding under S. 26-F the proviso to the section would not have been made applicable to a proceeding under S. 26-F (1). In the second place it has been held in 38 C W N 634 (1) that S. 188 does govern S. 26-F and no other authority on the question has been cited. I am satisfied therefore that S. 188 governs proceedings under S. 26-F. S. 188, Ben. Ten. Act, reads as follows :

Subject to the provisions of S. 148-A, where two or more persons are cosharer landlords, anything which the landlord is under this Act, required or authorised to do must be done either by both or all those persons acting together or by an agent authorised to act on behalf of both or all of them.

Provided that one or more cosharer landlords, if all the other cosharer landlords are made parties defendant to the suit or proceeding in manner provided in sub-ss. (1) and (2), S. 148-A and are given the opportunity of joining in the suit or proceeding as co-plaintiffs or co-applicants, may (1) file an application under sub-S. (1), S. 26-F.

This section contemplates that an application to pre-empt under S. 26-F (1) shall ordinarily be made by the whole body of cosharer landlords acting together. One or more cosharers, not being the whole body of cosharer landlords, may however make an application under S. 26-F (1) provided that certain conditions are fulfilled. If those conditions be not fulfilled, such cosharers are not entitled to pre-empt under S. 26-F. The conditions to be fulfilled are (1) that all the other cosharer landlords be made parties defendant to the proceeding; and (2) that all the other cosharer landlords be given an opportunity of joining in the proceeding as co-applicants. The first of the conditions is designed to inform all the interested cosharers of the proceeding and to enable them to note the result and correct their collection papers and records if necessary. This objection would be attained if the cosharers were made parties at any time before final orders on the application were passed.

The second of the two conditions is designed to protect one cosharer against pre-emption by another cosharer. The legislature recognises that a cosharer landlord may be quite willing to allow the original transferee to remain in possession of the holding, but be unwilling to allow one of more of his co-sharers to step into the shoes of that transferee. For this reason a cosharer is given the right of joining in the proceeding as co-applicant. If however a cosharer landlord desires to join in the proceedings as co-applicant he must comply with the condition laid down in S. 26-F, sub-ss. (4-a) and (4-b). If such co-sharers do not apply within two months of the service of notice under S. 26-C or 26-E, or within one month of the application under S. 26-F (1), he has no right to join in the proceeding as co-applicant. If therefore he be not informed of the application under S. 26-F (1) in sufficient time to comply with the provisions of S. 26-F, sub-Ss. 4a and 4b, it cannot be said that he is given an opportunity of joining in the proceeding as a co-applicant. In such a case, it would follow that the conditions under which one or more co-sharers, not being the whole body of landlords, are entitled to make an application under S. 26-F (1) had not been fulfilled, and the application under S. 26-F (1) would not be maintainable.

1. Baikantha Chandra v. Samsul Haq, 1934 Cal 662=152 I C 279=61 Cal 870=38 C W N 634.

The above argument applies where notices under S. 26-C or 26-E have been duly served on all the co-sharer landlords. But as pointed out in 38 C W N 634 (1) and in 35 C W N 688 (2) the Bengal Tenancy Act does not take into account the possibility that notices may not have been duly served on all the co-sharer landlords. It has been held in the two cases referred to, that a co-sharer landlord upon whom no notice under S. 26-C or 26-E has been served, may apply under S. 26-F (1) within a reasonable time of the date of his knowledge of the transfer. None of the rulings to which my attention has been drawn, discusses the rights of such a co-sharer to join in an application under S. 26-F (4a). The Advocate for the petitioner has argued that the same principle should be applied to applications under S. 26-F (4a) as to applications under S. 26-F (1); and that it should be held that a co-sharer upon whom no notice has been served under S. 26-C or S. 26-E, may apply under S. 26-F (4a) within a reasonable time of his knowledge of the transfer. He argues further that if this view be adopted, the application of one co-sharer under S. 26-F (1) should not be rejected on the ground that the second of the two conditions laid down in the proviso to S. 188 has not been fulfilled. If the right of the other co-sharers to join in the proceedings as co-applicants has not become barred by limitation, the right to apply under S. 26-F (4a) to join as co-applicant in proceedings instituted under S. 26-F (1) by a co-sharer is distinct from the right to institute the proceedings under S. 26-F (1). The right given under S. 26-F (4a) to join in the proceedings is given to a landlord who does not desire to pre-empt unless his co-sharers insist on doing so. If therefore the result of refusing to extend the time for joining in the application be to invalidate the original application under S. 26-F (1), the other co-sharers who did not apply under S. 26-F (1), will not be prejudiced.

It is not necessary to extend the period of limitation in order to protect the interest of the co-sharer landlord upon whom no notice has been served. The

extension of time is for the benefit mainly of the co-sharer landlord upon whom notice was duly served and who has applied under S. 26-F (1), but has omitted possibly deliberately to inform his co-sharer of his action. On the other hand, the extension of time allowed in 38 C W N 634 (1) and 35 C W N 688 (2) was necessary to protect the interests of the co-sharer landlord upon whom no notice was served. It is obvious that a transferee may have every justification for omitting to serve notices of the transfer on all the co-sharer landlords. If he should omit to serve notices on all, then, however justifiable the omission, he exposes himself to the liability of pre-emption by a co-sharer landlord upon whom no notice was served, for an indefinite time. There will ordinarily be less excuse for one co-sharer landlord omitting to inform the other co-sharer landlords of his intention to apply or of his application under S. 26-F (1). He will ordinarily know who his co-sharers are. He does not derive his knowledge from the conduct of the transferee. He will ordinarily be ignorant whether notices under S. 26-C or 26-E have or have not been served upon his co-sharers.

A co-sharer landlord applying under S. 26 F (1) is presumed to know the necessity of informing his other co-sharers of the application within sufficient time to enable them to comply with the conditions of S. 26-F sub-Ss. 4a and 4b. If he intentionally omits to inform them in time, there is no reason why he should benefit by the omission, possibly unintentional and excusable, of the transferee to serve notices upon other co-sharers which omission has not affected his conduct in any way. I can see no reason therefore to extend the rule laid down in 35 C W N 688 (2) to applications under S. 26-F (4a). I understand by the second condition mentioned in the proviso to S. 188 that a co-sharer landlord upon whom notice under S. 26-C or E of a transfer has been served, and who wishes to apply under S. 26-F (1), must give information of his application to all the co-sharer landlords known to him, within such time that those co-sharer landlords can, if they wish, make an application under S. 26-F (4a) and a deposit under S. 26-F (4b) within two months of the service of notice on the co-sharer landlord who is applying under S. 26-F (1).

2. *Surjya Kumar v. Noabali*, 1932 Cal 289=186 I O 871=59 Cal 15=35 C W N 688.

or within one month of his application under S. 26-F (1) whichever is the later. If he does not give all of them the information within the time so described, his application under S. 26-F (1) should be rejected, not on the ground that it is barred by limitation, but on the ground that the conditions on which alone the application can be entertained, have not been fulfilled.

In the present case 18 of the co-sharers were brought on to the record on 30th July 1934, i. e., more than two months after the date of the application under S. 26-F (1) and therefore necessarily more than two months after the service of notice under S. 26-C. Notice of the application was served on them after 30th July 1934. It is not suggested that they were given information of the application under S. 26 F (1) in any other manner than by service of notice after 30th July 1934. They were not therefore given an opportunity of joining in the proceedings as co-applicants. Such being the case the conditions under which petitioner was entitled to apply under S. 26-F (1) were not fulfilled, and his application was rightly rejected. This rule is discharged with costs two gold mohurs.

K.S./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 234

NASIM ALI, J.

Raj Nandini Debi and others—Plaintiffs—Appellants.

v.

Bhusan Chandra Sar — Defendant — Respondent.

Appeal No. 749 of 1933, Decided on 16th May 1935, from appellate decree of Addl. Sub-Judge, Burdwan, D/- 15th June 1932.

Bengal Tenancy Act (1885), S. 50—Tenant not paying uniform rent—But this due to abatement of portion of rent on account of diminution of area and not due to variation in rent or rate of rent—Tenant is entitled to presumption under S. 50.

Where the tenant has not been paying uniform rent to the landlord but the difference in the rents paid is due only to abatement of rent on account of acquisition under Land Acquisition Act and not due to any variation in the rent, the tenant is entitled to the presumption under S. 50. [P 234 C 2]

Bijan Kumar Mukherjee and Apurba Charan Mukherjee—for Appellants.

Sarat Chandra Basak and Urukram Das Chakrabarty—for Respondent.

Judgment.—This is an appeal by the plaintiffs in a suit for ejectment of the defendants under S. 25 and S. 155, Ben. Ten. Act. One of the defences to the action was that the defendants were not occupancy raiyats but raiyats holding at fixed rate. The trial Court accepted this defence and dismissed the suit. On appeal the learned Judge has found that the defendants are occupancy raiyats, but the Judge dismissed the suit on the ground that it was barred by limitation under Art. 32, Lim. Act. Hence the present appeal by the plaintiffs.

The Advocate for the appellants contends that the view taken by the learned Judge on the question of limitation is wrong, inasmuch as Ex. 7 would go to show that the "misuse" took place within two years before the institution of the suit. It is not necessary to express any opinion on this question inasmuch as it appears to me that the learned Judge's finding on the question of the status of the defendants is wrong. The Judge has held that the defendants failed to prove uniform payment of rent within 20 years preceding the institution of the present suit. It appears however from the Dakhilas which were granted by the plaintiffs to the defendants that the difference between the existing rent and the previous rent is due to abatement of a portion of the rent on account of a diminution in the area of the holding by acquisition under the Land Acquisition Act. The abatement given is no doubt not proportionate to the area acquired. But under S. 52, Cl. (4), Ben. Ten. Act, the amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof. There cannot be any doubt, therefore, that the difference between the existing rent and the previous rent is due only to abatement of rent on account of acquisition and not due to any variation in the rent or rate of rent. The tenant therefore is entitled to the benefit of the presumption under S. 50, Ben. Ten. Act. There being no evidence on the side of the plaintiffs to rebut the presumption, the conclusion is irresistible that the defendants are raiyats holding at fixed rate. The plaintiffs are, therefore, not entitled to get any relief in the suit. The appeal

is accordingly dismissed with costs. Leave to appeal under S. 15, Letters Patent, has been asked for in this case and is refused.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 235

R. C. MITTER, J.

Mohomed Mohsen Ali and others—Pro-Defendants—Petitioners.

v.

Roy Kshitish Bhushan Roy Bahadur and others—Opposite Parties.

Civil Rule No. 271 of 1935, Decided on 9th May 1935, from order of 3rd Munsiff, Pabna D/- 28th February 1935.

Bengal Tenancy Act (1885), S. 148-A—Suit for rent under S. 148-A—Persons not impleaded as parties and claiming to be co-sharer landlords are not as matter of right entitled to intervene and be added as parties—Order bringing them on record is not justified by law.

In a rent suit, a person who is not on the record cannot intervene in a rent suit on his own application and attempt to transfer a rent suit into a title suit. There is nothing in the Bengal Tenancy Act which has modified this principle, in case of persons claiming to be landlords. [P 236 C 1, 2]

Where in a suit for rent framed under S. 148-A, Ben. Ten. Act, certain persons who are not impleaded as parties claiming to be co-sharer landlords, apply to be added as parties, they are not entitled as a matter of right to intervene in the suit on their application and to be added as parties. [P 237 C 1]

Where therefore such persons are brought on record as defendants and subsequently transferred to the category of co-plaintiffs, such an order is not justified in law and although the successor of the Judge passing the order acts irregularly in vacating it, the High Court will not interfere as the applicants cannot be said to be prejudiced by the order inasmuch as there is no legal bar to their instituting a suit for establishing their title: 8 Cal 238 and 1925 Cal 743, Rel. on. [P 236 C 2; P 237 C 2]

Abul Hossein—for Petitioners.

Prokash Chandra Pakrashi—for Opposite Parties.

Satyendra Nath Mitter—for Dy. Registrar.

Order.—A very interesting question has been raised by Mr. Hossein in this case. The question is whether certain persons who are not made parties in a suit for rent apparently framed under S. 148-A, Ben. Ten. Act, have the right to intervene in the suit on their own application. The facts are these: Opposite parties Nos. 1 and 2, who are admittedly co-owners of Touzi No. 3 of the Pabna

Collectorate and some of the joint landlords of the tenants, who are opposite parties Nos. 3 to 10, instituted a suit for recovery of their shares of the rent for the years 1337 to 1340, their shares being admittedly 8as. 13gds. odd. To the suit they made a large number of persons, who, according to them, are their co-sharers and joint landlords of opposite parties Nos. 3 to 10. Those persons are opposite parties Nos. 11 to 54. There is no controversy on the point that opposite parties Nos. 16 to 42 and 46 to 54 have still interest in the aforesaid Touzi and are some of the joint landlords of the opposite parties Nos. 3 to 10. But the controversy relates to the rights of opposite parties Nos. 11 to 15 and 43 to 45. The petitioners before me made an application to the learned Munsiff on 26th September 1934 to be added as pro-forma defendants. The position that they took up in the application is that 1 anna share of separate account No. 16 of touzi No. 3 which originally belonged to opposite parties Nos. 11 to 15 and 43 to 45 was sold at a revenue sale at which they purchased. They accordingly put in the application alleging that after the sale the opposite parties Nos. 11 to 15 and 43 to 45 had no longer any interest in the touzi and had ceased to be the joint landlords of opposite parties Nos. 3 to 10 and that the petitioners became the co-sharers landlords of the said persons from the date of the revenue sale. On 27th September 1934 the learned Munsiff granted that application and the petitioners before me were added as pro-forma defendants and the register of suits was amended accordingly. Later on the petitioners before me made a further application to the learned Munsiff for being transferred to the category of the plaintiffs. Apparently this application was made on the footing of the provisions of S. 148-A, Ben. Ten. Act.

This application was also granted and the petitioners before me were transferred as co-plaintiffs. It appears that at the time when these orders were made there was no opposition either by the tenants or the original plaintiffs or any of the pro forma defendants on the record. But it is equally clear that none of the parties consented to the said applications of the petitioners. After these orders had been passed the learned Munsiff who had seisin of the case was trans-

ferred and the matter came up before his successor-in-office, Mr. A. C. Ghose. The matter came up in this way. The petitioners before me made an application for removing from the record the names of opposite parties Nos. 11 to 15 and 43 to 45 who were pro forma defendants 1 to 5 and 29 to 31. As soon as that prayer was made it was opposed both by the original plaintiffs, namely opposite parties Nos. 1 and 2 and the pro forma defendants. The matter was heard at length and by his order dated 28th February 1935 the learned Munsiff Mr. A. C. Ghose did not accede to the prayer and came to the conclusion that the names of the petitioners had been put on the record wrongly. He virtually recalled the orders of his predecessor allowing the petitioners before me to intervene and allowing their application to be transferred to the category of the plaintiffs. This is against this order that the present rule is directed and Mr. Hossein in support of the rule takes up two points, namely that Mr. A. C. Ghose had no jurisdiction to vacate the orders passed by his predecessor and that in any event, his clients had the right to intervene in the suit and to claim relief in the suit as co-plaintiffs.

With regard to the first point, it may be that Mr. A. C. Ghose, acted irregularly when he vacated the previous orders passed by his predecessors. But in as much as the matter is before me it is open to me to consider in considering the legality of the order against which this rule is directed whether the previous orders adding the petitioners as pro forma defendants and later on transferring them as co-plaintiffs are orders which could be justified in law. As they cannot be justified in law I am bound to discharge the rule on the footing that Mr. A. C. Ghose has taken the correct view of the law. Now the position is generally this: that in a rent suit a person who is not on the record cannot intervene as a matter of right and attempt to transform a rent suit into a title suit. This position was laid down in clear terms by Field, J., in the leading case of 8 Cal 238 (1). No doubt in certain cases a tenant can defeat a rent suit by pleading that the plaintiff is not his land-

lord but the landlord is somebody else. If such questions are raised by the tenant in cases where it is open to him to raise such question, as for instance where the plaintiff claims to be the landlord by devolution of interest, such questions must be gone into. But even in those cases the third party in whom title is set up by the tenant has no right to intervene in the suit. This position is clearly laid down by Field, J., and this proposition is adopted with full approval by Subrawardy and Cuming, JJ., in 41 C L J 341 (2). The passage is at the bottom of p. 343 and runs as follows:

Then the learned Judge (Field, J.) proceeds to examine the English law on the point and comes to the conclusion that there is no authority for the procedure adopted by the Court, in the circumstances, of adding a third party to a rent suit for the purpose of determining the question of title raised. That case lays down the very sensible and salutary principle that in a rent suit when the defendant pleads *jus tertii* or right of a third party, the Court ought not to make such a third party a party in the suit and convert a suit for rent into a complicated title suit. The reasons given in support of this view are very cogent and need not be repeated here.

That being the general principle, I hold that unless there is some provision in the Bengal Tenancy Act, the petitioners before me had no right to intervene in the rent suit on their application, and the orders allowing them to intervene in the suit and subsequently to become co-plaintiffs must be held to be wrong orders. So far as the Bengal Tenancy Act is concerned, I have examined the provisions with care and the learned Advocates appearing in the case before me have also examined them with great care and I do not find anything in the Bengal Tenancy Act which has, in the case of persons claiming to be landlords, modified those general principles. There are however indications in the Act itself which would furnish a clue to the intention of the legislature. Those indications I will point out later on. Now S. 148-A says that a co-sharer landlord in certain circumstances can institute a suit for rent, and for his own share of the rent, and if he follows the procedure provided for in that section the decree that he will obtain would be a rent decree within the meaning of the Bengal Tenancy Act, that is to say a decree by which he will

1. *Lodai Mollah v. Kally Dass*, (1882) 8 Cal 238 = 10 C L R 581.

2. *Indra Narain Manna v. Sarbasova Dasi*, 1925 Cal 743 = 87 I C 930 = 41 C L J 341.

have a first charge upon the holding or tenure. On a plaint by a co-sharer landlord framed according to S. 148-A the Court shall by summons in the prescribed form call upon the remaining co-sharer landlords made parties defendants to join in the suit as co-plaintiffs for their shares of the rent due to them in respect of the tenure or holding up to the date of the institution of the suit. If a special summons mentioned in sub-s. 2 is served and only in that contingency the co-sharer landlords who have been made defendants in the suit would be debarred from suing for their share of the rent for the period covered by the suit unless they come in as co-plaintiffs. But even if certain persons are not made defendants in the suit as co-sharers, or if made defendants in the suit, but no special summons are served on them, then there is no bar to their instituting a suit for rent for their share for the same period.

This is the position which is clear on the section itself. Who must be made defendants in their character as co-sharer landlords in a suit framed under S. 148-A, Ben. Ten. Act, would depend upon the choice and risk of the plaintiff. If he leaves some of them out, his suit may be a suit badly framed. But there is no provision in S. 148-A or any of the provisions in the Bengal Tenancy Act which allows a person who claims to be co-sharer landlord, but has been left out in the suit instituted under S. 148-A, to come in and intervene. The legislature has framed a specific provision when co-sharer tenants have been left out in a suit for rent. S. 146-B gives the right to a co-sharer tenant to come in the suit as a matter of right and on his own application. The fact that there is no corresponding provision concerning persons who claim to be co-sharer landlords and who have been left out in a suit for rent indicates that the legislature did not intend to depart from the general principle formulated by Field, J., in 8 Cal 238 (1), the principles which I have indicated above. I hold accordingly that there is no procedure by which the persons in the position of Mr. Hossein's clients can as of right come in and intervene in the suit for rent. Having regard to the provisions of S. 148-A, some of which I have noticed in my judgment, I do not see how his clients can be prejudiced by their not being allowed to in-

tervene in the suit which has been instituted for rent by opposite parties Nos. 1 and 2. They are no parties to that suit, and no special summons had been served upon them. There is no bar, subject to the question of limitation to their instituting a suit against the tenants for their share of the rent. In any event there is no legal bar in their instituting a suit for establishment of their title to the 1 anna share against opposite parties Nos. 11 to 15, 43 to 45 and for appropriate reliefs which would compensate them. I accordingly hold that the order passed by the learned Munsiff Mr. A. C. Ghose is a correct order and in any event that order ought not to be revised inasmuch as the expunging of the names of the petitioner from the records of the rent suit has not prejudiced and will not prejudice them in any way. If their claims are not barred by time, they have their remedies and they can seek relief in proper proceedings to be instituted by them. In this view of the matter I discharge this rule, but in view of the circumstances of the case I do not make any order for costs in this rule.

R.M./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 237

R. C. MITTER, J.

Ballav Dass—Accused—Petitioner.

v.

Mohan Lal Sadhu — Complainant—Opposite Party.

Criminal Revn. No. 490 of 1935, Decided on 12th June 1935.

Companies Act (1913), Ss. 32 (4), 77 (6), 134 (4)—Conviction under—Prosecution has only to prove that officer knowingly or wilfully authorised or permitted defaults—Offence is complete if Officer knowingly permitted defaults—Proof of authorization is not necessary.

In order that a conviction under Ss. 32 (4), 77 (6), and 134 (4) of an officer of a Company may be sustained, the only thing that the prosecution has to prove is that, that particular officer knowingly and wilfully authorised or permitted the defaults. The offence is complete if the officer of the Company knew of the defaults and permitted them, and it is not necessary to prove that he wilfully authorised those defaults. [P 238 O 1]

*Binode Lal Ghose—for Petitioner.**Anil Chandra Roy Chowdhury—for the Crown.*

Order.—In this case the petitioner Ballav Das who is a Director of the Cash Insurance Bank Ltd. has been convicted under Cl. (4) of S. 32, Cl. 6 of S. 77 and

Cl. (4) of S. 134, Indian Companies Act, and sentenced to pay a fine. The Company commenced business under a commencement certificate on 16th May 1933. The statutory meeting of the Company ought to have been held on or before the 15th November 1933. Admittedly this was not held, and there can be no doubt that the petitioner knew that the statutory meeting had not been held within the time mentioned in S. 77 of the Act. The statutory report required to be forwarded under Cl. (2) of S. 77 was not forwarded to any member of the Company, and there can be no doubt that the petitioner knew of the said fact. Although the prosecution was started on 14th April 1935, the register of shareholders was not prepared in accordance with the provisions of S. 32, and there cannot be any doubt on the evidence that the petitioner also knew of the fact. The balance-sheet of the Company was not prepared and placed at a general meeting nor filed with the Registrar of Joint Stock Companies. In fact the General Meeting was never held, and the petitioner also knew of the fact. The provisions of S. 134 were therefore not complied with. It appears that he took no steps to have the abovementioned requirements under the Companies Act complied with. Under the circumstances, it can be safely held that he permitted the defaults to continue. In order that a conviction, under these sections, of an officer of the Company may be sustained, the only thing the prosecution has to prove is that that particular officer knowingly and wilfully authorised or permitted these defaults.

The sections speak also of authorization of those defaults, but it is not necessary to prove that as the offence is also complete if the officer of the Company knew of the defaults and permitted the defaults. Although in the judgment of the learned Chief Presidency Magistrate these points are not fully stated, the evidence amply supports the conclusion which I have stated above. In this view of the matter, I uphold the conviction of and sentence passed on, the petitioner, and discharge this Rule. In the order of the learned Magistrate the conviction is stated to be under S. 34, Cl. (4) and S. 73, Cl. (3). Obviously there is a mistake here and for Ss. 34 (4) and 73 (3) it should be read as Ss. 32 (4) and 77 (6).

R.M./R.K.

Rule discharged.**A. I. R. 1936 Calcutta 238**

R. C. MITTER, J.

Maharaj Bahadur Singh — Decree-holder—Petitioner.

v.

Mafizuddin Chowdhury and another—Opposite Parties.

Civil Rules Nos. 1335 and 1336 of 1935, Decided on 13th December 1935, from order of Munsif, First Court, Balurghat (Dinajpur), D/- 27th June 1935.

Execution — Duty of Court — Executing Court should help decree-holder in realising money due on his decree—Rule of procedure should not be used for obstructing justice.

Rules of procedure are handmaids to justice and ought not to be used for obstructing justice. It is the duty of the Court executing a decree to aid the decree-holder in realising the amount due on his decree. [P 239 C 1]

A decree-holder applied for attachment of the moveables of the judgment-debtor in the first instance, and if the money was not so realised for sale of the defaulting tenure. As during pendency of the application, certain moneys due to the judgment-debtor were deposited in the Court the decree-holder applied for attachment of the moneys. As the Court said that the decree-holder could not be given the attachment of the money until the writ issued for attachment of the moveable was recalled, the decree-holder applied for recalling the writ and it was accordingly recalled. But the Court, taking the ground that there was no prayer in the application for execution for attachment of the moneys, dismissed it and the amount was withdrawn by the judgment-debtor:

Held: that the order was not justified. The Court ought to have aided the decree-holder in realising the money due on his decrees, and should not have enabled the judgment-debtor to take away the money. The Court could have allowed the decree-holder to add a prayer for the attachment of the moneys. [P 239 C 1]

Urukramdas Chakravarti — for Petitioner.

Hamidul Haq Chowdhury — for Opposite Parties.

Order.—The petitioner before me obtained a decree for rent against the judgment-debtor opposite party. He put in an application by which he wanted the moveables of the judgment-debtor to be attached in the first instance and if the money was not realised by the attachment of the moveables, he wanted to sell the defaulting tenure. While this application was pending certain moneys to which the judgment-debtor was entitled were deposited in Court. On that the decree-holder made an application for attachment of those

moneys. The Munsif said that inasmuch as the writ to attach the moveables had been sent over to the Nazir, he could not allow the attachment of the moneys to be effected till that writ was recalled. On the said assurance and on the faith that the decree-holder would be given the attachment of the money, he made an application to the Court for recalling the said writ that had already been issued to the Nazir and it was accordingly recalled. But the learned Munsif then took up the attitude that inasmuch as there was no prayer in the application for execution for the attachment of the money in question, he refused the prayer for attachment of the money. Then he said that 'the execution case is dismissed for default.' Probably he was under the impression that there was no further prayer left in the execution petition after the writ of attachment of the moveables had been recalled. It is very unfortunate that the money which was lying in Court to the credit of the judgment-debtor was withdrawn before this Rule could be communicated to the lower Court.

I am unable, therefore, to deal in the present Rule with the question as to whether those moneys ought to have been attached or not. This Rule has become infructuous to that extent. But I do not feel that there was any justification for the order by which the application for execution as it was filed has been dismissed. That order must be vacated and the case sent back in order that the application for execution filed by the decree-holder may be proceeded with. If any money to the credit of the judgment-debtor hereafter comes to the Court, the said Court would give reasonable facilities to the decree-holder to add the necessary prayers in this application for execution to give him the rights to attach the moneys. After all, in this case, the Court ought to have considered that rules of procedure are handmaids to justice, and ought not to be used for obstructing justice. It ought to have aided the decree-holder in realising the money due on his decrees and should not have enabled the judgment-debtor to take away the moneys from Court thereby defeating or delaying the execution. As there was no question of limitation, I do not see what prevented the Court from allowing the decree-holder to add a

prayer, namely for attachment of the said moneys

The Rules are accordingly made absolute in part, but inasmuch as the orders of the learned Munsif have placed the decree-holder in difficulties and the judgment-debtor, although he has taken full advantage of some of those orders, was not responsible for them, I would not make any order for costs in these Rules against the judgment-debtor opposite party.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 239

HENDERSON AND R. C. MITTER, JJ.

Kristo Kamini Debi—Decree-holder—Appellant.

v.

Girish Chandra Mondal and others—Judgment-debtors—Respondents.

Appeal No. 272 of 1934, Decided on 22nd May 1935, from appellate order of Dist. Judge, Burdwan, D/- 10th February 1934.

(a) Civil P. C. (1908), O. 21, R. 29—Execution of decree stayed by injunction—Court passing order that attachment is to subsist till decision of suit by judgment-debtor and that application is to stand dismissed for time being—Order is not warranted by law—It is merely suspensory order keeping execution case pending.

Where the Court executing a decree, by reason of an injunction obtained by a judgment-debtor restraining the decree-holder from proceeding with the execution of the decree till the disposal of suit by him to have the decree set aside, passes an order to the effect that the attachment is to subsist till the disposal of the suit, and that the execution case is to stand dismissed for the time being, the order is not warranted by law and is merely a suspensory order keeping the execution case pending but off the list of pending cases only during the time during which the suit by the judgment-debtor is pending.

[P 240 C 2]

(b) Decree—Execution—Consideration of application suspended by reason of injunction or like obstruction—Subsequent application for execution may be treated as one in continuation or revival of previous application.

An application for execution of a decree may be treated as one in continuation or for revival of a previous application for execution, similar in scope and character, the consideration of which had been interrupted by objections and claims subsequently proved to be groundless or had been suspended by reason of an injunction or like obstruction.

[P 241 C 2]

(c) Limitation Act (1908), S. 15—S. 15 contemplates filing of application for execution and does not apply to any other application

—Execution suspended by reason of injunction—Subsequent application after removal of bar and to revive execution not being fresh application does not come within S. 15.

A later application for execution of a decree can in certain circumstances be treated as an application for revival or in continuation of the earlier application. S. 15 contemplates the filing of an application for execution and does not in terms apply to any other application. If therefore an application is made by the decree-holder, after the removal of the bar to execution, to revive or continue an application for execution which could not have been, by reason of the bar, proceeded with, such an application not being in terms a fresh application for execution does not come within S. 15 : 1927 *All* 16 (FB), *Foll.* [P 241 C 2]

(d) Limitation Act (1908), Art. 181—Execution of decree stayed by reason of injunction—Application only removed from list of pending cases by order not finally terminating it—Subsequent application for revival of execution—Art. 181 does not apply—No rule of limitation is prescribed for such application.

Where an execution case is pending but cannot be proceeded further by reason of an injunction and has been "struck off the file" or is removed by an order which does not terminate it finally but has the effect of removing it from the list of the pending cases, the decree-holder is not bound to apply for revival of the said proceedings after the removal or discharge of the said injunction. His application in substance only conveys to the Court the information that the bar has been removed. It is the duty of the Court to have in sight all undisposed cases and when the bar is removed to direct the party to take the necessary steps for further progress of the case. [P 243 C 1]

Such an application, therefore not being a fresh application for execution, Art. 181 does not apply to it and in regard to applications of such nature there is no rule of limitation prescribed : 31 *Mad* 71 ; 36 *Mad* 553 ; 37 *Cal* 796 and 8 *Cal* 420, *Foll.* ; 1920 *All* 174 ; 1921 *All* 99 ; 1926 *All* 409 and 1926 *Pat* 62, *Dissent.* ; 20 *I C* 439 and 1930 *Cal* 329, *Commented upon.*

[P 243 C 2]

Bejoy Kumar Bhattacharya and *Bhut Nath Chatterjee*—for Appellant.

Gopendra Nath Das and *Jagadish Ch. Ghose*—for Respondents.

R. C. Mitter, J. — This appeal is on behalf of the decree-holder and is directed against the order of the learned District Judge of Burdwan dated 10.2.1934 by which her application for execution of a decree for money which she had obtained against the respondents on 8th June 1920 has been dismissed. The appeal raises an important question of limitation on which not only the other High Courts have differed, but different views have been expressed by this Court on different occasions. The relevant facts are as follows : In 1921 the appellant applied

to execute her decree. Her application for execution was numbered Title Execution No. 135 of 1921. Therein she applied for sale of some properties and in due course the said properties were attached. The judgment-debtors, however, instituted a suit against her in the year 1922 (Title Suit No. 66 of 1922) in which they prayed for setting aside her decree. In the course of that suit an injunction was applied for and obtained by the judgment-debtors restraining her from proceeding with her execution till the disposal of the said suit. On the injunction being granted the executing Court recorded an order on 19th June 1922 in the following terms:

Under order No. 7 dated 19th June 1922 passed in title suit No. 66 of 1922 the sale of this case be stayed. The attachment will continue till the disposal of the aforesaid suit. The case be dismissed for the present.

There is nothing to show that this order was passed in the presence of the decree-holder, and certainly there is nothing to show that the decree-holder was at fault or in default to merit the dismissal of her execution case. It seems to us to be one of these classes of orders, for which there is no warrant in law, frequently passed for the quarterly returns. The order had no doubt the incidental advantage of improving the Subordinate Judge's list, but it has the disadvantage of causing a great deal of difficulty and argument both in the Courts below and before us. After giving our anxious consideration to the matter, we have come to the conclusion that it is a suspensory order which kept the execution case pending, but off the list of pending cases only during the time that the aforesaid title suit of 1922 would be pending in the Court of first instance. On 10th June 1929 the said title suit was dismissed by the Court of first instance and an appeal against the decree of the said Court was dismissed on 21st July 1930. On 20th April 1933, that is beyond three years of the date of the dismissal of the title suit by the first Court, when the injunction order terminated, the appellant filed an application in the executing Court in a tabular form. Therein she mentioned some properties over and above those mentioned in her application for execution filed in 1921, which she wanted to sell for satisfaction of her decree, but ultimately she gave up those additional properties and wanted to sell only those properties which were

mentioned in her application for execution filed in 1921.

In one column of the application which she filed on 20th April 1933 she stated that her application may be treated as an application for reviving Title Execution Case No. 135 of 1921, and be taken in continuation of her previous application for execution. The learned District Judge has held that after the abandonment of her claim to proceed against the additional properties her application is one in continuation of her previous application for execution filed in the year 1921. We hold that the learned District Judge is right in the view he has taken in this respect. It is well established that an application for execution of a decree may be treated as one in continuation or for revival of a previous application for execution, similar in scope and character, the consideration of which had been interrupted by objections and claims subsequently proved to be groundless or had been suspended by reason of an injunction or like obstruction. The finding of the learned District Judge in our judgment is a finding of fact and cannot be challenged by the respondent judgment-debtors.

The learned District Judge, however, held that her application of 20th April 1933 was an application for reviving Title Execution Case No. 135 of 1921, and came within the purview of Art. 181, Limitation Act, and inasmuch as the right to apply accrued on 10th June 1929, when the injunction was dissolved, it was barred by time. The question before us, in this appeal is whether this view is correct. Mr. Dass appearing on behalf of the judgment-debtors has raised a further point in support of the order appealed against. He says that after the amendment of S. 15, Limitation Act, in 1908, the doctrine of revival of execution proceedings can no longer be invoked and a decree-holder is only entitled to get a deduction of the time during which he had been restrained by an injunction from executing his decree. He says that the application for execution would have been in time if filed within three years of the date of the attachment effected in Title Execution Case No. 135 of 1921, (which was certainly before 19th June 1922), that being the last step in aid of

execution plus the time during which the injunction order passed in title suit No. 66 of 1922 was in force. If this contention be accepted, certainly the decree-holder is hopelessly out of time. This further point taken by Mr. Dass may be conveniently taken up first.

Section 15, Limitation Act of 1877, applied only to suits, and limitation in case of suits only was extended when its institution was stayed by an injunction. When the law stood thus it was held that, where an application for execution of a decree was stayed by an injunction, the time during which the injunction was in force could not be excluded in computing limitation, but the Court relieved the decree-holder by treating the application for execution made after the discharge of the injunction as an application to revive or continue the previous application for execution, if it was similar in nature and scope. This doctrine could have no possible application and would not have assisted the decree-holder where an injunction was passed against him before he had made any application for execution or when there was no application for execution pending. The position was the same when the second application for execution was not similar in nature and scope to the earlier application for execution. In 1908 the scope of S. 15 was enlarged by making the section applicable also to applications for execution, and thereby the hardships caused to decree-holders in the two classes of cases last mentioned was removed. But we do not think that the enlargement of the scope of S. 15 by the Act of 1908 has superseded the principle that a later application can in certain circumstances be treated as an application for revival or in continuation of the earlier application. S. 15 contemplates the filing of an application for execution and does not in terms apply to any other application. If therefore an application is made by the decree-holder, after the removal of the bar to execution, to revive or continue an application for execution which could not have been, by reason of the bar, proceeded with, such an application not being in terms a fresh application for execution does not, in our judgment come within the section. We agree entirely with the reasons given by Lindsay, Sulaiman and Mukherjee, JJ., on this point in

49 All 276 (1). We accordingly overrule this point urged by Mr. Dass.

The question that remains to be determined, then, is whether Art. 181 applies to the application made by the appellant before us on 20th April 1933. The Allahabad High Court has taken the view that the said article applies : 42 All 564 (2) ; 43 All 383 (3) and 1926 All 409 (4). The Full Bench of the same Court has adopted the same view in 49 All 276 (1), although the said questions did not arise and was conceded by the decree-holder's advocate, as the application for revival of the execution proceedings was made within three years of the date of the discharge of the injunction. The Patna High Court has also taken the same view: see 1926 Pat 62 (5). This view proceeds upon the basis (and in our judgment can only be supported on that basis) that a decree-holder under these circumstances is bound under the law to apply for continuation of the execution proceedings after the removal of the bar. When an execution case is still pending, but cannot be proceeded with further by reason of an injunction, and has been "struck off the file," or is removed by an order which does not terminate it finally but has the effect of only removing it from the list of pending cases, we do not see why it must be said that the decree-holder is bound to apply for revival of the said proceedings after the removal or discharge of the injunction. His application in substance only conveys to the Court the information that the bar has been removed. It is also the duty of the Court to have in sight all undisposed cases and when the bar is removed to direct the party to take necessary steps for further progress of the case. For these reasons we do not agree with the view of the Allahabad and Patna High Courts. In 37 Cal 796 (6), Mookerjee and Carnduff, JJ., after noticing the doctrine of revival of execution proceedings,

1. Chatter Singh v. Kamal Singh, 1927 All 16 = 100 I C 692 = 49 All 276 = 25 A L J 201 (F B).
2. Balvant Singh v. Budh Singh, 1920 All 174 = 56 I C 1006 = 42 All 564 = 18 A L J 642.
3. Madho Prosad v. Draupadi Bibi, 1921 All 99 = 61 I C 417 = 43 All 383 = 19 A L J 174.
4. Sat Narain Lal v. Ganga Jal, 1926 All 409 = 94 I C 1005.
5. Bibi Hajo v. Har Sahay Lal, 1926 Pat 62 = 89 I C 992 = 7 P L T 39.
6. Madhabmani Dass v. Lambert, (1910) 37 Cal 796 = 6 I C 537.

when the bar to execution had been subsequently removed, make the following observations at p. 805 of the report.

The only reasonable view we can take of the proceedings under such circumstances is that the application of 10th February 1910 was in continuation of the application of 8th July 1909, which was in substance for revival of the application of 9th September 1908 which had been dismissed on 19th December 1908. In this view no question of limitation arises.

Although the obiter in that case that Art. 181, Limitation Act, does not apply to an application for a final decree in a mortgage suit, when the preliminary decree had been passed after the Civil Procedure Code of 1908 had come into force, was dissented from by Sir Lawrence Jenkins in 38 Cal 913 (7), affirmed by the Judicial Committee sub-nomine 42 I A 88 (8), the principle there laid down that there is no scope for the application of limitation to pending proceeding has not in our judgment been doubted either by the Judicial Committee or by decisions of this Court binding on us. That principle had been formulated by Wilson, J., in an old case. [8 Cal 420 (9)] has been repeatedly followed in this Court and has the merit of being fundamentally right. We accordingly hold that the view taken by the Madras High Court on the question which we have to decide is the correct view, and to applications of the nature which we have before us there is no rule of limitation prescribed : 31 Mad 71 (10) and 36 Mad 553 (11).

Two cases of this Court have been cited before us by the learned advocate for the respondent, which, it is said, militate against the view we are taking. They are 20 I C 439 (12) and 57 Cal 860 (13). In the first mentioned case the 'application for revival' of the execution proceedings was made within three years of the date, when what was considered by the executing Court as an order for stay of execu-

7. Amlook Chand Parruk v. Sarat Chandra, (1911) 38 Cal 913 = 11 I C 943.
8. Munnalal Parruk v. Sarat Chunder, 1914 P C 150 = 27 I C 683 = 42 I A 88 = 42 Cal 776 (P C).
9. Kedar Nath Dutt v. Hara Chand Dutt, (1882) 8 Cal 420.
10. Kotiah v. Alimelammah, (1908) 31 Mad 71 = 18 M L J 46.
11. Subba Chariar v. Muthuveeram Pillai, (1913) 36 Mad 553 = 14 I C 264.
12. Lal Govind v. Bhikar Sahu, (1912) 20 I C 439.
13. Akshay Kumar Ray v. Abdul Kader, 1930 Cal 329 = 126 I C 268 = 57 Cal 860 = 34 O W N 102.

tion was removed. The observations of Richardson and Newbold, JJ., that Art. 181 was applicable to the application was therefore obiter dictum. In the case of 57 Cal 860 (13), the matter was not argued but was conceded by the advocate for the decree-holder, who seemed to have concentrated his attention on the question as to whether limitation ran from the date of the order of the first Court reversing the Court sale or from the date of the appellate Court's affirmatory order. The cases on the subject were not cited from the Bar and the learned Judges in support of their observations that,

it is well known that an application for reviving execution proceedings is governed by Art. 181,

cited no authority nor noticed any. They cited the case of *Madho Ram v. Nihal Chand* (14), in support of the other proposition that limitation ran not from the date of the appellate order but from the date of the original order which the appellate Court had confirmed. The value of the decision in 57 Cal 860 (13), on the point we have to decide, regarded as a precedent, is in our judgment weak. We accordingly hold that the application of the appellant before us had been wrongly thrown out by the Courts below. We accordingly allow the appeal, send the case back to the Court of first instance with directions to that Court to proceed with the execution case No. 135 of 1921. The appellant will have her costs of this Court and of the Courts below. Hearing fee is assessed at two gold mohurs.

Henderson, J. — I agree, and only desire to say this. It could hardly be contended with any show of reason that an application which was filed in time, can subsequently become barred by limitation. It has however sometimes been held that after the removal of an injunction staying execution and further proceedings, the decree-holder is bound to file a petition for permission to go on with his case within three years.

This implies that a duty is cast upon the decree-holder to file such a petition. With great respect to the learned Judges who have taken that view, we are of opinion that such a petition is entirely redundant, and the decree-holder cannot

be prevented from going on with his pending case in the ordinary way. Indeed in some cases it is not necessary for the decree-holder to do anything at all. For example, if the Court has directed the issue of a notice under the provisions of O. 21, R. 22, and before such notice is actually issued further proceedings are stayed, it is obviously for the Court of its own motion as soon as the bar is removed to issue the notice. Again if the judgment-debtor after receipt of such notice has been granted time to file objections and before that time has expired further proceedings are stayed, the next step after the removal of the injunction would lie with the judgment-debtor. The result is that when a decree-holder files a petition asking the Court that a pending case may be proceeded with, the Court should inquire whether there is in fact such a case pending or not. If there is, the decree-holder is obviously entitled to go on with it. If there is not, the application is clearly misconceived and would fail. But in neither case can any question of limitation arise.

Turning to the present case there is a concurrent finding that the present appellant did in fact ask to go on with a pending case. The order of the learned Munsiff that the case is dismissed for the present has no real meaning and could not reasonably be interpreted as a final dismissal of the execution case. The only object of such an order appears to be to remove the case from the pending list so that it may not be shown in the periodical returns. In this connexion I desire to emphasize what has fallen from my learned brother, with regard to the impropriety of passing such orders.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 243

LODGE, J.

Jogesh Chandra Das and another—
Plaintiffs—Appellants.

v.

*Hem Chandra Ghose and others—*Res-
pondents.

Appeal No. 730 of 1933, Decided on 21st May 1935, from appellate decree of Sub-Judge, 5th Court, Dacca, D/- 4th November 1932.

Bengal Tenancy Act (1885), Ss. 76 (2) (f), 77—Only tenant is entitled to erect permanent dwelling house on holding and that too only for benefit of himself and his family—

Unrecognized transferee of a non-transferable holding has no such right.

Under S. 76 (2), sub-s. (f) and S. 77, a landlord is not entitled to prevent his tenant from erecting a permanent dwelling house whether of masonry bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices. The right to erect a dwelling house is a right belonging to the tenant and to no other and even the tenant is entitled to do so only for the benefit of himself and his family. It belongs to the tenant by virtue of his relationship to the landlord and not by virtue of his rights of occupying the land. An unrecognised transferee of a portion of a non-transferable holding does not stand to the landlord in the relationship of tenant. [P 245 C 1]

Atul Chandra Gupta and Sachindra Kumar Ray—for Appellants.

Naresh Chandra Sen Gupta and Bhupendra Krishna Bose—for Respondents.

Judgment.—This appeal arises out of a suit for declaration of plaintiff's title to and recovery of Khas possession of the lands of a holding which originally stood in the name of one Hosanaddin. Hosanaddin died 20 years ago leaving 2 sons, 3 daughters and a widow. The sons are defendants 3 and 4 in the suit. After the death of Hosanaddin the lands of the holding were in the actual occupation of defendants 3 and 4, the sons of Hosanaddin. These two defendants have transferred their interest in the holding to defendants 1 and 2 by two Kobalas dated Falgun 1329 and Pous 1332. The transferees are in actual occupation of the holding. The plaintiffs in the suit are the landlords. They seek khas possession on the ground that the holding has been abandoned by the original tenants. They made a second prayer for permanent injunction restraining the defendants from erecting permanent structures on the land. The Munsiff who tried the suit came to the conclusion that the holding had not been abandoned and he rejected the prayer for khas possession. He held further that the transferees had the same right as the tenants to erect permanent structures on the lands and he refused the prayer for permanent injunction. The findings of the Munsiff were upheld on appeal. I have been asked to hold first that the holding has been abandoned by the tenants and secondly that the plaintiffs appellants are entitled to the permanent injunction prayed for. The finding of the trial Court and the lower appellate Court is to the effect that

the sisters and the mother of defendants 3 and 4 had an interest in the holding and that that interest was still subsisting, that they were in possession with defendants 3 and 4 and that they were co-tenants with defendants 3 and 4 in the disputed jote.

The Advocate for the appellants had pointed out that defendants 1 and 2 are in occupation of the holding and that there is no evidence that the sisters and the mother of defendants 3 and 4 had made any arrangement whatsoever for the payment of the rent, and he argues that these facts are sufficient to establish the abandonment of the holding by the tenants. Abandonment implies a change of conduct or, at all events, of attitude on the part of the tenants. The sisters and the mother of defendants 3 and 4 were not in actual occupation of the holding before the sale to defendants 1 and 2. Defendants 3 and 4, occupied and possessed it on their behalf. The sisters and the mother did not pay the rent and there is nothing on the record to show that there has been any change in their conduct or in their attitude. Defendants 1 and 2 alleged that two of the sisters had transferred their interest to them by oral sale and that the third sister had granted a korfa settlement to these defendants. But this case was disbelieved in the lower Courts. Apparently there is no change in the conduct of the sisters and the mother of defendants 3 and 4 since the transfer by defendants 3 and 4. Whether the holding has been abandoned or not is largely a question of fact and in these circumstances I am not prepared to differ from the finding of the lower Courts. On this issue I hold that the tenancy has not been abandoned and that the prayer for khas possession was rightly rejected. The plaintiffs appellants prayed for a permanent injunction to restrain defendants 1 and 2 from erecting permanent structures on the holding. The Munsiff came to the conclusion that defendants 1 and 2 are co-sharers of the other tenants and that as the tenancy has not terminated the landlord cannot restrain the purchaser from building any pucca structures on the land which is not objected to by the other co-tenants and which was within the competence of other co-sharers to build. This finding was affirmed with some hesitation by the lower appellate Court.

Under S. 76, Cl. 2, sub-s. (f) and S. 77, Ben. Ten. Act, a landlord is not entitled to prevent his tenant from erecting a permanent dwelling house whether of masonry bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices. The right to erect a dwelling house is a right belonging to the tenant and to no other. It belongs to the tenant by virtue of his relationship to the landlord and not by virtue of his rights of occupying the land. An unrecognised transferee of a portion of a non-transferable holding does not stand to the landlord in the relationship of tenant. In my opinion therefore there is no justification for holding that the transferee has the same right as the tenant. Under S. 76, Cl. 2, sub-s. (f), it is the tenant and the tenant only who is entitled to erect such a dwelling house, and even the tenant is entitled to do so only for the benefit of himself and his family. I hold therefore that the plaintiffs were entitled to the permanent injunction prayed for. It remains to be decided however whether the permanent structures since erected by defendants 1 and 2 stand upon the lands of the holding or, as they allege, upon the lands covered by the mirash lease granted by the plaintiffs-appellants to them. A Commissioner was appointed in the trial Court to re-lay the settlement daks. The Commissioner re-laid the settlement map from two different points and arrived at two different conclusions. The learned Munsiff adopted one of these conclusions, a conclusion which indicates that the structure in question stands partly upon the holding transferred. The respondents denied that the structures stand upon the holding. The matter was not considered in the lower appellate Court and there was no finding on this point. As the building has since been erected the respondents are entitled to have this matter decided by the lower appellate Court whether in fact the structures stand wholly upon the lands of the mirash lease or partly on the lands of the holding transferred to them by defendants 3 and 4. I therefore order that the appeal be allowed in part. The prayer for khas possession is rejected. The appeal in so far as it concerns the plaintiff's prayer for permanent injunction be remanded to the lower appellate Court for determining whether the

structures stand wholly within the mirash land or partly within the lands of the holding transferred by defendants 3 and 4, and not covered by the mirash lease. In the latter event the suit should be decreed. Costs of this Court as also of the lower appellate Court to abide the result.

K.S./R.K. *Appeal partly allowed.*

A. I. R. 1936 Calcutta 245

NASIM ALI AND HENDERSON, JJ.

Ramesh Chandra Talukdar and others
—Defendants—Appellants.

v.

Pramatha Nath Sanyal—Plaintiff—Respondent.

Appeal No. 555 of 1933, Decided on 7th January 1936, from appellate decree of Sub-Judge, Pabna and Bogra, D/- 5th September 1932.

(a) Civil P. C. (1908), S. 149—Appellate Court directing plaintiff to pay deficit Court-fees within particular period—Suit to stand dismissed in case of failure to pay Court-fees—Plaintiff applying for extension of time before expiry of period—Court can extend time under S. 149.

Where the appellate Court orders the plaintiff in a suit to put in additional Court-fee within a particular time and directs that in case of failure to do so on his part the suit is to stand dismissed, and the plaintiff applies for extension of time for putting in the deficit Court-fee before expiry of the period, the appellate Court has jurisdiction under S. 149 to extend the time as the appeal is not finally disposed of, before the order of extension of time is made. [P 246 C 1]

(b) Second Appeal—Finding of fact—Finding on question of title is one of fact.

A finding on the question of title is one of fact and cannot be challenged in second appeal. [P 246 C 1]

Rabindra Nath Choudhury—for Appellants.

Subodh Chandra Sen—for Respondent.

Nasim Ali, J.—This appeal is by the defendants in a suit for declaration of plaintiff's title and possession to certain lands described in the Schedule of the plaint. The trial Court decreed the plaintiff's suit on the finding that the plaintiff has title to and possession in the disputed land. On appeal by the defendants to the lower appellate Court the learned Judge has dismissed the plaintiff's claim so far the properties mentioned in Schedule Ka are concerned but has declared the plaintiff's title in respect of the other disputed properties and has passed a decree for recovery of posses-

sion after receiving additional Court-fees from the plaintiff. Hence this second appeal by the defendants. The first point urged by the learned Advocate for the appellants is that the lower appellate Court had no jurisdiction to extend the time for putting in additional Court-fees after he delivered his judgment on 5th September 1932. It appears that the learned Judge by his judgment delivered on 5th September 1932 directed the plaintiff to put in additional Court-fees within three weeks from that date. There was a further direction in the judgment that if the plaintiff failed to put in the Court-fees required within the time fixed, the suit would stand dismissed. It appears however that before the three weeks expired, the plaintiff made an application for extension of time for putting in the deficit Court-fees and his application was allowed. There cannot be any doubt therefore that under S. 149, Civil P. C., the learned Judge had jurisdiction to extend the time as the appeal was not finally disposed of before the order of extension of time was made. The second point urged by the learned Advocate for the appellants is that the lower appellate Court was wrong in throwing the onus upon the defendants. I am unable to accept this contention. It appears however from the judgment of the learned Judge that in view of the pleadings of the parties and the entire evidence in the case, he was of opinion that the plaintiff's title was proved. The finding of the lower appellate Court on the question of plaintiff's title therefore cannot be successfully challenged in second appeal. The grounds taken by the learned Advocate for the appellants therefore fail and the appeal is dismissed with costs.

Henderson, J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 246

S. K. GHOSE AND EDGLEY, JJ.

Provat Kamal Basu and another—
Plaintiffs—Appellants.

v.

Phoenix Assurance Co. Ltd.—Defendant—Respondent.

Appeal No. 1317 of 1933, Decided on 11th February 1936, against decree of Dist. Judge, Pabna, D/- 27th February 1933.

Principal and Agent—Insurance Company, principal—Duties of agent not ceasing with first introduction of customer—Commissions on payments by customer cannot be claimed when agency has come to an end.

Although a contract between an Insurance Company and its agent does not contain a clause to the effect that commission is to be allowed to the agent so long as the premiums are paid and so long as the agent continues to represent the company, where there is no contract that the duties of the agent do not cease with the first introduction of the customer to the company, commissions cannot be claimed on payments made by the customer after the agency ceases: 1921 *Mad* 309 and *Lewin's case* (1871) 15 *S J* 828, *Foll.* [P 246 C 2; P 247 C 2]

*Khitish Chandra Chakrabarty and Surajit Chandra Lahiri—*for Appellants.

*S. C. Basak and Ambica Pado Chowdhury—*for Respondent.

Judgment.—Plaintiff's case is that he was appointed an agent by the defendant Life Insurance Company on 29th October 1918 in order to do work of Life Canvasser. He continued in the service until there was trouble between him and the company as he began to work for another Insurance Company also. The defendant company objected to this and finally terminated his services by a notice as from the end of December 1926. Plaintiff sues claiming damages for the renewal commissions which were due for the renewal of policies by clients introduced by the plaintiff, and for a further declaration that the plaintiff is entitled to such renewal commissions in future. The defence is that the plaintiff is not entitled to renewal commissions after the termination of his agency. The learned Subordinate Judge who tried the suit accepted the defence and gave a partial decree for the sum of Rs. 33-5-0 which the defendant company was willing to pay. The plaintiff appealed and the District Judge upheld the decree of the trial Court. Hence this second appeal by the plaintiff. It is contended that in accordance with the contract between the plaintiff and the defendant company the plaintiff is entitled to renewal commissions even though his services had been terminated by the company. The Courts below have taken the view that, even after the acceptance of the policies introduced by the plaintiff, he had other works to do from time to time. On behalf of the appellant reliance is placed on Ex. 1 which embodies: "The Terms of Regulations governing Canvassers." It is pointed out that it is stipulated that

the company will pay commission on proposals for Life Assurance introduced by the plaintiff and accepted by the company according to certain rates, for the first year's premium and certain other rates for subsequent years' premium or instalments paid to and received by the company. It is relevant to note however that this document is headed "Terms of Regulations governing Canvassers," thereby implying that the canvasser must continue to be such at the time at which the premia are paid and received by the company. Cl. 9 is to this effect: "The company is to be at liberty at any time to terminate the arrangement with the agent." It is contended for the respondent and, I think rightly, that this applies to the whole arrangement. For the plaintiff-appellant the argument is that in the present case the plaintiff's services were only terminated and nothing was said as to the payment of commissions which were due to him. This however appears to be wrong as para. 8 of the plaint is to this effect:

That by their letter dated 30th September 1926, the defendant company informed the plaintiff that they could not agree to continue his agency of their company after 31st December 1926, on the sole ground of the plaintiff's name having been included amongst the Special Agents of the Great Eastern Life Assurance Company Limited and refused to pay the renewal commission already earned by the plaintiff for his services in disregard of the terms of the agreement entered into by the parties to the suit.

This shows that in accordance with Cl. 9 the company in fact terminated the whole arrangement with the plaintiff. The next point is that both the Courts have found that as a matter of fact in this case, after the introduction of the clients by the plaintiff, something further remained to be done from time to time. It has been found that the plaintiffs' services were required when loans, etc., were negotiated, evidence of age on maturity of policies was being gone into, confidential enquiries had to be made when death occurred and so on. The plaintiff himself admitted in his evidence that there were other duties to be performed by him over and above such duties as those mentioned above. The learned Advocate for the appellant has referred us to certain passages in Blackwood Wright on Principal and Agent, Edn. 2, and the cases collected therein. All these

cases were considered in 44 Mad 170 (1). It was there pointed out that one very important duty of the agent will always be to impress on the policy-holders the value of keeping up their premia and this is specially a work necessary for the earning of the premia. This is in accordance with Cl. 17 of the document Ex. 1. As was stated by Lord Cairns in (1871) 15 S J 828 (2) the position of a canvasser is that of an agent who, so long as he is acting for his employers, is daily or weekly soliciting advertisements or renewals. In the Madras case it so happened that there was a clause to the effect that "The commission was allowed so long as the premiums were paid and the agent continued to represent the company." It was held however upon a consideration of the authorities that, even if there was no such clause in the contract, where the duties of the agent do not cease with the first introduction of the customer to the principal, commissions are not to be claimed on payments made by the customer after the agency ceases. We consider that the present case is covered by the decision in the case mentioned above. The suit has been rightly decided. In the result the appeal fails and it is dismissed with costs.

R.M./R.K.

Appeal dismissed.

1. Empire of India Life Assurance Co. Ltd., Bombay v. Nanu Ayyar, 1921 Mad 809=60 I C 69=44 Mad 170.
2. Lewin's case, (1871) 15 S J 828.

A. I. R. 1936 Calcutta 247

M. C. GHOSE, J.

Profulla Kumar Sen Gupta and another—Plaintiffs—Appellants.
v.

Behari Lal Sen Gupta and others—Respondents.

Appeal No. 1790 of 1934, Decided on 24th February 1936, against decree of Addl. Dist. Judge, 2nd Court, Backarganj, D/- 23rd May 1934.

Minor—Decree against—Setting aside—Suit against minors and their uncle—Notice to minors and their mother duly served—Mother not defending suit—Suit conducted adequately by their uncle—Defect in representation not affecting merits—Minors held not entitled to set aside decree.

It is important that Courts should follow strictly the rules laid down for representation of minors, but it is quite another thing to say that a defect in following the rules is necessarily fatal to the proceedings. [P 248 O 2]

In a suit against two minors and their uncle, the minors were represented by their natural guardian, namely their surviving parent, the mother, and notice to the minors and their mother was duly served. The mother did not choose to defend the suit but the defence was adequately conducted by the minor's uncle, defendant. The defect in the representation of the minors did not in fact affect the merits of the case:

Held: that, the minors were not entitled to set aside the decree: 16 Cal 40 (P C); 30 Cal 1021 (P C) and 32 All 287 (P C), *Rel. on*; 1921 Cal 534; 1923 Cal 692 and 1929 Cal 669, *Ref.* [P 249 C 1]

Panchanon Ghose and Nripendra Chandra Das—for Appellants.

Prafulla K. Roy—for Respondents.

Judgment.—This is an appeal by two plaintiffs in a suit to set aside an *ex parte* decree. The facts are that the principal defendants brought a suit on 31st July 1929 for declaration of their right to the western boundary of a certain tank and for confirmation of possession of the same. The suit was instituted against the two appellants plaintiffs, who were described as minors represented by their mother as their natural guardian and also against their uncle defendant 7 who was living in joint mess with them. A summons was served upon the mother of the two plaintiffs. The mother did not appear to defend the suit. The suit however was strenuously defended by the plaintiffs' uncle, defendant 7. The trial Court decreed the suit. Defendant 7 made an appeal and the appeal being decided against him made a second appeal to the High Court. The decree of the trial Court was passed on 11th August 1930 and the present suit was instituted on 16th September 1932. The trial Court found that plaintiff 2 was in fact a major when the suit was instituted, and as the summons was served upon him and he did not defend the suit he cannot claim to set aside the decree. As regards plaintiff 1 the trial Court concluded that he was a minor though the evidence was somewhat doubtful whether he had in fact attained majority and declared that the decree was infructuous against him. In appeal it was held that plaintiff 2 was a major and that plaintiff 1 had not attained majority at the date of the suit. The Court of appeal below however considered in the circumstances of the case that plaintiff 1 was substantially represented by his uncle, defendant 7, and the nature of the case shows that plaintiff 1

was not prejudiced in any manner in the defence of the suit. On that ground the Court dismissed the suit against plaintiff 1.

In appeal the only question urged is whether the Court of appeal below was correct in the circumstances to hold that the decree was binding against plaintiff 1. It is urged, on the other side, that the parties are neighbours and the property in dispute is the bank of a tank valued at Rs. 45 only, that there was a previous dispute between the parties and it was decided in 1917 on a compromise, but that afterwards the defendants again trespassed on the land and dispossessed the other party who were forced in 1929 to institute the suit in question, that as the plaintiffs had lost their father, their mother was their natural guardian and their adult uncle defendant 7 who lived in joint mess with them was their *de facto* protector. Defendant 7 himself defended the suit strenuously up to the High Court. When he had failed then the present plaintiffs came forward to set aside the decree on the ground that they were minors. One of them, as stated above, was found to be a major. Numerous cases were cited on both sides. For the appellants reliance is placed on 25 C W N 525 (1), 37 C L J 496 (2), and 33 C W N 742 (3). In these cases it was held that when the minor defendant was not represented strictly according to law the suit was infructuous as against him. On the other side reliance is placed on three judgments of their Lordships of the Privy Council, namely 15 I A 195 (4) 30 I A 182 (5), and 37 I A 77 (6). In these cases their Lordships held that it is important that Courts should follow strictly the rule laid down for representation of minors, but it is quite another thing to say that a defect in following the rules is necessarily fatal to the proceedings.

In this case the plaintiffs were represented by their natural guardian, namely

1. Surendra Nath Bose v. Aghore Nath Bose, 1921 Cal 534=62 I C 464=25 C W N 525.
2. Umapati Samanta v. Masietulla, 1923 Cal 692=72 I C 475=37 C L J 496.
3. Makshud Mandal v. Khedu Mandal, 1929 Cal 659=124 I C 75=33 C W N 742.
4. Hari Saran Moitra v. Bhubanneswari Debi, (1888) 16 Cal 40=15 I A 195=5 Sar 198 (P C).
5. Mt. Bibi Walian v. Banke Behari Pershad, (1903) 30 Cal 1021=30 I A 182 (P C).
6. Munshi Munnu Lal v. Ghulam Abbas, (1910) 32 All 287=6 I C 788=37 I A 77 (P C).

their surviving parent, the mother. Notice to the minors and their mother was duly served. The mother did not choose to defend the suit. It is clear that the defence was adequately conducted by the minors' uncle, defendant 7. The learned District Judge has found clearly that the defect in the representation of the minors did not in fact affect the merits of the case. In this position the learned Judge was right to hold that the minor plaintiff is not entitled to set aside the decree. The appeal is dismissed with costs. Leave to appeal under S. 15 of the Letters Patent is refused.

K.S./R.K. Appeal dismissed.

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D. N. MITTER AND PATTERSON, JJ.

Radha Nath Maity—Claimant No. 2—Appellant.

v.

Krishna Chandra Mukherjee—Claimant No. 1 and others—Respondents.

Appeal No. 29 of 1935, Decided on 7th January 1936, from original decree of President, Calcutta Improvement Tribunal, D/- 31st January 1935.

(a) Admission—Admission is presumed to be true.

What a man admits to be true must reasonably be presumed to be so. So where there is an admission made in a kabuliati, that a tenant is an occupancy tenant, the admission must be taken or at least presumed to be correct in the absence of evidence to the contrary: 29 *All* 184 (P C), *Foll.* [P 252 C 2]

(b) Bengal Tenancy Act (1885), S. 178—Acquisition of land—Compensation—Occupancy raiyat agreeing to abandon claim for compensation—Agreement is enforceable.

Even in the case of an occupancy raiyat a clause in a kabuliati with regard to the tenant abandoning any claim to compensation money is effective and does not hit in any way the provisions of S. 178, Ben. Ten. Act: 1922 *Cal* 187, *Ref.* [P 253 C 2]

(c) Calcutta Improvements Act (5 of 1911)—Preamble—Acquisition made by trustee is acquisition for Government.

Acquisition of land made by the Calcutta Improvement Trust under the Calcutta Improvement Act amounts to acquisition made by or on behalf of the Government. [P 254 C 2]

(d) Bengal Tenancy Act (1885), S. 178—Tenancy held from month to month—Clause in tenancy that tenant is not to claim compensation in case of acquisition—Clause held is not inconsistent with tenancy—Tenant making improvements on holding—Tenant can claim compensation for improvements.

A clause that tenant is not to receive any compensation in case the acquisition of land is made by Government or Municipality is not inconsistent with the nature of the tenancy, namely the tenancy being one from month to month. The clause regarding the non-taking of compensation cannot be said to be a clause which is collateral to the ordinary incident of the holding. But the clause does not preclude the tenant from claiming such part of the compensation as has been the result of the improvements on the land made by the tenant; in other words such part of the compensation as has been the result of improvements which have enhanced the market value of the land: *Bradbury v. Grimble & Co.*, (1920) 2 *Ch D* 518 and *Sherwood v. Tucker*, (1924) 2 *Ch D* 440, *Ref.* [P 255 C 1]

Pugh, H. D. Bose, Manmatha Nath Roy (Sr.), Satindra Nath Mukherjee, Radhika Charan Chatterjee and Prem-ranjan Roy Choudhury—for Appellant.
Brojalal Chakravarti, Hiralal Chakrabarti, Atul Chandra Gupta and Ram-chandra Mukherjee—for Respondents.

D. N. Mitter, J.—This is an appeal from a decision of the President of the Calcutta Improvement Tribunal dated 31st January 1935 and arises out of a dispute with regard to apportionment of the compensation money which has been awarded by reason of compulsory acquisition under the Calcutta Improvement Act of 1911. It appears that the land in question, which consists of about six bighas in area, was required for the purposes of a certain improvement scheme, and the value of the land, which is premises No. 25, Lake Road, was assessed at (including the statutory allowance) Rupees 1,12,700, and the value of the structures and trees in the premises in question with the statutory allowance was assessed at Rs. 1769.12.10. At the time of the declaration the tenant one Radhanath Maity who was claimant No. 2 before the Collector, was in possession. The whole of the sum of Rupees 1,12,700 was awarded to the landlord claimants who are the respondents before us and the sum of Rs. 1,769.12.10 was given to Radhanath, the tenant. The tenant was dissatisfied with the award of the Collector and there was a reference both as regards valuation and apportionment. We are not now concerned with the question of the amount of compensation which has been awarded. The only dispute before us is with regard to the apportionment of the compensation awarded. The tenant claimed that he was an occupancy raiyat on the land at the

time of the acquisition and that therefore on the principle accepted by this Court he is entitled to half the compensation which has been awarded in favour of the landlord claimants. This position was not accepted by the learned President of the Tribunal who has confirmed the award of the Collector and has dismissed the reference made at the instance of Radhanath Maity, the appellant before us. Hence the present appeal by claimant No. 2.

In appeal before us Mr. Pugh who has appeared for claimant No. 2, has raised several contentions. He has contended in the first place that the land in question was agricultural land in the year 1906 when the kabuliat was executed in favour of the landlord by the present claimant, and that before the actual execution of the kabuliat, his case is, Radhanath or rather his predecessor-in-interest was for more than 12 years in occupation of this land and has acquired a right of occupancy to the same. Alternatively, the contention is that in any event Radhanath was before the execution of the lease in 1906 a non-occupancy raiyat on the land and that having regard to the provisions of S. 178, Ben. Ten. Act it was not permissible to the landlord to grant a lease or to take a kabuliat by which the rights of Radhanath Maity under the Bengal Tenancy Act could be jeopardized. His contention in substance is that by this document of 1906, to which reference will be made hereafter, it was not open to the respondents, the landlords, to defeat the rights of the appellant under the Bengal Tenancy Act and the document consequently being out of the way as Radhanath since the date of the lease in 1906 was in occupation of the land for more than 12 years he had acquired a right of occupancy in the land acquired and the apportionment of the compensation money should have been on that basis. The next argument is based on a clause in the kabuliat of 1914 which has been marked as Ex. B (see p. 63 of the second part of the paper-book), namely that in the case of the acquisition of the land by the Government or Municipality, the tenant would not be entitled to get any compensation in respect thereof. It is argued that in accordance with the terms of this kabuliat the tenant precluded himself from getting any portion of the com-

pensation money in cases of acquisition being made only by the Government or by the Municipality, and as the acquisition was not made by the Government but by a board of trustees of the improvement of Calcutta this clause does not prevent the tenant, now appellant, from making a claim with regard to the compensation money. The first two contentions have been negatived by the learned President of the tribunal. With regard to the last contention, namely that the acquisition was not by the Government but by the board of trustees appointed under the Calcutta Improvement Act of 1911, it appears that no such ground was taken before the President of the tribunal nor is there any indication of such a ground in the memoranda of appeal before us. Mr. Pugh has however handed over to us the written argument which was supplied to the President by Mr. Shasmal, counsel for his client, which will show that this point was indicated in those notes which were presented to the learned President and which he afterwards returned to Mr. Pugh's client. The fourth point taken is with reference to the compensation which Mr. Pugh's client claims on account of the improvements which have been effected on the land since the taking of the kabuliat by Radhanath Maity. The learned President has noticed this point and has refused to give any compensation to the appellant on the ground that there is not even an iota of evidence to guide the Court in the assessment of such improvement of the land and also on the further ground that Radhanath himself had given up all rights with regard to the compensation for the land by Ex. B.

In order to understand the contentions raised on behalf of the appellant it would be necessary to state a few salient facts relating to the history of this land prior to 1906. It appears that a kabuliat was executed by one Uday who is the father-in-law of the appellant Radhanath in favour of the landlord on 1st Magh 1304 B. S. corresponding to 22nd January 1898. This lease was for a term of three years: see Ex. G printed at p. 26 of the second part of the paper-book. It will appear from an examination of this kabuliat that it was in respect of Bastu land. The lessee states this:

I having applied to your Sarkar for being granted a settlement for the purpose of dwelling and residing as a temporary tenant at will, of one plot of about 6 B. 8 K. of land more or less, lying in holding No. 186, Division 6, Sub-Division Q, and within the boundaries given in schedule below out of the Lakheraj lands and Jamas which you have in Mouza. Panditia, Monoharpur village, appertaining to Dihi Panchannagram, within Pargana Khaspur, in District 24-Pargannas, Sub-District Alipore, under thana Tallygunge, you granted my prayers and settled Rs. 51 (fifty one rupees) as annual rent for the said 6 B. 8 K. of land and I give in writing this temporary kabuliat for the term of three years after accepting temporary patta to the effect that I shall pay the amount of rent into your Sarkar.

It is clear from this recital that this was a temporary lease which was given for the purpose of residence. It appears that Uday died in Asar 1305 corresponding to some time in 1899 and he was survived by his son Ganesh. On 21st December 1899 Ganesh executed a kabuliat in favour of the proprietor Khento Kali Deb and others: see Ex. H printed at p. 29 of the second part of the paper-book. Here again the recitals show that a temporary lease was being granted for the purpose of dwelling and residing as such. It appears from this document that there were certain trees on the land for there are some provisions with regard to the trees in this document. This kabuliat was taken for a term of five years and the effect of this kabuliat expired on 21st December 1904 corresponding to the 7th Pous 1311 B. S. It appears that in the meantime before the expiry of this lease Ganesh died in Chaitra 1306 leaving a son Ananta who was an infant at that time. It appears from the evidence that Radhanath Maity, the appellant in the present case, was looking after this infant son of Ganesh and the receipts show that the landlords granted receipts in respect of the tenancy which stood in the name of Ganesh and Radhanath was described as Sarbarakar: see Ex. D-8, D-11, which are printed at pp. 3 and 4 of the second part of the paper-book. Apparently, after the expiry of this lease on 22nd December 1904 Radhanath continued to be in occupation of the land which he claimed to be in his own account and in his own right. The contention in this behalf is that he was really inducted on this land without execution of any kabuliat, and evidence to this effect has been led, and reliance has been placed on some

evidence which has been given on behalf of claimant No. 1 by witness 1: see p. 61 about p. 62, line 44 and p. 63, top of the first part of the paper-book. At this time, it is stated, the Bengal Tenancy Act was in operation in this area for it appears that the area on which this land is situated came to be included within the Municipality in the year 1907. The first kabuliat which was executed by Radhanath Maity the appellant in favour of the landlords Khento Kali Debe and others is dated 18th April 1906 corresponding to 5th Baisakh 1330 B. S: see Ex. A, page 60 of the second part of the paper-book. This was for a term of five years. It will be necessary to consider the provisions of this document as some of the questions which have been argued turn on the construction to be put on this kabuliat. It appears from the recitals to which we will just now refer that this kabuliat was taken for the purpose of dwelling and residence as Bharatia tenancy-at-will for a term of five years. There was a clause also to the effect that the tenant will not be competent to dig or sell earth, nor shall he be competent to allow anybody else to dig or sell earth. The clause is in the following term:

I shall not be competent to dig or sell earth, nor shall I be competent to allow anybody else to dig or sell earth. I shall be competent to enjoy the fruits only of the trees, etc., that are in existence now. I shall not be competent to cut down or sell them.

There was a clause that on the expiry of the term it will be open to the landlord to let out and to make fresh settlements. After the expiry of the term of this kabuliat in 1911 it appears that Radhanath Maity continued to occupy this land and he executed a second kabuliyat in favour of Benoy Kumar Mukherjee on 30th June 1914 corresponding to 16th Asar 1321 B. S. This lease has been marked as Ex. B, see p. 63 of the second part of the paper-book. The kabuliat also recites that this was a temporary Bharatia tenancy at will in respect of 6 bighas 8 cottas of rent-paying land. It contains further an important clause about which there has been some discussion as to the question as to whether having regard to that clause the appellant is entitled to any compensation. That clause runs as follows:

Further be it mentioned that if the Municipality or the Government acquires the said land at any time for any purpose, then you shall get the compensation awarded therefor. I shall not have any concern therewith, and if some portion of the said land be acquired then I shall not get abatement of rent therefor. After the expiry of the term, I shall give up (the said land) without any notice and without any objection.

The third kabuliat was executed in favour of Benoy Krishna Mukherjee on 22nd April 1916 by Radhanath and the terms of this kabuliat, which has been marked as Ex. 2 and printed at p. 67 of the second part of the paper-book, are similar to the terms of the previous kabuliat of 1914. It contains the same clause about the tenant not being entitled to get any compensation in case of acquisition by either Government or Municipality. It is said, however, that this kabuliat was not acted upon. The rent stated in this kabuliat was a sum of Rs. 300, per year and it seems to be the case of both parties that no effect was given to this kabuliat. So it appears clear that Radhanath clearly continued to occupy this land after the expiry of the effective kabuliat, Ex. B, the terms of which expired on 30th June 1919.

We have no doubt, having regard to the object and purpose for which these kabuliats were executed by the tenant in favour of the landlord, that the lease was given for dwelling and residential purposes. It is undoubtedly true that some evidence was given on behalf of the landlord which would go to show that even after the granting of the first lease in favour of Uday a portion of the land in question was being cultivated and paddy was being grown as also other vegetables; and it is argued on the basis of this evidence on behalf of the appellant that having regard to the fact that a large portion of the land was cultivated with paddy and other vegetables by the tenant who for the time being was occupying this land it must be taken that the lease was taken for agricultural purposes, and that this land was agricultural land. It is not possible to accede to this contention. The terms of the different kabuliats to which reference will be made are absolutely clear on the point, namely, that the lease was for dwelling and residential purpose and that the terms of these leases cannot possibly make the tenancy of a raiyat within the meaning of the Bengal Tenancy Act. The

word 'raiya' has been defined in S. 5 of the Act and the word means primarily a person who has acquired a right to hold land for the purposes of cultivating it either by himself or by members of his family or by servants or labourers or with the aid of partners, and includes also the successors-in-interest of persons who have acquired such right.

The relevant kabuliats show that these kabuliats were taken not for the purpose of cultivating the land in the various ways mentioned in S. 5 (2), Ben. Ten. Act. Mr. Pugh realized the difficulty of his position having regard to the terms of this kabuliat and the case which was put forward before us therefore was that between the expiration of the lease of Ganesh in 1904 and the actual execution of the kabuliat by Radhanath in 1906. Radhanath was really holding these lands as a non-occupancy raiyat, the land apparently being according to his contention agricultural land, and he wanted to support this position by the evidence of Bhabataran Basu, the agent of the landlords, that excepting 10 or 12 cottas of land, which was not under cultivation the rest was under cultivation. It is difficult to accept the position taken up in this Court, namely, that Radhanath was really a non-occupancy raiyat seeing that it is in direct conflict with the admission made in the kabuliat which was executed in 1906, and which must be taken or at least presumed to be correct in the absence of evidence to the contrary, for it is now well established that what a man admits to be true must reasonably be presumed to be so. See the observations of their Lordships in 29 All 184 (1). The admission is undoubtedly not conclusive and may be shown to be wrong. But the mere fact that the land to the extent of major part of it was under cultivation does not shift the burden on to the other side of showing that notwithstanding the admission the land was given for cultivating purposes. Very strong evidence would be necessary for the purpose of showing that the tenancy was of a kind different from that indicated in the several kabuliats to which reference has been made.

It cannot be contended having regard to the authorities that the mere fact that, notwithstanding the terms of the kabuli-

1. Chandra Kunwar v. Narpat Singh, (1907) 29 All 184=4 A L J 102 (P C).

that the lands were put to a different use, namely, that they were cultivated, would render the lands agricultural lands in which the person in occupation would acquire either a non-occupancy right or a right of occupancy by occupying the same for more than 12 years. We have to consider for the purpose of judging as to whether the tenants on the land were raiyats, whether or not the object, with which these kabuliyats were executed or leases granted was one which brings them within the meaning of S. 5, Ben. Ten. Act. After a careful consideration of the question we are of opinion that the express object with which the lease was given was for dwelling and residential purpose, and these tenancies therefore are governed by the Transfer of Property Act and not by the Bengal Tenancy Act.

An attempt was made in this Court to show that even during the continuance of the lease in favour of Ganesh after Ganesh's death Radhanath was holding the lands in his own rights and it is pointed out that he was paying rent to the gomostha before the execution of the kabuliyat in 1906. It is argued that the tenancy being shown to be in the name of the deceased person Ganesh Chandra Mandal it must be taken on the authorities that he was being recognized as a tenant in his own rights, and we are referred to an unauthorized report reporting the case of *Bali Mahammad v. Janati Nath*, 1924 Cal 535 (2). This case lays down the proposition that where rent receipts are issued in the name of another person after the death of the last tenant and rent is accepted from him the person from whom the rent is accepted should be regarded as a tenant. The distinction between the facts of that case and the facts of the present case is obvious. It appears from the evidence which has been given by Bhabataran that Radhanath was looking after the infant son of Ganesh and it was really in that capacity, namely, as the de facto guardian of the infant son, that Radhanath was allowed to occupy this land. This witness Bhabataran says this:

Ganesh was in possession for two or three years after Ganesh's death, and during the subsistence of Ganesh's lease, Radhanath came to us with Ganesh's son, Ananta and said that as Ganesh was dead, and he had to look after Ananta the land should be given to him and therefore the maliks, namely, Krishna Babu,

Benoy Babu and Anath Babu said that till the remaining period of Ganesh's lease, Radhanath could be in possession of the land.

Looking closely to this evidence there can be no doubt that Radhanath was occupying this land in the character of de facto guardian of Ganesh's son Ananta. This distinguishes the present case from the case reported in All India Reporter 1924, Calcutta. We are referred by the respondents to two cases with regard to the question as to whether the terms regarding compensation money in the lease, the kabuliat of 1914 could be effective if the position be accepted that the tenancy is governed by the Bengal Tenancy Act. In the face of what we have stated it is not necessary to deal with the question, but as the matter has been argued before us we may state here that even in the case of an occupancy raiyat the clause with regard to the tenant abandoning any claim to compensation money has been held to be effective and not to be hit in any way by the provisions of S. 178, Ben. Ten. Act. We may refer in this connexion to the case of 35 C L J 133 (3), where Asutosh Mukerjee and Buckland, JJ., held that an agreement that an occupancy raiyat will not in the event of acquisition by the Crown, claim a share of the compensation money is legal and enforceable. It is further held that such a covenant not affecting the title or status of the raiyat is not affected by Cl. (a), S. 178, Ben. Ten. Act. The question which we have to decide in the first instance is as to whether having regard to this clause about compensation to which we have already referred (Ex. B) the tenant is entitled to get any compensation in respect of this land. The argument on this head falls under two distinct categories.

It is argued in the first place that the clause cannot affect the tenant in the present case as the tenancy is not acquired either by the Government or by the Municipality, within the meaning of the clause, and under the second category or head it has been argued that even assuming that this clause would cover the case of acquisition made by the Board of Trustees for the improvement of Calcutta this, not being an ordinary incident of the holding, cannot be a stipulation which will be binding on

2. 1924 Cal 535=72 I O 311.

3. Asutosh Chandra v. Haripada Ganguli, 1922 Cal 187=62 I O 793=35 O L J 133.

a tenant who holds over after the expiry of the lease it being argued that the agreement as to the taking of compensation money is in the nature of a collateral agreement. With regard to the first contention we think that this contention cannot be given effect to if we keep in view the object with which this land was acquired, namely for the purpose of the improvement of the town of Calcutta. Having regard to the provisions of the Calcutta Improvement Act and the Land Acquisition Act as amended by the Act of 1911 it appears clear that the acquisition was really made by the Government. The Calcutta Improvement Act was an Act to provide for the improvement and expansion of the town of Calcutta, and it appears from the preamble that whereas it was expedient to make provision for the improvement and expansion of Calcutta by opening up congested areas, laying out or altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes and for the re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes, and otherwise, and whereas it was expedient that a Board of Trustees should be constituted and invested with special powers for carrying out the objects of this Act that the enactment of the Calcutta Improvement Act was passed. The Board of Trustees for the improvement of Calcutta was a body which was a statutory body appointed under the provision of the Calcutta Improvement Act. The method of acquisition is stated in S. 69, Calcutta Improvement Act, which states that the Board may with the previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894 for carrying out any of the purposes of this Act. Under S. 16, Land Acquisition Act, the land, after the award is made, vests absolutely in the Government free from all encumbrances. S. 16 runs as follows: "When the Collector has made an award under S. 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances." Under S. 17-A, Land Acquisition Act of 1894, which is the result of the amendment by Act 5 of 1911 it is enacted as follows:

In every case referred to in S. 16 or S. 17

the Collector shall, upon payment of the cost of acquisition, make over charge of the land to the Board (meaning apparently the Board of Trustees for Improvement of Calcutta) and the land shall thereupon vest in the Board, subject to the liability of the Board to pay any further costs which may be incurred on account of its acquisition.

Having regard to the clear principles of S. 16, Land Acquisition Act, which has been made applicable to the acquisition for the expansion and improvement of Calcutta we have no doubt that this is an acquisition by Government and therefore under the clause in question the tenant is not bound to be given any compensation which is offered on the acquisition for the improvement of Calcutta. When we say any compensation we mean any compensation which is due to the value of the land in its unimproved state. We shall have to develop this a little when we deal with the question of the value of the improvement, which is raised in the fourth ground before us. This disposes of the first ground with regard to the clause about compensation. The second head of the argument is this: that the clause with regard to compensation cannot bind a tenant and that when a tenant holds over after the expiry of the lease he does so on the same terms and stipulations meaning them thereby to be such stipulations as are the ordinary incidents of the holding. After the expiry of the lease it appears that the possession of Radhanath was that of a tenant from month to month, and he is undoubtedly bound by such stipulations after the expiry of the lease as are consistent with the stipulations of a monthly tenancy. As is put in the very well-known book of Woodfall on Landlord and Tenant, third edition (1934) at p. 275:

When a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance, but when he pays or expressly agrees to pay any subsequent rent, at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same are applicable to and not inconsistent with a yearly tenancy.

The clause that a tenant is not to receive any compensation in case the acquisition is made by Government or a Municipality is not inconsistent with the nature of the tenancy, namely the tenancy being one from month to month. The clause regarding the non-taking of compensation cannot be said to be a clause which is collateral to the ordinary incidents of

the holding. The real test is as to whether this is a clause which has really the effect of affecting the tenancy so long as it exists. We do not see anything inconsistent in this clause with the precarious nature of the tenancy. In the books are to be found clauses which have been held to be collateral to the ordinary incidents of the holding. As for instance the option of the lessee to purchase the reversion has been held to be a provision outside the terms which regulate the relations between the landlord as landlord and the tenant as tenant, and is not one of the terms of the original tenancy which bound the tenant holding over after the expiration of the lease. As has been put in some of the English cases such an option really is inconsistent with the existence of the tenancy but is consistent with the destruction of the tenancy. See the case of (1920) 2 Ch D 548 (4) and the case of (1924) 2 Ch D 440 (5). In the first mentioned case Peterson, J., observed:

An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision outside of the terms which regulated the relations between the landlord as landlord and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.

Having regard to the true test as laid down in the case which we have just mentioned we are of opinion that this clause regarding the abandonment of compensation money is not in any way inconsistent with the condition under which the tenancy was held under the previous *kabuliyat* of 1906. This clause does disentitle a tenant to claim any compensation which might be given on the acquisition of the land; subject to this the clause does not preclude the tenant from claiming such part of the compensation as has been the result of the improvements on the land made by the tenant; in other words such part of the compensation as has been the result of improvements which has enhanced the market value of the land. This disposes of the first three grounds taken on behalf of the appellant. It remains to consider now the last

ground taken, namely that the president of the tribunal has gone wrong in not awarding any sum of the compensation which has been awarded in this case for the improvements which have been effected by the tenant. The learned president says that the tenant has not put before him an iota of evidence to guide the Court in assessment of such improvements on the land.

It is not exactly right to say that there is no evidence because Radhanath himself deposed in the case and he states that he spent a large sum of money which is about Rs. 25,000 for the improvement. That undoubtedly is a very exaggerated estimate of costs which he had to incur for effecting the improvements, which have been admitted on the side of the landlords, on the land. Indeed it is difficult to accept this statement with regard to the large sum that is said to have been spent for these improvements in the absence of books of account. The only tangible evidence which we have got in regard to this matter from the side of the landlords is that an area of about 2½ bighas was improved in this sense that its level was raised to a considerable height, and that must have meant surely some expenditure. It is true that this is a lacuna or defect of material on which to assess the compensation, but we can proceed by accepting the position as has been admitted on behalf of the landlords. Our attention has been drawn to the statement that 2½ bighas were improved by having the level raised to some height and that circumstance must have influenced the Land Acquisition Authorities in giving a higher value in respect of this piece of land. The Court can certainly arrive at a figure and we think that a little over Rs. 500 per bigha should be awarded to the tenant appellant on this head. We assess the compensation which the appellant is entitled to at Rs. 1,350, with 15 per cent. as the statutory allowance which amounts to Rs. 202-8-0. The appellant is thus entitled to Rs. 1,350 plus Rs. 202-8-0, that is Rs. 1,552-8-0 over and above the compensation which has been awarded to him in this case by the Court below on account of trees and huts. The landlords are entitled to withdraw the compensation money awarded to them by the Court below less the sum of Rs. 1,552-8-0. Each party is to bear its own costs throughout. Let the

4. *Bradbury v. Grimble and Co.*, (1920) 2 Ch D 548=89 L J Ch 645=65 S J 61=124 L T 189.

5. *Sherwood v. Tucker*, (1924) 2 Ch D 440=94 L J Ch 66=40 T L R 782=68 S J 769=132 L T 86.

record be sent down to the Court below as early as possible.

Patterson, J.—I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 256

NASIM ALI, J.

Raghumani Roy and another—Plaintiffs—Appellants.

v.

Bibhuti Bhusan Roy and others—Defendants—Respondents.

Appeal No. 672 of 1934, Decided on 13th February 1936, from appellate decree of Addl. Sub-Judge, Howrah, D/- 8th November 1933.

(a) Religious Endowment — Alienation — Shebait Gomasta—Power to grant lease—Legal necessity must be for the benefit of estate.

Shebait Gomasta of the Debuttar property is not competent to grant perpetual lease of the land except for imperative legal necessity for the benefit of the estate, such as the preservation of the estate from extinction, defensive litigation and protection from injury and deterioration: 13 M I A 270 (P C); 1917 P C 33; 2 I A 145 (P C) and 6 M I A 393 (P C), *Foll.* [P 258 C 1, 2]

(b) Religious Endowment — Alienation — Legal necessity—Permanent lease granted—Entire amount raised must be necessary to meet actual pecuniary pressure on estate.

Shebait granting permanent lease at fixed rent must, in order to prove compelling legal necessity, show that the entire amount raised as Selami was necessary to meet the actual pecuniary pressure on the estate. Also he must show that the amount actually required for meeting the pressing need of the estate could not be raised by a lease for a term or even in perpetuity at variable rent. [P 258 C 1]

(c) Practice—Appellate Court — Reversal of findings—Appellate Court must consider relevant evidence in the trial Court.

When the appellate Court reverses the findings of the trial Court it must consider and discuss the relevant evidence in the trial Court where the conclusions of the trial Court mostly depend upon the oral testimony of witnesses. [P 258 C 2]

Hira Lal Chakravarty and Diptendra Mohan Ghose—for Appellants.

Gopendra Nath Das and Khitindra Kumar Mitter—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for possession, damages and for mesne profits. The plaintiff's case, briefly stated, is as follows: The disputed land measuring about 1 bigha 15 cottas in area is the Debuttar property of Sri Sri Sridhar Jiu Thakur of the Roys of Tajpur in the District of

Howrah. The members of the Roy family are many and four elderly members of the four main branches of the family jointly look after the Debuttar estate, and carry out litigations in respect of the same. If any property appertaining to the Debuttar estate is to be leased out the managing shebait obtains the consent of all the shebaites residing at Tajpur, and after publication of notice and announcement by beat of drum settle the same. One Golok Moira and his descendants were Chakran tenants of the disputed land under the Debuttar estate. The family of the Moiras gradually became extinct and the last holder surrendered the land and left the village. The land thereafter remained in the khas possession of the Thakur. Defendant 2 was temporarily entrusted with the supervision of the work of the gomasta of the Debuttar property. Taking advantage of his position he got a kabuliyat secretly executed by his own relation, defendant 1, on 8th Baisakh 1336 B. S. in the name of defendants 3, 4 and 5 and the late Lalit Mohan Roy, the four managing shebaites of the Debuttar estate, without their consent and knowledge.

The other shebaites including the plaintiffs were not aware of this settlement. The kabuliyat was registered on 17th May 1929. Defendant 2 thereafter erected temporary huts on the disputed land and is illegally possessing the same. The rent fixed in the kabuliyat is a nominal rent and the term of the kabuliyat is indefinite. The plaintiffs never accepted defendant 1 as tenants; nor did they authorise the gomastha of the Debuttar estate to grant dakhilas to him. Defendant 2 being himself a shebait acted, in breach of trust, in taking the kabuliyat in the name of defendant 1. The kabuliyat is therefore void. As the shebaites are numerous and as it is not possible to serve the summons on all the shebaites the suit has been brought by two of the shebaites on behalf of the Thakur, under the provisions of O. 11, R. 8, Civil P. C. The defence of defendants 1 and 2 is as follows: The majority of the members of the Roy family do not reside at Tajpur. As it is not possible to obtain consent of all the shebaites in matters relating to the management of the Debuttar estate the practice is to entrust one shebait residing at Tajpur to look after the Debuttar property. Before any Debuttar property is

leased out, his duty is to consult all the shebaita residing at Tajpur and to announce it by notice and beat of drum. The documents however are taken in the names of four persons representing the four main branches of the Roy family. Golak and his descendants held the disputed land at a money rent of Rs. 3. The land became khas after the extinction of Golak's family and in spite of best efforts no tenant was available. At the time of the settlement of the disputed land one Ganesh was entrusted with the supervision of the Debuttar estate.

There was a pressing need for money for meeting the expenses of many litigations concerning the Debuttar estate. The shebaita repeatedly asked Ganesh to let out the land in kaimi right by taking selami. After consulting defendants 3 to 5 and Lalit Mohan Roy and other shebaita residing at Tajpur, there was publication of notice and announcement by beat of drum about the intended settlement. Bibhuti Roy, son of defendant 2, offered the highest bid, paid a selami of Rs. 201 and took the bandobast at a rental of Rs. 5 in the name of defendant 1; and in accordance with the practice a kabuliyat was taken in the name of the representatives of the four branches of the family. With the money obtained as selami Ganesh met the costs of the litigation relating to the Debuttar property without any objection from any of the Shebaita. The settlement had thus benefited the Debuttar estate. Bibhuti was subsequently added as defendant 2-Ka. He filed a written statement supporting defendants 1 and 2. The other defendants did not contest the suit. The findings of the trial Court are these: (1) No litigation was pending at the time of the settlement. (2) There was no want of money. (3) The practice regarding the settlement of Debuttar land was not followed at the time of settlement. (4) All the managing Shebaita did not consent to the settlement. (5) No selami was paid. (6) The kabuliyat was taken secretly and the settlement was not at all bona fide. On these findings the suit was decreed by the trial Court.

Defendant 2-Ka appealed to the lower appellate Court. The learned Additional Subordinate Judge who heard the appeal came to the conclusion that there was legal necessity for granting the perma-

nent lease on the following facts: (1) Some rent suits were pending in which the deity was the plaintiff. (2) An execution case in which the deity was the decree-holder was also pending. (3) Money was required for the conduct of the above cases and the gomastha in charge of them was making repeated demands for money. (4) Less than one rupee was in the coffer of the deity. He also found that the selami was paid as alleged by the defendants; that the receipt of the selami was acknowledged by the four managing shebaita and nine other shebaita by Ex. G; that the plaintiff was present at the time of the settlement and that he was one of the intending lessees; that the plaintiff had failed to show that any other shebaita was left out or not consulted that the procedure obtaining in the Debuttar estate in making settlement of land was followed and that the entire body of shebaita residing at Tajpur for the time being made the settlement. He accordingly allowed the appeal and dismissed the suit with costs. The plaintiffs appeal to this Court.

The first contention of the learned Advocate for the appellant is that Ex. G is not admissible in evidence inasmuch as it is not registered in accordance with the provisions of the Registration Act. By S. 17 (1) (c), Registration Act, a non testamentary instrument which acknowledges receipt of payment of any consideration on account of creation, declaration, assignment limitation or extinction of any such right, title or interest is compulsorily registrable. Ex. G is a receipt which acknowledges receipt of Rs. 201 as selami for a permanent lease of the disputed land. It therefore required registration. It is, therefore, not admissible in evidence to prove that any consideration was paid as selami for the permanent lease alleged to have been granted by the shebaita. The next point urged by the learned Advocate for the appellant is that on the facts found by the learned Judge the lease cannot be said to have been granted for legal necessity.

"To create a new and fixed rent for all time to come, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time would be a breach of duty in a shebaita." See the

case in 13 M I A 270 (1) at p. 275. But there would be no breach of duty if the shebait is constrained to do so by unavoidable necessity. The principle applies equally to agricultural lands and building sites in villages: see the case in 44 I A 147 (2). The authority of a shebait is analogous to that of a manager of an infant heir. It can only be exercised rightly in a case of need or for "the benefit of the estate." The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, are the criteria to be regarded: see the cases in 2 I A 145 (3) and 6 M I A 393 (4). It is not possible to state precisely the meaning of the words "benefit to the estate." The reported cases show that preservation of the estate from extinction, defence against hostile litigations affecting the estate, protection of the estate or portions of it from injury or deterioration by inundation, have been taken as "for the benefit of the estate." The shebait is not entitled to sell a Debutter land solely for the purpose of investing the sale proceeds for a larger income than what was being derived before.

Again in order to show imperative necessity compelling the shebait to grant a permanent lease at a fixed rent it must be found that the entire amount raised as selami was necessary to meet the actual pecuniary pressure on the estate. It must also be shown that the amount actually required for meeting the pressing need of the estate could not be raised by a lease for a term or even in perpetuity at a variable rent. The findings of the learned Judge do not show what was the amount which was actually necessary for meeting the costs of the litigation pending at the time. It has not been found that there was no immediate prospect of getting sufficient money from the rents and profits of the debutter estate and that unless money had been immediately

raised the rent suits and the execution case would have been dismissed. There is also no finding to the effect that the actual amount necessary could not be raised by giving a lease for a term or in perpetuity with variable rent. The learned Judge, in my opinion, did not correctly appreciate the real nature of the controversy between the parties on this point.

The last contention of the learned Advocate for the appellant is that in reversing the findings of fact arrived at by the trial Court the learned Judge did not at all consider the reasons given by the trial Court and that he did not at all apply his mind to the evidence on which the trial Court had based its findings. This contention is well founded. As regards the question whether the practice prevalent in connexion with the granting of settlements was followed by the shebait in the present case the trial Court in a very careful judgment, after considering all the relevant evidence, came to the conclusion that the practice was not followed. The learned Judge without advertting to the reasons given by the trial Court, and the evidence on which it relied, disposed of the matter in one solitary sentence with the words: "The procedure obtaining in debutter estate of the plaintiff deity in making settlement of land was also followed in this case." His findings on other facts are not also satisfactory. He did not discuss all the relevant evidence and did not give any reasons for his inability to agree with the trial Court in its conclusion on these facts which depended mostly on the oral testimony of certain witnesses whom the trial Court heard and whom he had no opportunity of hearing. In my judgment there was no proper hearing of the appeal by the lower appellate Court. The result, therefore, is that this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and the case is sent back to that Court for a rehearing of the appeal in the light of the observations made above. Costs will abide the result.

M.D./R.K.

Appeal allowed.

1. Maharani Shibeswaree Debia v. Mathura Nath, (1869-70) 13 M I A 270=13 W R 18=2 Suther 300=2 Sar 528 (P C).
2. Palaniappa Chetty v. Deinasi Kamony Pandara, 1917 P C 33=39 I C 722=44 I A 147=40 Mad 709 (P C).
3. Prasanna Kumari Debya v. Golab Chand Babu, (1876) 2 I A 145=14 Beng L R 450=23 W R 253=3 Suther 102=3 Sar 449 (P C).
4. Hanuman Pershad Pandey v. Babooee Munraj Koonwaree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).

A. I. R. 1936 Calcutta 259

R. C. MITTER, J.

Emperor

v.

Bhola Giri Mohunt—Accused.

Criminal Ref. No. 186 of 1935, Decided on 18th February 1936.

Criminal P. C. (1898), S. 144—Order for injunction must be absolute and definite and not conditional—Party violating conditional order is not guilty of offence under S. 188, Penal Code.

The order for injunction under S. 144 must be an absolute and definite order and it must be left to the party to apply for rescinding the order by having recourse to the procedure laid down in sub-ss. (4) and (5) of S. 144. S. 144 does not contemplate the passing of a conditional order to be made absolute later on. [P 259 C 2]

Where, therefore, a Court by its order under S. 144 directs a party, either to refrain from doing certain acts, or to show cause, if any, against the order, such order not being definite, does not come within the terms of S. 144 and no charge can be sustained under S. 188, Penal Code, for violating such order. [P 259 C 2]

Jitendra Mohun Banerji and Nirmal Kumar Sen—for the Reference.

Bir Bhusan Dutt—for the Crown.

Order.—It appears that a certain plot of land was acquired under the Land Acquisition Act for the purpose of extending the Gun and Shell Factory at Cossipore. Within the plot there is a Siva temple belonging to the accused Bhola Giri. The site of the temple was not acquired. Various disputes arose between the accused and the officers of the Gun and Shell Factory, but they resulted in compromises, and ultimately it was agreed that a space of four cubits was to be left open for the purpose of affording access to the temple. On 21st September 1934 a certain complaint was made to the learned Police Magistrate at Sealdah by the officer in charge of the Cossipore Police Station. The learned Magistrate on that date passed an order after reciting the acts said to have been committed by the accused which according to him would lead to a disturbance of the peace on the following terms:

As the said breach of the peace is imminent and immediate preventive measures are desirable, I do hereby under S. 144, Criminal P. C., order and direct the person named in the margin (the accused) either to refrain from doing any of the acts set forth above and exercising any other act set forth above beyond using the passage as a passage; or to show cause, if any, against the said orders of injunction on 2nd October 1934.

In pursuance of this order, the accused showed cause before the learned Magistrate. The charge against the accused was under S. 188, I. P. C., that he violated the order of injunction passed on 21st September 1934 by doing certain acts between the 10th November, and 21st November 1934. He has been convicted by the trying Magistrate and the learned Additional District Magistrate of Alipore has made this reference under the provisions of S. 438, Criminal P. C. In my judgment the conviction cannot stand. It can only stand if there was an injunction on the petitioner under S. 144, Criminal P. C. That section contemplates the passing of an absolute order directing any person to abstain from any act or take certain order with certain property in his possession or under his enjoyment. The order can be passed either ex parte in case of emergency under the provisions of sub-s. (2) or it may be passed after giving an opportunity to the person against whom an order is proposed to be passed. But the order must be an order which is absolute and definite in terms. S. 144, Cls. (a) and (b) do not contemplate the passing of a conditional order to be made absolute later on. As I read these provisions the order for injunction under S. 144 must be an absolute and definite order, and it must be left to the party to apply for rescinding the order by having recourse to the procedure laid down in sub-ss. 4 and 5 of the said section. In the present case the order is in the following terms: " either to refrain from doing any of the acts set forth above or to show cause, if any, against the said order."

It is not an order which comes within the terms of S. 144, Criminal P. C., at all. The order is not definite. In this view, and having regard to the fact that there was no order for injunction as contemplated by S. 144 passed on the accused on 21st September 1934, the charge for violating an imagined injunction cannot be sustained. For these reasons I accept the Reference, set aside the conviction and sentence passed on the accused and acquit him of the charge. The fine, if already paid must be refunded.

R.M./R.K.

Conviction set aside.

A. I. R. 1936 Calcutta 260

CUNLIFFE AND HENDERSON, JJ.

Hare Krishna Nayak — Plaintiff — Appellant.

v.

Fakir Chandra Pal and others—Respondents.

Appeals Nos. 144 and 145 of 1933, Decided on 24th January 1936, from appellate decrees of Sub-Judge, 3rd Court, Midnapore, D/- 15th August 1932.

Contract—Maintenance in exchange of land—Purchaser of land contracting to pay maintenance—Arrears of maintenance assigned for value—Assignee can recover arrears from purchaser.

A widow *W* was to receive maintenance from *M* in exchange of her interest in the land. *W* assigned the arrears to *H* for value. The land was purchased by *F* from *M*. *H* sued *F* for arrears :

Held: *H* was entitled to a decree against *F*, *H* being an assignee of beneficial rights from *W*: *Tweddle v. Atkinson*, (1861) 1 B & S 393, *Foll.*

[P 261 C 1]

Narendra Nath Chaudhury—for Appellant.

Manmatha Nath Das Gupta and *Apurba Charan Mukherjee*—for Respondents.

Judgment.—The facts relating to this appeal lie within a narrow compass. They may be shortly stated as follows: Three persons, Atal Behari Mahala, Jogendra Nath Mahala and Basanta Kumar Mahala, by the terms of a sole-nama, undertook to pay maintenance to a Hindu widow, by name Haramani Dasi. This undertaking was in exchange for her interest in lands formerly belonging to her deceased husband. The maintenance was not properly paid and Haramani Dasi assigned the arrears to one Harey Krishna Nayek. Subsequently, the three Mahalas sold the land to one Fakir Chandra Pal, who undertook by the terms of the sale deed to continue the maintenance to the widow. In the Court of the Munsif at Jhargram Harey Krishna Nayek sued the three Mahalas and Fakir Chandra Pal for the arrears of maintenance. He also added Haramani Dasi as a pro forma defendant. The three Mahalas did not appear, nor did Haramani Dasi. Fakir Chandra Pal, however, did, and strenuously contested the suit. In the result the Munsif decided that Fakir Chandra Pal was liable to the plaintiff for the greater part of the arrears. He also gave judgment against the Mahalas

and Haramani Dasi in default of appearance. On appeal to the Subordinate Judge of the third Court at Midnapore, the decision of the Munsif was reversed. The learned Subordinate Judge for reasons which commended themselves to him (but do not commend themselves to us) came to the conclusion that the kobala under which the deceased husband's land passed to defendant 4 did not show that there was any consideration for the promise of defendant 4 to pay the maintenance. Moreover the learned Judge was of the opinion that the terms of the kobala showed no charge upon the land and that the only liability to the widow rested with the Mahalas.

It seems to us that the whole question turns on whether or not the facts giving rise to this litigation and the terms of the agreements entered upon can be brought within the well-known rule laid down in the English leading case of 1 B & S 393 (1), a decision which has long been recognised in the Indian Courts as binding upon them. The principle of that case is this: that, where in a contract it can be shown that a third party holds a beneficial interest in its performance, and, where, the Court can properly appraise the position of the third party as one of a cestui que trust, the third party is entitled to sue for the purpose of obtaining a declaration enforcing his right. This rule is an equitable corrective of the Common law principle which lays down that a stranger to the consideration of a contract cannot sue upon the contract, as there is no legal nexus between the contracting parties and himself. We think that when Fakir Chandra Pal purchased the land from the Mahalas, he established himself in a fiduciary capacity, qua the payment of Haramani Dasi's maintenance, under the specific clause in the sale deed undertaking the payment; and we further consider that Haramani Dasi in these circumstances held a beneficial interest in the contract between the Mahalas and Fakir Chandra Pal; and that she was impliedly in the position of a cestui que trust vis a-vis the contracting parties. It is not necessary for us to consider whether we come to this conclusion because of our agreement with the recent decision of Mr. Justice Lort-

1. *Tweddle v. Atkinson*, (1861) 1 B & S 393=30
L J Q B 265=9 W R 761=4 L T 468.

Williams and Mr. Justice M. C. Ghose in 61 Cal 841 (2), a decision which was greatly pressed upon us. This case appears to us to be an extension of the rule in 1 B & S 393 (1), on general grounds of equitable policy which do not necessarily apply to the case before us.

We see no reason to doubt that in law an assignment for value of a beneficial right under a contract can be enforced under the principle discussed, just as much as the right of the original assignor. The assignment of the arrears of maintenance by Haramani Dasi to the appellant was a transfer of an advantage under the contract; and this class of assignment has always been recognised in law. For these reasons we are of the opinion that the decision of the Subordinate Judge is wrong and that the original decision of the Munsif, save that Haramani Dasi will be dismissed from the suit, must be restored in the appellant's favour, with costs both here and below. As Haramani Dasi did not appear there will be no order for costs either for or against her.

M.D./R K.

Appeal allowed.

2. *Khirode Bihari Datta v. Mangobinda*, 1934 Cal 682=152 I C 351=61 Cal 841=38 C W N 682.

A. I. R. 1936 Calcutta 261

R. C. MITTER, J.

Nityananda Poddar and another —
Accused—Petitioners.

v.

Rupai Bepari—Complainant—Opposite Party.

Criminal Revn. No. 1273 of 1935, Decided on 11th February 1936.

Penal Code (1860), Ss. 379, 447—Land and structures jointly owned by co-sharers—Accused purchasing share in them in execution of decree against one of them—Huts belonging to co-sharers blown away—Accused utilizing old materials and building huts on same land—They are not guilty under S. 379 or under S. 447.

Where certain persons, purchasing a share in the land and structures jointly owned by some co-sharers, in execution of a decree against one of them and taking possession through Court, utilize some of the old materials of huts belonging to the co-sharers which have been blown away and build a hut on the same land, they are not guilty of an offence under S. 379, there being no dishonesty on their part or any wrongful loss to other co-sharers. Nor can the persons be convicted under S. 447 as being part owners of the land. They enter upon the land for the purpose of exercising their rights of ownership.

[P 261 C 2; P 262 C 1]

Nirmal Chandra Chakravarty — for Petitioners.

Amrita Lal Mukherjee—for Opposite Party.

Order.—The petitioners before me have been convicted under S. 379, I. P. C., and sentenced to pay a fine of Rs. 30 each, in default to suffer rigorous imprisonment for four weeks. They have also been convicted under S. 447, I. P. C., and each of them sentenced to pay a fine of Rs. 15, in default to suffer rigorous imprisonment for two weeks. It is against both these convictions that the two petitioners have moved this Court. In my judgment, on the findings arrived at by the Courts below, these convictions are not sustainable in law. The position is this: that the complainant Rupai, his brothers Serajuddi and Sonajuddi, and others were the owners of a plot of land situate in Anguria Bazar, and they were also joint owners of some huts which were on that land. The complainant's case is that this piece of land and the huts standing thereon were inherited from their father Osimaddi, not only by the complainant but also by Sonajuddi. For the purpose of this case, it is not necessary to mention the names of other co-sharers. The complainant's further case is, and that is also the finding, that the complainant and his other co-sharers including Sonajuddi were in possession of the land and huts. But about three days before the occurrence the huts were blown away, and the two petitioners utilized some of the old materials of those huts and built a hut on the same land.

The two petitioners, in execution of a decree obtained against Sonajuddi, purchased four anna share in the land and the structures and they had taken possession through Court. As against Sonajuddi this possession is effective in the eye of the law and it amounts to actual possession. The question is whether under these circumstances these persons can be convicted under the above-mentioned sections. If Sonajuddi had utilized the materials and had built a hut on the same joint land he could not have been convicted under S. 379. This is my firm opinion because there would be no dishonesty on his part. 'Dishonesty' has been defined in the Penal Code to mean 'wrongful loss' or 'wrongful gain.' A co-sharer in possession of a joint property has the undoubted right to remove a moveable

property in his possession and also in the possession of other co-sharers from one spot of the joint land to another spot of the same land. There would be no wrongful loss to the other co-sharers in such a case. Having regard to the fact that the possession of the two accused was effective against Sonajuddi, I do not see how they can be convicted of any offence in such a case. One of the elements of theft, namely dishonesty, is absolutely absent in this case. I do not see also how they can be convicted under S. 447. They are part owners of the land, they have obtained effective possession of Sonajuddi's share and they had entered upon the land for the purpose of exercising the rights of ownership. If the other co-sharer comes to resist them, and in spite of the protest they remain upon the land, I do not see how it can be said that they entered the land to intimidate, insult or annoy the other co-sharers. They wanted to go in peacefully, and it was only the obstruction of the complainant which led them to enter in spite of the protest. For these reasons I set aside the conviction and sentence under both the sections aforesaid and acquit both the petitioners. The fines, if paid, must be refunded.

R.M./R.K. *Convictions set aside.*

A. I. R. 1936 Calcutta 262

GUHA AND BARTLEY, JJ.

Newaz Ahmad Khan—Appellant.

v.

Hasamaddin Ahmed and others—Respondents.

Appeal No. 139 of 1933, Decided on 6th February 1936, from original decree of Dist. Judge, 24-Parganas, D/- 24th April 1933.

Mahomedan Law — Wakf — Mutawalli — Removal of—Mutawalli setting up personal title to portion of wakf property—Mutawalli also guilty of breach of trust and negligence of duty—He is liable to be removed from office.

Setting up a title to wakf property is not by itself a sufficient ground for the removal of a mutawalli from his office, if it is established that there was honest administration of the wakf and upon conformity to and not in defiance of the trust for which the religious institution is established. Where, however, in addition to the fact that the mutawalli had set up his personal right to a portion of the wakf property which was not established the evidence shows that the mutawalli has practically no accounts of his management of the wakf property and that he has been guilty of misfeasance, breach of trust, and negligence of

duty, the mutawalli is liable to be removed from his office: 1928 P C 106, *Ref.*

[P 262 C 2; P 263 C 1]

Prakash Chandra Majumdar and Amalendu Sen—for Appellant.

S. C. Chowdhury, Abdul Ali and Surendra Nath Basu 2— for Respondents.

Judgment.—The plaintiffs in the suit in which this appeal has arisen prayed for reliefs contemplated by S. 92, Civil P. C., and succeeded in obtaining a decree for the removal of the defendant, a Mutawalli of the Wakf property consisting of a mosque, tombs, trees, and out-houses, standing on about 3-1/2 bighas of land, premises Nos. 12 and 12/1 Mayerpore Road, Alipore, and granting other incidental and ancillary reliefs claimed in the suit.

The questions raised in support of this appeal by defendant appellant, was mainly whether the learned District Judge in the Court below, was right in proceeding, almost entirely, on a previous decision of this Court in which it was held that the defendant in the suit had set up his own title to a part of Wakf property. The result of the decision was that the Mutawalli had set up his personal right to Wakf property which was not established on evidence. As has been held by the Judicial Committee of the Privy Council, setting up a title to Wakf property as his personal estate might not by itself be sufficient ground for removal of a Mutawalli from office, if it were established that there was honest administration and management of the Wakf, and upon conformity to, and not in defiance of the trust for which a religious institution was established. A breach of these obligations on the part of the trustee would be a ground for removal from office: see 47 C L J 542 (1). In addition to the position regarding which there cannot be any controversy, in view of the judgment of this Court dated 30th September 1929, in appeal from appellate decree No. 1618 of 1926, that a portion of the wakf property which the mutawalli defendant claimed, in his personal right, was not the personal property of the defendant, and that it was wakf property, the evidence in the case before us, including the evidence of the defendant himself, establishes the fact that the mutawalli has practically no accounts

1. *Mt. Hassem Bibi v. Nur Hussain Shah*, 1928 P C 106=109 I C 52=47 C L J 542 (P O).

of his management of the wakf property; and the definite evidence in the case coming from the side of the plaintiffs-respondents, relating to misfeasance, breach of trust and neglect of duty on the part of the mutawalli, as alleged in the plaint, stands un rebutted. In our judgment there cannot be any doubt, on that evidence, that the income of the trust property was being misapplied and misappropriated, and further that the duties imposed by the trust were being persistently neglected.

On the materials before us, therefore, in addition to the decision of this Court, clearly establishing the petition that the mutawalli defendant was persistently setting up a title of his own to a portion of the wakf property as his own personal estate, there was ample proof of the allegations as to breach of trust and neglect of duty on the part of the trustee justifying his removal. A question was raised in support of the appeal, that the decision and decree, as passed by the trial Court for accounts, do not mention the period of accounting. The learned counsel appearing for the plaintiffs-respondents has no objection to the period of accounting being fixed by this Court, and to that period being limited to six years before the date of institution of the suit. The decree of the Court below is to be varied to that extent, fixing the period of accounting. In the result, with the modification mentioned above, the decision and decree passed by the Court below are affirmed and the appeal is dismissed. There is no order as to costs in this appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 263

R. C. MITTER, J.

Maharaj Bahadur Singh—Petitioner.
v.

Binode Behary Choudhury and others
—Opposite Party.

Civil Rule No. 1376 of 1935, Decided on 18th February 1936, from order of Munsiff, Additional Court, Balurghat, D/- 27th May 1935.

Bengal Tenancy Act (8 of 1885), Ss. 26-J and 111—Application under S. 26-J for recovery of money and not for determination of status of tenant—Court is not empowered to stay application under S. 111, although question of status may have to be gone into.

A suit or proceeding can be stayed under S.

111, Ben. Ten. Act only if the suit or application is filed for the determination of the status of any tenant. Where therefore the prayer in an application under S. 26-J is not for the determination of the status of a tenant but is for recovery of a sum of money and it is a money claim which the landlord wants to enforce the mere fact that the question of status may have to be gone into because the defendant has raised it, will not authorise the Court to stay the application under S. 111: 1928 Cal 388, *Rel. on.*

[P 263 C 2]

Urukram Das Chakravarty—for Petitioner.

Order.—This rule is directed against an order of the learned Munsiff, Additional Court, Balurghat, dated 27th May 1935, by which he has stayed an application made by the petitioner before me, under S. 26-J, under the provisions of S. 111, Ben. Ten. Act. In my judgment, S. 111 does not apply to this case. The opposite party according to the case of the petitioner, took a transfer on the footing that the holding was not an occupancy holding, but a holding at a fixed rent. On that the petitioner before me filed an application under S. 26-J, and in answer to that application the opposite party has stated that the holding in question is a holding held at a fixed rate of rent. He also made an application for stay of the hearing of this application on the ground that an order has been made under S. 101, Ben. Ten. Act, directing the preparation of the record of rights. In my judgment simply because a defendant raises a question of status it cannot be urged that a pending proceedings should be stayed under the provisions of S. 111. 32 C W N 132 (1), is an authority for this proposition. A suit or proceeding can be stayed under S. 111 only if the suit or the application is filed for the determination of the status of any tenant. The prayer in an application under S. 26-J is not for the determination of the status of a tenant but for the recovery of a sum of money although in deciding the said claim of the landlord, the question of status may have to be gone into. It is a money claim which the landlord wants to enforce, and the fact that the question of status has to be gone into because the defendant has raised the question of status, will not authorise the Court to stay the application under S. 111. I accordingly make this Rule absolute and

1. *Khemadananda Kumar v. Rashamaya Halder*, 1928 Cal 388=106 I C 875=32 C W N 132.

direct the learned Munsiff to proceed on with the application under S. 26-J. As there is no appearance on behalf of the opposite party, there will be no order for costs.

R M./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 264

R. C. MITTER, J.

Jogendra Nath Das — Principal-Defendant—Petitioner.

v.

Sarup Chand-Hukum Chand, Firm—Plaintiff and another—Pro forma Defendant—Opposite Party.

Civil Rule No. 53 of 1936, Decided on 19th February 1936, from order of 1st Addl. Sub-Judge, 24-Parganas, D/- 25th November 1935.

Court-fees Act (1870), S. 7 (v), Cl. (e)—Suit for possession—Valuation of subject matter—Legislature draws distinction between cases where subject matter is land and where it is house or garden—If subject matter is garden case comes under S. 7 (v), Cl. (e).

For purpose of computing valuation of the subject-matter in a suit for possession, the legislature had drawn a distinction between the case where the subject-matter is land and where the subject-matter is house or garden. If the subject-matter in suit is a garden it would come under Cl. (e), sub-s. (v), S. 7 and Court-fee will have to be paid on the market value of the garden and not on the basis of annual revenue of land. [P 264 C 2]

Probodh Chandra Chatterjee and Bireswar Chatterjee—for Petitioner.

Kushi Prasun Chatterjee—for Opposite Party.

Order.—The defendant is the petitioner before me. The plaintiff instituted a suit to recover possession of certain property described in the schedule to his plaint. There had been a revenue sale. He was the former proprietor; and his case in the plaint is that the revenue sale is illegal, a nullity and has not passed title to the defendant. Secondly, he prays for setting aside the revenue sale in any event; and his third prayer is for recovery of possession.

The suit is a suit for recovery of possession and for the purpose of Court-fees and valuation it comes within sub-s. 5, S. 7, Court-fees Act. The question is whether under Cl. (a) or Cl. (e) of that sub-section such valuation is to be made. In the schedule to the plaint the land is described as "garden land together with trees, etc." The land is comprised in holding No. 39, Touzi No. 1298/2833 of

the Collectorate of the 24-Parganas. Of this holding a separate revenue has been assessed at Rs. 21-3-5. The plaintiff's valuation has been arrived at by multiplying the said sum by 10; and the Court-fee was paid on the said sum. The defendants stated that the Court-fee was to be paid not on the basis of revenue assessed but on the basis of the market value, and he said that the market value was more than Rs. 5,000 and so the suit was beyond the jurisdiction of the Munsif at Alipur. The learned Munsif held that the value should be computed in accordance with Cl. (e), sub-s. 5, S. 7, Court-fees Act. He also held that as the market value exceeded his jurisdiction the plaint should be returned for presentation to the proper Court and he ordered the return of the plaint.

An appeal was taken by the plaintiff and it was heard by the learned Subordinate Judge. When the suit was pending in the Court of the Munsif, the plaintiff by way of amendment wanted to strike out the words "garden" and "trees, etc." and the learned Subordinate Judge held that that amendment ought to have been allowed, and if that amendment be allowed, the suit would be a suit for recovery of land and it would come under Cl. (a). Para. 1, sub-s. 5, S. 7 begins by saying that in suits for possession of land, house and gardens the Court fees are to be paid according to the value of the subject-matter. Then follows certain clauses which deal with the method of computation of the value. Immediately after para. 1, it is said: where the subject-matter is land, the method of valuation is to be as indicated in four clauses, (a) to (d). Reading these clauses and Cl. (e) it appears to me that for the purpose of computing valuation of the subject-matter in a land for possession, the legislature has drawn a distinction between the case where the subject-matter is land, and where the subject-matter is a house or garden. If the subject-matter of the present case is really a garden, in my opinion it will come under Cl. (e), sub-s. 5, S. 7, Court-fees Act, and the Court-fee will have to be paid on the market value of the garden and not on the basis of annual revenue of the land. If the subject-matter is a garden, the application of the plaintiff for amendment would have no bearing upon this question.

Inasmuch as, it has not been held whether the subject matter is land or garden, I consider that the question must be gone into after giving the parties an opportunity to lead evidence. If the Court comes to the conclusion that the property is a garden it will direct the plaintiff to file the plaint in proper Court. If not the suit will be retained in the Court of the Munsif. To have this question decided I remand the case to the Court of first instance with liberty to the parties to adduce evidence on this point. The rule is made absolute. Costs of this rule will abide the result, hearing fee one gold mohur.

R.M./R.K. Rule made absolute.

A. I. R. 1936 Calcutta 265

R. C. MITTER, J.

Saila Bala Roy and on her death Malti Bose—Petitioner.

v.

Chairman, Darjeeling Municipality—Plaintiff Opposite Party.

Civil Rule No. 757 of 1935, Decided on 10th February 1936, from decree of Judge, Sm. C. C., Darjeeling, D/- 30th March 1935.

Electricity Act (9 of 1910), S. 23 (3) (c), Schedule, Cl. 11 (a)—S. 23 (3) (c) does not authorise licensee to levy minimum charges without agreement with consumer.

Clause (c), sub-s. (3), S. 23, contemplates charges made on the basis of consumption. A minimum charge is not a charge which has for its basis the consumption of electric energy.

[P 266 C 2]

Clause (c), sub-s. (3), S. 23 does not authorise a licensee to levy minimum charges without any agreement with the consumer. Cl. 11 (a) of the Schedule only empowers or authorises the licensee to levy the minimum charges, but that power can only be exercised by licensee through a contract entered into with an intending consumer and not otherwise: 1932 Cal 14, Ref. (*Policy of the Act explained.*)

[P 266 C 2; P 267 C 1]

Susil Chandra Sen—for Petitioner.

Basak, Gopesh Chandra Chatterjee for Asitranjan Ghose—for Opposite Party.

Order.—This rule, which has been obtained by the defendant, relates to the claim of the opposite party to minimum charges for the supply of electric energy. Dr. D. N. Roy was the owner of a house within the limits of the Darjeeling Municipality known as the "Roy Cot." The said Municipality obtained a license in the year 1913 from the Local Government for the supply of electric energy in Darjeeling. It constructed a plant and

began supplying electric energy. Dr. Roy applied about fifteen years ago for the supply of electric energy to his premises, and he was required to enter into a written contract before he was allowed the supply. This written contract must have been entered into in pursuance of Cl. 6 of the schedule annexed to the Indian Electricity Act of 1910. At the time when the contract was entered between Dr. Roy and the Municipality, there was no clause in the said schedule which, subject to such additions and modifications as may be made by the Local Government, was incorporated in every license by the provisions of Cl. (f), S. 3 of the said Act. In the year 1922 the Act was amended and a clause 11-A, was added to the schedule. The clause is in these terms:

A licensee may charge a consumer a minimum charge for energy of such amount and determined in such manner as may be specified by his license and such minimum charge shall be payable notwithstanding that no energy has been used by the consumer during the period for which such minimum charge is made.

The license of the Municipality has not been produced, but a copy of the Calcutta Gazette dated 22nd January 1925 has been produced by the plaintiff. The notification dated 19th January 1925 in the Calcutta Gazette runs as follows:

It is hereby notified for general information that, in exercise of the powers conferred by Cl. (6), sub-s. (3), S. 4, Electricity Act 1910, (IX of 1910), the Governor in Council is pleased to make the following amendment in Cl. 5 of the Darjeeling Electric License, 1913, published under the Public Works Department notification No. 1 M. P. 1, dated 14th July 1913: After Cl. 5, sub-s. (b) of the Darjeeling Electric License, 1913, the following shall be added, namely: Provided that where the total charges for energy in any year fall short of Rs. 72 per kilowatt of the total connected load in respect of any one installation connexion to the licensee's distributing system, the licensee may require the consumer to pay a minimum charge for such year at the rate of Rs. 72 per kilowatt of the total connected load of the installation, and where a minimum charge is made for any such year as aforesaid, the licensee shall not charge separately for any energy consumed in respect of such installation during that period, etc.

On 12th March 1925 the Municipality passed a resolution authorising the Municipality to levy minimum charges for April 1925 in accordance with the terms of the said notification. Dr. Roy died in 1926 and the defendant petitioner is his legal representative. It is admitted by plaintiff's witness 1, Nikhil Chandra Sen

Gupta, electrical sub-overseer of the Municipality, that agreements for payment of minimum charges were taken from consumers after the introduction of the minimum charges in that Municipality, but no such agreement was taken either from Dr. Roy or after his death from his legal representatives. Accordingly no contract to pay minimum charges has been pleaded by the Municipality in its plaint. In the year 1930-31 the actual consumption of "Roy Cot" was Rs. 3-15-0. A bill for that amount was made out by the Municipality and paid by the consumer on 17th August 1932. On 29th September 1932 a further bill for Rs. 9-0-3 was made out and served on the consumer on 17th October 1932. In the said bill the sum of Rs. 12-15-3 was shown as the minimum charges for the year 1930-31 and the sum of Rs. 3-15-0 which was paid by the consumer previously was deducted and a demand was made for the balance of Rs. 9-0-3. The sum of Rs. 12-15-3 would be the minimum charges according to the said Government Notification. The said amount being not paid the present suit was instituted by the Municipality to recover the said sum of Rs. 9-0-3. The defendant pleaded that as there was no contract to pay minimum charges, the suit should be dismissed. This defence has been overruled and a decree has been made by the Small Cause Court Judge of Darjeeling.

Although the amount involved in this rule is a small one, a question of great importance arises in the rule, and in my judgment the defendant is entitled to succeed in the plea taken by her. A license given by the Local Government to a person under the Electricity Act confers the right on the licensee to supply electric energy in a specified area. Certain statutory powers and duties are conferred and imposed on the licensee. These powers are given for the purpose of enabling the licensee, who undertakes a public undertaking, to construct his works, his plant, service mains, etc., and to maintain them and certain duties are also imposed on him for the safety of the public or individuals. The undertaking being for public benefit a duty is imposed on the licensee to supply energy to any person, who wants to take a supply of energy, subject to certain conditions laid down either in the body of the Act or in the schedule which is incorporated in the

license subject to any addition or modification which the Local Government may make. The licensee cannot show undue preference to any particular consumer in the matter of rates; subject to this he is empowered to regulate his relations by agreement with his consumers, but even here there are restrictions imposed. He cannot in his agreement with his consumers insert any condition whatsoever, but only such conditions which are consistent with the Act or his license and to which previous sanction of the Local Government had been obtained: Ss. 21 to 23. Subject to these restrictions, the legislature in my opinion intended the rights between a licensee and a consumer to be regulated by contract. Cls. 6 and 5 respectively of the schedule cast the obligation on the licensee to supply electric energy to an applicant or a group of applicants for supply of electric energy only when the applicant or group of applicants enter into a written contract with the licensee. The only power which is reserved to the licensee by the Act in the matter of rates, a power which may be exercised by the licensee apart from contract, is that he can charge on any one of the three alternative modes specified in Cls. (a), (b) and (c) of sub-s. 3 to S. 23 of the Act, and even when the licensee intends to prefer to go upon the basis of Cl. (c) of that sub-section, the consumer can by following the procedure laid down in Cl. 10 of the schedule compel the licensee to adopt either of the modes mentioned in Cls. (a) and (b). In my judgment Cl. (c) contemplates charges made on the basis of consumption. A minimum charge is not really a charge which has for its basis the consumption of electric energy. It is really based on the principle that every consumer's installation involved the licensee in a certain amount of capital expenditure in plant and mains on which he is to have a reasonable return. He gets a return when energy is actually consumed, in the shape of payments for energy consumed.

When no such energy is consumed by a consumer, or a very small amount is consumed in a long period, he is allowed to charge minimum charges by his license, but these minimum charges are really interest on his capital outlay incurred for the particular consumer. Cl. (c), sub-s. 3, S. 23 accordingly in my judgment does not authorise a licensee to levy minimum

charges without any agreement with the consumer. I also fail to see how Cl. (c) can also be invoked by the Municipality to support its claim for minimum charges as the Local Government has not exercised their powers under that clause by the aforesaid notification issued by it. In my judgment Cl. 11 (a) of the schedule only empowers or authorises the licensee to levy minimum charges. That clause was inserted by the amendment of 1922 to remove doubts on the authority of the licensee to enter into contracts with intending consumers with terms for payment of minimum charges. But that power in my judgment can only be exercised by a licensee through a contract entered into with an intending consumer. The Local Government by the issue of the aforesaid notification has only amended the license of the Municipality and has simply given it the power or authority to enter into such contracts with consumers for levying minimum charges. The view I am taking is not in my judgment inconsistent with the decision in 35 C W N 933 (1), a case which did not deal with minimum charges. As there was no such contract either with Dr. Roy or his legal representative the Municipality cannot sue for minimum charges. The rule is accordingly made absolute. The judgment and decree of the Small Cause Court are set aside. The petitioner must have the costs of the lower Court. There will be no costs in the rule.

R.M./R.K.

Decree set aside.

1. Burdwan Electric Supply Co. v. Sm. Kumud Kamini, 1932 Cal 14=135 I C 721=58 Cal 1458=35 C W N 933.

A. I. R. 1936 Calcutta 267

S. K. GHOSE AND EDGLEY, JJ.

Amarendra Nath Mallick — Decree-holder—Petitioner.

v.

Balai Chand Ghatak — Judgment-debtor—Opposite Party.

Civil Rule No. 1357 of 1935, Decided on 10th February 1936, from order of 1st Court Munsiff, Krishnagar (Nadia), D/- 15th July 1935.

(a) Civil P. C. (1908), Ss. 115 and 104, O. 43, R. 1—Order directing execution to be dismissed for non-prosecution is not appealable—It is open to revision.

No appeal lies with reference to an order directing an execution case to be dismissed for non-prosecution. Such an order does not fall

within the scope of those sections of the Civil P. C., which relate to appealable orders, nor can it be said to be a decree. Such an order is in the nature of one for dismissal for default and is open to revision. [P 268 C 1, 2]

(b) Decree—Execution — Decree-holder is always entitled to apply for execution to Court passing decree although execution is in respect of property situate outside its jurisdiction.

A decree-holder has always a right to apply, as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court: 1931 Cal 312, *Foll.*; 17 Cal 699 (*F B*), *Disting.* [P 268 C 2]

(c) Execution—Transfer of decree for execution—Transferring Court retains jurisdiction over execution though for specific purposes only.

Even after the transfer of a decree for execution to another Court, the transferring Court retains jurisdiction over the execution, though for certain specific purposes only: 1931 Cal 312, *Foll.* [P 269 C 1]

(d) Decree — Execution — Application for execution to Court passing decree — Such Court can transmit decree to Court where immoveable property sought to be sold is situate along with papers required by O. 21, Rr. 5 and 6, Civil P. C.—Fresh application for execution to transferee Court is not necessary.

Where an application for execution is made to the Court which passed the decree, that Court will transmit the same to the Court where the immoveable property sought to be sold is situate along with the other papers required by O. 21, R. 5 or R. 6, Civil P. C., and then the latter Court will make an order for sale. It is not necessary in such a case to have a fresh application for execution before the Court where immoveable property sought to be sold in execution is situate: 1931 Cal 312, *Foll.* [P 269 C 1]

Bejoy Kr. Bhattacharjee, Panchanan Ghose and Sourindra Narain Ghose—for Petitioner.

Amarendra Nath Bose and Paresh Nath Mukerji—for Opposite Party.

Edgley, J. — This rule is directed against the order of Babu D. N. Pal, Munsiff of Krishnagar, dated 15th July 1935, in which he directed that a certain execution case should be dismissed for non-prosecution. The facts of the case appear to be that the petitioner's mother obtained a money decree against the opposite party on a promissory note in the Court of the first Munsif at Krishnagar. This decree was then put into execution, but during the course of the execution proceedings a brother of the judgment-debtor and certain other people

filed a claim case in respect of the property against which the decree was sought to be executed. This claim case was allowed on 17th November 1934 and it is contended on behalf of the opposite party that, as a result of this claim case being allowed, there remained no property against which execution could be taken.

On 1st April 1935, the petitioner applied for amendment of the execution petition by including therein certain other property not within the jurisdiction of the Krishnagar Courts. The Munsiff allowed the amendment on 30th April 1935. On 20th June 1935 an application was made for transmitting the decree to the Court of the Munsiff at Alipur for execution but with reference to this application on 12th July 1935 the learned Munsiff held that the procedure which the decree-holder desired to adopt was irregular and he directed that the decree-holder should file a definite application stating whether he wished the decree to be sent for execution to the Alipur Court. Such an application was filed and on 15th July 1935, the learned Munsiff directed that the execution case should be dismissed and that the decree-holder should make a fresh application in proper form for a transfer of the decree for execution. It is against the latter order that this rule has been obtained.

It has been urged by the learned advocate for the petitioner that the learned Munsiff acted illegally in dismissing the execution case and that the effect of his order has been to compel the petitioner to file a fresh application for execution in the Alipur Court which, having regard to the circumstances of the case, may possibly be held to be time-barred. A preliminary objection has been urged with reference to this rule inasmuch as it is contended that no application lies for the revision of the order dated 15th July 1935 because no appeal with reference to the order in question was preferred to the District Judge. It appears however that no appeal lies with reference to an order of this nature. Such an order does not fall within the scope of those sections of the Civil Procedure Code which relate to appealable orders and in no circumstances can it be held to be a decree, and in any event, having regard to the provisions of S. 2 (2), Civil P. C., the order from its very nature

appears to be an order for dismissal for default. We are not prepared to accept the argument which has been urged in connexion with this preliminary objection.

The learned advocate for the opposite party next contends that the order of the learned Munsif dated 15th July 1935 was correct inasmuch as the Court of the Munsif of Krishnagar, after the passing of the order of 3rd April 1935, was functus officio in view of the fact that the only property against which execution could then be taken was situated outside the jurisdiction of the Court. With regard to this argument it must be remembered that on 3rd April 1935 the learned Munsif had merely permitted the amendment of the petition for execution. As the matter then stood before him, therefore, there was a pending application for the execution of a decree passed by this Court and such application was with a view to execution proceedings being taken against certain property outside his territorial jurisdiction.

The learned advocate for the opposite party relies in support of his contention upon a decision of the Full Bench of this Court in 17 Cal 699 (1) in which it was held that a Court had no jurisdiction in execution of a decree to sell property over which it had no territorial jurisdiction at the time it passed the order of sale; with reference to this particular case it was however pointed out by Mitter, J., in 35 C W N 77 (2) that the case in question was no authority for the proposition that the Court which passed the decree had no jurisdiction to entertain the application for execution. This is a question which was discussed at great length in 35 C W N 77 (2) and it was held by Mukerji and Mitter, JJ., that a decree-holder had always had a right to apply as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court could be no more than execution by transmission to another Court. Having regard to the clear views expressed by Mukerji and Mitter, JJ., in the above case we are of

1. Prem Chand Dey v. Mokhoda Debi, (1890) 17 Cal 699 (F B).

2. Sreenath Chakravarti v. Priya Nath Bando-padhya, 1931 Cal 312=192 I C 149=58 Cal 832=52 C L J 569=35 C W N 77.

opinion that there is no force in the contention put forward by the learned advocate for the opposite party with reference to this matter.

With reference to the order dated 12th July 1935 it appears to be somewhat unfortunate that the learned Munsif should have directed the decree-holder to file a fresh petition as directed by him in the concluding portion of his order. In view of the fact that a petition for transmitting the decree to the Court of the Munsif at Alipur appears to have been made on 20th June 1935 the circumstances indicate that even if the decree-holder had acquired certain papers other than those mentioned in O. 21, R. 6, Civil P. C., to be transferred to Alipur it would have been sufficient if the learned Munsif had directed a transfer of the decree with such papers as might legally be sent, having regard to the provisions of O. 21, R. 6 of the Code. The procedure which was actually adopted in the case appears merely to have the effect of delaying the execution proceedings and to have placed unnecessary difficulties in the way of the decree holder. As regards the order dated 15th July 1935 the learned Munsif appears to have been under a misapprehension in supposing that the execution proceedings could not be allowed to remain pending in his Court after the decree had been transferred to another Court for execution. With regard to this point Mukerji, J., points out in 35 C W N 77 (2):

It may be stated here that even after transfer, the transferring Court retains jurisdiction over the execution, though for certain specified purposes only.

Further, on the same point, Mitter, J., makes the following observations:

If an application for execution is made to the Court which passed the decree that Court will transmit the same to the Court where immoveable property sought to be sold is situate along with the other papers required by O. 21, R. 5 or R. 6 of the Code, and then the latter will make the order for sale and it will not be necessary in such a case to have a fresh application for execution before the Court where immoveable property sought to be sold in execution is situate.

Having regard to the consideration mentioned above we are of opinion that the order dated 15th July 1935 is wrong. This rule must therefore be made absolute with costs and the order against which it is directed is set aside. The petitioner should make such further application as he considers necessary with

a view to the transfer of the requisite papers to Alipur. The hearing fee is assessed at three gold mohurs.

S K. Ghose, J.—I agree.

R.M./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 269

MCNAIR, J.

Kanhyalal Bhargava and others—Creditors—Petitioners.

v.

Banwari Lal and others—Debtors—Opposite Parties.

Insolvency Case No. 41 of 1935, Decided on 22nd August 1935.

(a) **Presidency Towns Insolvency Act (3 of 1909), S. 9 (g)**—Notice of suspension of payment of debt—Oral and written notices alleged—Written notice informal—Oral conversation cannot be held to be definite and formal notice.

Where under S. 9 (g), Presidency Towns Insolvency Act, both written and oral notices of suspension of payment of debts were alleged and it was found that correspondence comprising of written notice was of formal nature, it cannot be held that the conversation amounting to oral notice was definite, formal and deliberate, intended to be understood in that sense: *Ex parte Oastler*, 13 Q B D 471, *Ref.* [P 271 C 1, 2]

(b) **Presidency Towns Insolvency Act (3 of 1909), S. 9 (g)**—Difference between S. 13 (4) (b) and S. 9 (g)—Under S. 9 (g) debtor must be unable to pay and also convey his intention to his creditor not to pay.

Section 13 (4) (b) provides that the Court shall dismiss a petition for adjudication if the debtor appears and satisfies the Court that he is able to pay his debts. But S. 9 (g) contemplates something entirely different. Not only must the debtor be unable to pay his debts, but he must also convey to the creditor his intention not to pay: 1933 Cal 417, *Ref.*

[P 271 C 1]

(c) **Presidency Towns Insolvency Act (3 of 1909), S. 9 (g)**—Mere inability to pay does not amount to suspension of payment of debt.

A mere declaration of inability to pay does not of itself constitute an act of insolvency: *English Cases Ref.*

[P 273 C 1]

(d) **Hindu Law—Joint family—Institution of suit for partition by member operates as severance of joint status from date of institution—Separation of one does not involve separation of all members—What amounts to separation of all is a question of fact—Subsequent conduct and intention should be decided.**

There can be no doubt that the institution of a partition suit by a member of a joint family operates as a severance of the joint status as from the date of its institution. The member who institutes the suit intimates to his co-sharers his clear and unequivocal intention of his desire to sever himself from the joint family and the status of the plaintiff as separate in estate is brought about by his assertion of

his right to separate. The separation of the plaintiff however does not automatically involve the separation of the other branches of the family and it is a question of fact in each case whether the other members of the family separated or remained united. Their subsequent conduct must be scrutinised and thus their intention must be decided. [P 273 C 2]

(e) **Presidency Towns Insolvency Act (3 of 1909), S. 113** — Rules framed by Calcutta High Court—Petition of insolvency by creditor—Rules of procedure explained.

There are particular rules dealing with an application by a petitioning creditor and the rules contemplate only a formal petition with an affidavit in support and a notice by the debtor specifying the statements which he intends to deny or dispute. No other affidavit, notice or pleading is suggested, but R. 81 contemplates an adjudication on the materials before the Court including any oral evidence that may be tendered at the hearing and on adjournment if either party desire to produce further oral evidence so long as the rules indicate a particular form of procedure that procedure should be observed. [P 274 C 2]

S. N. Banerjee and S. C. Roy—for Petitioners.

A. K. Roy, S. M. Bose, Arun Sen, P. C. Ghose and I. P. Mukherji—for Opposite Parties.

Order.—This is an application for adjudication as insolvents of 19 members of a joint Mitakshara Hindu family who are alleged to be carrying on business under the firm name of Kishorelal Mukundlal at various addresses in Calcutta. That firm is alleged to be indebted to the petitioners in a sum of about rupees 75,000 on Khatapeta account. The petitioners were three members of a Mitakshara family trading as Radha Kisen Beniprasad at 10 Cotton Street, Calcutta. Kanhyalal is said to be the Karta of the family, Manoharlal is his brother and Baikuntha is the infant son of Kanhyalal who acts as his next friend. The petition was presented on 18th April 1935 and was ordered to be served on the debtors, the hearing being fixed for 21st May. The third petitioner Manoharlal died on 2nd May and his interest devolved on his brother Kanhyalal. Owing to Manohar's death the hearing was adjourned to 18th June and has since been adjourned on various occasions by consent. On 24th January 1935, a letter of demand was sent to the debtors and a reply was received dated 30th January from solicitors for 4 of the alleged debtors viz., Banwarilal, Budriprasad, Sangamlal and Samsunder who are represented on

this application by the learned Standing Counsel.

The debtor family are the descendants of Dwarkaprasad who had 5 sons and for convenience I shall refer to the various alleged debtors according to the 5 branches of his family which these sons represent: (1) Harnamdas, (2) Mohanlal. These two branches are represented before me by Mr. Sen, (3) Kisorilal's branch represented by the learned Standing Counsel, (4) Kanhyalal represented by the learned Advocate-General, and (5) is Mukundlal's branch which is unrepresented. In January 1926, Protap Chandra, a member of branch 2, filed a suit for partition of the joint family properties. A preliminary partition decree was made on 14th February 1927 by the Subordinate Judge of Allahabad. There was an appeal from that decree and on 13th January 1931 a consent decree was passed. It is clear from the pleadings in the partition suit that the Calcutta business of Kishorilal Mukundlal was included in the joint family properties being valued in the plaint at Rs. 30 lakhs. There were also numerous other businesses carried on under different names in the large towns of India and in Burma. They include a business in Allahabad where the partition suit was brought and where many of the alleged debtors reside.

The alleged debtors oppose this application on the ground that they ceased to be "partners" in the firm of Kishorilal Mukundlal on the filing of the partition suit in January 1926, which they claim formed a severance of the joint family and a cessation of the joint family business. Alternatively, they contend that their interest, at any rate in the Calcutta business, ceased in February 1927, the date of the preliminary decree, or in January 1931 when the decree was made by the appeal Court embodying the terms of settlement. They further contend that no act of insolvency has been committed and branches 1, 2 and 4 plead that it has not been established that this Court has jurisdiction within the meaning of S. 11, Presidency Towns Insolvency Act. I will deal first with the alleged acts of insolvency. These are based on S. 9 (g), Presidency Towns Insolvency Act, and are said to be notices of suspension of payment of debts. Two oral notices are alleged: (1)

28th February 1935 and (2) 5th March 1935, and two written notices in the form of letters dated respectively 30th January 1935 and 6th March 1935.

Admittedly at sometime prior to 1926 the firm of Kishorilal Mukundlal in Calcutta was a branch of a vast family business operating throughout India. The petitioners claimed to be creditors of the Calcutta branch for a sum of Rs. 74,805-3-0 calculated upto 24th January 1935, and on that date their solicitors sent a letter demanding payment to 42 members of the joint family. On 30th January Messrs. Dutt and Sen replied on behalf of branch 3 admitting the debt. This is alleged to be the first written notice of suspension. On 28th February the petitioners sent their gomastha Shewgolam Sukul to the debtor's office in Shib Thakur Lane. Shewgolam says in his affidavit that he met Banwari Lal, Songam Lal and Badri Prasad, 3 of the members of branch 3 from whom he demanded payment immediately. "They informed me" he says:

that they and other members of the joint family were unable to pay the debt, had practically closed the business and had already suspended payment of their debts to all their creditors.

The second oral notice of suspension is said to have taken place on 5th March when Jivanram, the creditors' munim gomastha, called and interviewed the same persons and received the same reply, which he was told to convey to his masters and to state "that they will be writing to them in the matter." A letter was written on 6th March, which is relied on as the second written notice of suspension. This letter of 6th March does not mention either of the interviews and considering that it was supposed to be written immediately after Jivanram's call, and in pursuance of an alleged statement to him that it would be written, the failure to mention the interviews is noteworthy. Again, at the interviews it was alleged that the debtors stated that they had suspended payment of all their creditors. This is not the statement in the letters, and it is contrary to fact, for it appears that several creditors were paid, though comparatively small sums, throughout March and until the middle of June. It may be that the alleged interviews took place, though even that is denied on oath by Sangam Lal, but I cannot believe that those conversations

were definite, formal, and deliberate notices and intended to be understood in that sense; in view of the somewhat informal nature of the correspondence—anything less is inadequate: see 13 Q B D 471 (1) at p. 475. I am not prepared to accept the statements of Shewgolam and Jivanram, and I hold that no act of insolvency has been proved at the alleged interviews. Turning to the alleged written notices, the letter on 30th January is set out in para. 6 of the petition. It recites the partition suit and states that the firm of Kishorilal Mukundlal, from whom the debt is due, is one of the joint family businesses subject to the partition suit. The debt is admitted and it is asserted that the assets of the joint family will be considerably more than the amount of the debt. "There is therefore," the writers say:

no real cause of apprehension for non-payment of your clients' debt; only there may be a little delay in payment. Under the circumstances our clients hope that your clients will be good enough to stay their hands for the present.

The letter of 6th March set out in para. 11 of the petition is written by the debtor firm and purports to explain the reasons for delay in meeting their obligations. It explains the vast activities of the family and the difficulty of getting out the accounts and the valuation of their properties. They then write:

We are sorry to say, due to the most unpleasant and hostile attitude of the fighting plaintiff lately, the situation became very serious and we were obliged to put a stop to most of our business activities A commissioner however had been appointed and remarkable progress had been made. "As for your dues," they write:

We have no doubt whatever in respect of their repayment to the last pie, because our liabilities are quite insignificant in comparison with the assets of our family business, but it is only a question of time. Due to this unfortunate litigation we feel absolutely helpless at the moment and we feel sure that things will straighten out in course of the next few months. We cannot but express our most sincere thanks and gratitude for your patience and reliance on us and we do sincerely hope that in view of our past unstained business relations you will be so good as to allow us time and give us opportunity to pay back your dues. To enable us to expedite matters further we shall thank you to furnish with the amount of your dues both principal and interest up to 28th February 1935

1. Ex parte Oastler, (1885) 13 Q B D 471=54 L J Q B 23=1 Morrell 207=33 W R 126=51 L T 309.

That was to the end of the preceding month. It is contended that these letters do not give notice that the debtor has suspended or is about to suspend payment of his debts. No composition is offered and there is a definite offer to pay, and to pay in full, and although the letter of 6th March contains the statement "we were obliged to put a stop to most of our business activities . . .", this is not a categorical assertion that payment has been suspended. The meaning appears to me to be, our trade is at a standstill owing to the disputes connected with the partition, but there really has been some progress recently: the money is there, and we hope very shortly it will be available for distribution. I have been referred to numerous cases both under the English Act, in which the relevant clause is in the same words, and under the Indian Act, and I quote Lord Justice Bowen's words in (1887) 4 Morrell 25 (2), at p. 32, which have been referred to with approval in most of the reported cases:

Suspension of payment is a business term usually applied to traders . . . It seems to me that it means not meeting your engagements, and paying your debts in the ordinary course of business as they become due, and as you are called upon to pay them. What, therefore, is the question that arises when we are presented with a statement of a debtor, and we are asked to consider that it falls within the mischief at which this provision of the statute strikes? We have in each case to ask ourselves, and in each case to answer the question, what is the reasonable construction which those who receive this statement of the debtor would have a right under the circumstances of the debtor's case to assume, and would assume, to be his meaning as to what he intends to do with respect to paying or suspending payment of his debts. Having said that, I protest that I hope we are not going to have a series of cases which are to be cited hereafter as determining that special words used by a special debtor in a particular case do or do not amount as a matter of law to notice of suspension.

and on p. 34:

It does seem to me that applying as far as I can the only real legal test to this circular to bring it within the statute, we ought to take the circular in its business sense, then to find the circumstances of the debtor under which he makes it, and then to see what the statement came to . . .

No useful purpose can be served by comparing the words used by one debtor with the words used by another; in each case it must depend on the construction of a particular document and the circum-

stances under which it was written. We do however find from the cases the legal tests to which the words should be subjected and the principles by which the Court should be guided in coming to a conclusion. It is noteworthy that most of the English cases deal with a circular letter sent by the debtor to all his creditors, but in the case of (1896) 1 Q B 619 (3) the debtor was an unmarried lady of no occupation who lived with her mother at Broadstairs, and the petitioning creditors relied on statements made by the debtor in conversation with one of her creditors as amounting to a notice of suspension of payment. During that conversation the debtor, in answer to the question, "Wont you pay Mr. Lewis's account as you promised?" replied, "No, I won't pay anybody now." In the report of his judgment at p. 623 Vaughan Williams, J. said:

If we were to hold that every refusal to pay a debt when demanded was a notice of suspension of payment, merely because it was based on the excuse of inability to pay the debt at that moment, we should be giving far too wide an application to S. 4, sub-s. 1 (h),

(which is the equivalent section in the English Act), and at p. 624 the learned Judge, while holding for other reasons that the notice came within the meaning of the section, said:

I do not hold that this notice comes within the section, on the ground that it is based on inability to pay; if that were all, it would not be sufficient . . .

In (1891) A C 316 (4), there was a general circular by the debtor to all his creditors and Lord Selborne referring to the words of Bowen, L. J., in (1887) 4 Morrell 25 (2) viz.,

what effect would the circular produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors?

said, "That is the true test," and both he and Lord Watson were of opinion that the words of that particular circular implied that the debtor meant to pay no creditor in full. In (1905) A C 442 (5), the House of Lords held by a majority that a stock broker's circular did not amount to an act of bankruptcy. Lord

3. In re Scott, (1896) 1 Q B 619=65 L J Q B 465 =44 W R 587=74 L T 555.

4. John Crook v. L & R Morley, (1891) A C 316 =61 L J Q B 97=8 Morrell 227=65 L T 359.

5. Clough v. Samuel, (1905) A C 442=74 L J K B 918=21 T L R 702=12 Manson 347=54 W R 114=93 L T 491.

2. In re Lamb, (1887) 4 Morrell 25.

Macnaughten, who dissented, held that the words did amount to a notice within the meaning of the Act. There was no divergence of opinion as to the proper construction of the section and Lord Halsbury in his speech referred to the opinions of Lord Selbourne and Lord Watson in (1891) A C 316 (4), that a declaration of inability by a debtor does not of itself and without reference to context or circumstances satisfy the statute. The same propositions have been considered and applied in 49 All 321 (6). For the petitioning creditor reliance has been placed on the decision of this Court in 60 Cal 345 (7), where it was held that although a debtor may have assets which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he is not able to pay his debts within the meaning of S. 13 (4) (b), Presidency Towns Insolvency Act. That Section provides that the Court shall dismiss a petition for adjudication if the debtor appears and satisfies the Court that he is able to pay his debts. Had the writer of the letter of 6th March appeared he might have found difficulty in persuading the Court that he was able to pay his debts, but S. 9 (g) contemplates something entirely different. Not only must the debtor be unable to pay his debts, but he must also convey to the creditor his intention not to pay.

In the English cases to which I have referred the House of Lords have laid it down quite definitely that a declaration of inability to pay does not of itself constitute an act of insolvency. In the present case I am unable to hold that the reasonable interpretation of the two letters is that the debtor intended to give notice to the petitioning creditor that he had suspended or was about to suspend payment of his debts. In the letter of 30th January there is not a word which suggests a general suspension of payment, and with regard to the particular debt there is definite assurance of payment in the near future. I have already given my reasons for considering that the letter of 6th March did not constitute a notice of sus-

pension. For these reasons in my opinion there has been no act of insolvency and this application must be dismissed, but in case the matter is taken further, I will record my opinion on the question which was argued at some length regarding the liability of the branches 1, 2 and 4. Reference is made to S. 11, Presidency Towns Insolvency Act, and it is contended that the Court has jurisdiction to make an order of adjudication only if the debtor has carried on business in person or through an agent within the limits of the ordinary original civil jurisdiction of this Court. Branches 1, 2, and 4 urge that there has been a partition of the joint family and that they are no longer carrying on business in Calcutta so as to be liable to adjudication on failure by the Calcutta branch to meet its liabilities.

There can be no doubt that the institution of a partition suit by a member of a joint family operates as a severance of the joint status as from the date of its institution. The member who institutes the suit intimates to his co-sharers his clear and unequivocal intention of his desire to sever himself from the joint family, and the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate. The separation of the plaintiff however does not automatically involve the separation of the other branches of the family, and it is a question of fact in each case whether the other members of the family separated or remained united. Their subsequent conduct must be scrutinised and thus their intention must be decided. It is urged in the present case that there was a severance of the joint family and a partition of the joint family properties on the institution of the suit in 1926. There was undoubtedly a severance of status; but it is a question of fact how far the various businesses remained the joint family property subject to subsequent division.

To ascertain the intention of the parties the most important evidence is the partition decree. The preliminary decree of 14th February 1927 declared that the property in the schedules to the plaint was joint family property. The Calcutta business was specifically set out in Sch. A to the plaint, and the plaint itself alleged that the joint family business was carried on in Calcutta among other places. "The business" it states

6. Narain Das v. Chiman Lal, 1927 All 266=102 I C 191=49 All 321=25 A L J 219.

7. Pratapmull Rameshwar v. Chunilal Johury, 1933 Cal 417=144 I C 142=60 Cal 345.

is transacted jointly, and the business in every shop and in mills is carried on in the name and supervision of some one or the other member of the family aforesaid.

These allegations are admitted in the written statements of members of branches 2 and 4. The consent decree of 13th January 1931 provides for division of the entire property into five lots of equal value. Each item of property was to be valued by a commissioner and the true valuation of the "shops with business" should be "according to the present existing net assets as disclosed by the account books of those shops."

There was a further provision that the entire net income, after meeting the necessary expenses and losses during the pendency of the suit, shall be a part of the divisible property. The petitioners rely strongly on this provision which they contend shows that the businesses were to continue as part of the joint assets and indicate the intention of the co-sharers to carry them on as undivided joint property pending the allocation of shares by a commissioner. Reference has also been made to recent proceedings in the Allahabad Court. The affidavit containing these proceedings was filed only on 13th August and was objected to. As it consisted almost entirely of certified copies of affidavits and orders, I admitted it and it has been referred to and relied on by both sides.

In these proceedings the original plaintiffs and other members of branch 2 applied for the appointment of a receiver for the preservation of the business and properties under partition, and the Subordinate Judge appointed an interim receiver to take charge as such and submit a scheme for starting the business which had already closed down. That receiver was discharged within a few weeks and each side relies on isolated sentences in the judgment as supporting his view. The compromise decree shows that the property was divided into five lots for apportionment between the five branches of the family, but there is no clear evidence as to how the businesses were being carried on. It is alleged that the members of branch 4 were actually participating in the management of the Calcutta business, but again there is no evidence to support that allegation nor is it clear that these were debts for which all the members of the family

would be liable. All that can be said is that by operation of law the persons who carried on the joint family business have changed their status from that of joint tenants to tenants in common.

There is no evidence as to the manner in which the debts were contracted nor as to the powers of the Manager of the Calcutta business to bind members of the family who are occupied in other branches of the business. Even assuming that after partition the business remained a joint family business there is no evidence that this debt was a debt for which the other members of the family would be personally liable, and the petitioning creditor cannot get an adjudication order against members of the other branches unless he can prove their personal liability. An argument has been based on the proposition that "all the members of the family, and therefore all their property, divided and undivided, are liable for debts contracted on behalf of the family by one who was authorised to contract them" and it is urged that the managers of the Calcutta business are the "accredited agents of the family and authorised to bind them for all proper and necessary purposes within the scope of their agency."

This is a proposition of law and refers to the position of the managing member of a Hindu joint family. The family here is no longer joint and the extent of the authority that was vested in the managers of the various businesses after the partition decree was made is a question of fact which cannot be determined on the evidence before me. The burden of proving that the members of branches 2, 3 and 4 are personally liable rests on the petitioning creditor and that burden he has not discharged. In view of my findings the petition must be dismissed with costs as against all the appearing parties, including Nos. 5, 6, 7, 18 and 19, who have not appeared at the hearing. The learned Advocate-General, in opening his case, contended that the procedure adopted was incorrect and objected to the use of any affidavits in reply on a petition of this nature. This is a creditor's petition and R. 66, Insolvency Rules, provide that it shall be in form No. 8 in the appendix with such variations as circumstances may require. R. 71 provides for the petition to be verified by the applicant and R. 72 provides for affidavits in

support. The petition is then presented to the Registrar, and, if approved, admitted and referred to Court. R. 74 (2) enables the Court forthwith to make an order of adjudication or to adjourn the hearing and have the petition served on the debtor. R. 79 provides that a debtor who intends to show cause should file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute. Under R. 81 the creditor has to prove the matters disputed, and if any new matter is introduced the Court is empowered to grant the debtor such further time as may be reasonable to show cause.

These are the particular rules dealing with an application by a petitioning creditor, and it seems quite clear that the rules contemplate only a formal petition with an affidavit in support and a notice by the debtor specifying the statements which he intends to deny or dispute. No other affidavit, notice or pleading is suggested, but R. 81 contemplates an adjudication on the materials before the Court including any oral evidence that may be tendered at the hearing and an adjournment if either party desires to produce further oral evidence. I was told on inquiry that this procedure is not adopted and that the ordinary practice is to present a petition supported by affidavits, and if this is accepted, to proceed by notice of motion with affidavits in support, in opposition, and in reply. This may be the procedure as formulated in Rr. 17 to 27, but it does not appear to be the correct procedure in an application by a petitioning creditor for which the special rules to which I have referred have been laid down. In view of the practice which has become prevalent I have dealt with this application on all the affidavits that have been filed although in my opinion no affidavits in reply are permissible. So long as the rules indicate a particular form of procedure that procedure should be observed, and in future, in an application by a petitioning creditor, only such affidavits will be admitted as are contemplated by Rr. 70 to 87. In view of the above findings the petition is dismissed with costs to all the parties who have appeared including debtors Nos. 5, 6, 7, 18 and 19. Costs as of a defended suit.

B.D./R.K.

*Petition dismissed.***A. I. R. 1936 Calcutta 275**

HENDERSON AND KHUNDKAR, JJ.

Gunarberinissa Choudhurani and others
—Judgment-debtors—Petitioners.

v.

Gopendra Prosad Sukul and another—
Decree-holders and others—Opposite
Parties.Civil Rule No. 125 of 1935, Decided on
13th May 1935, from order of Sub-Judge,
Dinajpur, D/- 16th January 1935.(a) Bengal Tenancy Act (8 of 1885), S. 174
(3), Proviso (b)—Deposit need not be made
at time of filing application.To admit an application is not the same
thing as to allow it. Hence the deposit under
S. 174 (3), proviso (b) need not be made at the
time of filing the application. It is enough if
it is made before the application is allowed;
1934 Cal 491 and Civil Revn. No. 1215 of 1938,
Rel. on; 1935 Cal 91, *Expl.*

[P 275 C 2; P 276 C 2]

(b) Civil P. C. (1908), S. 115—Refusing to
entertain application on wrong construction
of section—Interference in revision is proper.Where the lower Court has under an erro-
neous construction of a section refused to enter-
tain and decide an application which the sta-
tute directs it to decide, such a matter is
clearly within the purview of S. 115 of the Code
and interference in revision is proper.

[P 276 C 2]

C. C. Biswas and Joy Gopal Ghose—for
Petitioners.*Krishna Kamal Moitra*—for Opposite
Parties.

Henderson, J.—The first point which arises for decision in this rule is whether the deposit which is required by proviso (b), sub-s. (3), S. 174, Ben. Ten. Act, is to be made at the time the application is filed, or before the application is allowed. The petitioners filed an application and the learned Subordinate Judge directed them to deposit the amount recoverable under the decree within ten days. The petitioners then obtained this rule. They are supported by the decision in 61 Cal 338 (1). On the other hand the opposite parties rely on certain general arguments and certain observations made by Mukerji, J., in 60 C L J 112 (2). On behalf of the opposite

1. Mofjuddin Muhuri v. Mofizuddin, 1934 Cal 491=151 I O 94=61 Cal 338=59 C L J 69=38 C W N 334.

2. Kuloda Prosad v. Kumar Prativa Nath Roy, 1935 Cal 91=154 I O 420=62 Cal 149=60 C L J 112.

parties it is contended that inasmuch as the applicants cannot get any relief without making the deposit, it would be futile to provide that the deposit will not be required until some subsequent date; further if the intention of the legislature was to discourage false and frivolous applications, it is obvious that that object can only be obtained if the deposit is made at the time when the application is filed. So far as attaining this object is concerned Lort-Williams, J., referred to this difficulty. Mukerji, J., also in the other case said this:

The learned Judges have pointed out the enormous difficulties that are experienced in construing the clause. We are very doubtful if it was not the intention of the legislature that the word 'allowed' in the clause should be read in the sense of 'entertained', because we are unable to hold that unless it is so read the difficulties can be solved; the solution suggested in the aforesaid decision, in our opinion is not a satisfactory solution of the difficulties.

On the other hand the learned Advocate who supported this rule asked us to examine the matter from the point of view of an applicant who is unsuccessful. His contention is that when the application may be dismissed on the merits it would be unreasonable to call upon the applicant to deposit a sum of money which might have to be returned. Finally the matter may be examined from the point of view of the destination of the money. No doubt if the section merely provided that a deposit is only to be made when the applicant is the judgment-debtor, it might be argued that it is quite reasonable to ensure that whatever might be the result of the application, the admitted debt may be liquidated and a stop put to further proceedings in execution. The difficulty here is that the deposit is to be made whether the judgment-debtor is the applicant or not. We entirely agree with the opinion of Lort-Williams, J., that it is impossible to decide what should be the proper destination of the deposit without taking into consideration the facts of each particular case. We have therefore come to the conclusion that it is quite impossible to decide this important point by attempting to decide what was the intention of the legislature, and to what extent that intention has been carried out by the actual provisions of the section; in our opinion the only satisfactory way to decide the question is to consider the words which have been actually used. If

that is done there can, in our judgment, be no doubt that to admit an application is not the same thing as to allow it, and we accept the reasoning adopted by the learned Judges in the case reported in 61 Cal 338 (1). It cannot be said that this decision has been directly affected by the observations of Mukerji, J., in 60 C L J 112 (2), because he was not expressly deciding the point, and did not go further than to enunciate a certain doubt. On the other hand the view taken by Lort-Williams, J., has also been taken in Civil Revision No. 1215 of 1933 by Mallick and Jack, JJ.

It is further contended on behalf of the opposite parties that this is a matter with which we cannot interfere under the provisions of S. 115, Civil P. C., as the only point involved is one of a wrong decision on a point of law. It is clear that the learned Subordinate Judge has gone further than that. What he has really done is that under an erroneous construction of the section he has refused to entertain and decide an application which the statute directs him to decide. Such a matter is clearly within the purview of S. 115 of the Code. Lastly it was contended that we ought not to interfere because the petitioners have another remedy by way of appeal. Certainly, if the learned Subordinate Judge had dismissed the application, the petitioners could have filed an appeal, and if they did not do so, we might refuse to give them any relief in revision; but in the present case we do not even know that the learned Subordinate Judge will dismiss the application. He may keep it pending indefinitely. Furthermore when once the rule has been issued, no useful purpose would be served by discharging it and leaving the parties to get the same point decided in appeal.

For these reasons we make the rule absolute, and direct the Subordinate Judge to determine the petitioner's application in accordance with law. Costs of this rule will abide the result. We assess the hearing fee at two gold mohurs.

Khundkar, J.—I agree.

K.S./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 277

NASIM ALI AND HENDERSON, JJ.

Jitendra Nath Ray—Plaintiff—Appellant.

v.

Jnanada Kanta Das Gupta — Defendant 1 and *others*—Respondents.

Appeal No. 1923 of 1934, Decided on 22nd January 1936, from appellate decree of Addl. Dist. Judge, Jessore, D/- 28th August 1934.

(a) Court-fees Act (1870), Ss. 12 (ii) and 28—Document not properly stamped is not nullity—Written statement by defendant claiming set-off accepted although not stamped—Court subsequently directing payment of court-fees—Court-fees still deficient—High Court can, under S. 12 (ii) and S. 149, Civil P. C., direct payment of additional court-fee.

A document not properly stamped is not a nullity. [P 278 C 1]

Where, a written statement claiming a set off is accepted by the trial Judge, through mistake or inadvertence, although not stamped, and the trial Judge although he subsequently directs the party to pay the court-fees does not realise the full court-fees, the High Court can in second appeal under S. 12 (ii), Court-fees Act, and S. 149, Civil P. C., direct the payment of the additional court-fees : 1929 P C 147, *Rel. on*. [P 278 C 1, 2]

(b) Civil P. C. (1908), O. 8, R. 6 and O. 20, R. 19 (3) — Set-off may be purely defensive or may be by way of counter-claim—In case of defensive set-off, set-off claimed must be recoverable at date of plaintiff's suit—In counter-claim sum claimed by defendant must be legally recoverable when he files written statement claiming set-off — Indian Courts make distinction between defensive set off and counter-claim.

A set-off may be purely defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim or it may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. In a defensive set off, the set off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, i. e., at the date when he files the written statement. The words "legally recoverable" in O. 8, R. 6, mean legally recoverable at the date of the institution of the suit in one case and mean legally recoverable at the date when the counter-claim is made in the other case. Although in O. 8, R. 6 and O. 20, R. 19, there is no clear distinction between a mere set off, i. e., a defensive set-off and a counter-claim, a distinction has been made in Indian Courts in accordance with the law of England, as it is based on a sound principle.

[P 278 C 2; P 279 C 1]

(c) Second Appeal—Finding of fact—Question as to when arrears claimed by person became due is one of fact.

The question as to when the arrears of pay

claimed by a person became due is one of fact, depending upon the contract between the parties. [P 279 C 1]

(d) Limitation Act (1908), Art. 102 — Suit for recovery of money alleged to be due from dismissed employee—Defendant claiming set off on account of arrears of pay — Plaintiff filed within three years of dismissal admitting that arrears are recoverable — Written statement claiming set off filed within three years of filing of plaintiff — Defendant's claim for arrears is not barred.

Where in a suit by a person for recovery of a certain amount, alleged to be due from an employee who has been dismissed from service, the defendant files a written statement claiming set off on account of arrears of pay and the plaintiff in his plaintiff which is filed within three years of the dismissal of the defendant, admits that the arrears are recoverable from him and in fact deducts the amount from his claim in the suit, the defendant's claim for the arrears of pay cannot be said to have been barred at the date of the written statement which is filed within three years from the date of the filing of the plaintiff. [P 279 C 1]

(e) Civil P. C. (1908), S. 35—Suit for recovery of amount alleged to be due from employee dismissed from service — Claim found to be substantially false—Defendant's claim for set-off allowed in full — Court can grant costs to defendant and refuse them to plaintiff.

Where in a suit for recovery of a certain amount alleged to be due from an employee dismissed from service, the plaintiff's claim has been found to be substantially false and the defendant's claim for set off on account of arrears of pay is allowed in full, the Court is justified in giving defendant his costs and refusing costs to the plaintiff. [P 279 C 1]

C. C. Biswas, Bireswar Bagchi and Joy Gopal Ghose—for Appellant.

Gopendra Nath Das, Nirmal Kumar Sen and Satyendra Nath Mitra for Deputy Registrar—for Respondents.

Nasim Ali, J.—Plaintiff's case is that he is the Zamindar of Taraf Kalia in the District of Jessore. He had a Kutchery in a village called Kalia. Defendant 1 was his Naib in that Kutchery from 18th Pous 1329 to 5th Falgoon 1335 B. S. He was dismissed on 6th Falgoon 1335. He made over all the papers and cash to the plaintiff. On examination of these papers and deducting the amount due to defendant 1 Rs. 1,747.5-9 was found due from defendant 1. The present suit is for the recovery of this amount. The defence of defendant 1 who contested the plaintiff's suit in the Courts below is that nothing was due from him and that he was entitled to get Rs. 1,076 from the plaintiff, namely Rs. 576 for his pay and Rs. 500 which

he deposited with the plaintiff at the time when he was appointed Naib. The learned trial Judge dismissed the plaintiff's suit and passed a decree for Rs. 838.15-0 in favour of defendant 1. The plaintiff filed an appeal before the lower appellate Court and defendant 1 filed cross-objections. The plaintiff's suit was dismissed but the amount of the decree in favour of defendant 1 was enhanced to Rs. 865.9-6 by the lower appellate Court. Hence this second appeal by the plaintiff. Defendant 1 has also filed cross-objections.

The first point urged by the learned advocate for the appellant is that the claim for set off by defendant 1 is not maintainable as the written statement pleading the set off was not properly stamped. This objection was not raised in any of the Courts below. But it is not disputed by the learned advocate for defendant 1 that the written statement should have been stamped with court-fee stamp on Rs. 1,076, the amount pleaded as set off in the written statement. The written statement however though not stamped was accepted by the trial Judge through mistake or inadvertence. It appears however that the trial Judge directed defendant 1 to pay court-fees on Rs. 838.15-0 when he passed a decree in his favour for that amount, and defendant 1 paid court-fees on this amount accordingly. By S. 6, Court-fees Act, no document on which Court-fees are payable under the Court-fees Act shall be filed in Court unless in respect of such document the court-fees have been paid. A document not properly stamped is not however a nullity: 10 Lah 737 (1) at p. 743. S. 28, Court-fees Act, lays down that no document which ought to bear a stamp shall be of any validity unless and until it is properly stamped. But if any such document is through mistake or inadvertence filed or used in any Court without being properly stamped, the presiding Judge may, if he thinks fit, order that such document be stamped as he may direct and on such document being stamped accordingly the same and every proceeding relating thereto shall be valid as if it had been properly stamped in the first instance. Defendant 1

was liable to pay Court-fees on Rs. 1,076. He was however directed by the trial Judge to pay Court-fees only on Rupees 838.15-0 and has paid Court-fees on that amount. His written statement claiming set off is not therefore even now properly stamped. The question of amount of Court-fees payable by defendant 1 has been wrongly decided to the detriment of revenue. Defendant 1 in his written statement undertook to pay proper Court-fees on the amount of set off claimed by him. The trial Judge through mistake did not realize the full Court-fees. The learned Advocate for defendant 1 states before us that his client is willing to pay the additional Court-fees. Under S. 12 (ii), Court-fees Act, and S. 149, Civil P. C., we direct defendant 1 to pay the additional Court-fees. On such payment being made the question of the validity of the claim for set-off by defendant 1 will no longer arise.

The next point urged by the learned Advocate for the appellant is that the amount which defendant 1 claimed as set off was not legally recoverable at the date when the set off was claimed in the written statement and consequently the Courts below should have wholly rejected the plaintiff's claim for set off in respect of Rs. 1,076. A set-off is either legal or equitable. Legal set off must be in respect of an ascertained amount. O. 8, R. 6 is restricted to legal set off. Claim for equitable set-off is allowed when the demands arise out of the same transaction or are so connected in their nature and circumstances that they can be looked upon as a part of one transaction. Equitable set off is allowed if the amount be unascertained. O. 20, R. 19 (3), recognizes equitable set off. Again a set off may be purely defensive, that is it may amount to an adjustment or satisfaction of the plaintiff's claim, or it may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. Limitation applies to both these claims. In a defensive set off the set off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim, the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, that is at the date when he files the written statement. The words "legally recoverable" in O. 8, R. 6, mean legally recoverable at the date of the institution of the suit in one case

1. Faizullah v. Mauladad, 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737 (P C).

and as meaning legally recoverable at the date when the counter-claim is made in the other case. It is true that in O. 8, R. 6, and in O. 20, R. 19, there is no clear distinction between a mere set-off, that is, a defensive set off and a counter-claim. But in Indian Courts a distinction has been made in accordance with the law of England as it is based on a sound principle. The sum of Rs. 1,076 which is claimed by defendant 1 as set off consists of: (1) his arrears of pay, (2) deposit made by him with the plaintiff. So far as the claim regarding the deposit is concerned it comes either under Art. 120 or Art. 145, Lim. Act. There is nothing to show that the cause of action for recovering this amount arose beyond six years from the date of filing the written statement. So far as the arrears of pay are concerned the question is when these arrears had become due: (Art. 102, Lim. Act.) This is a question of fact. It depends upon the contract between the parties.

The question of limitation was not raised in any of the Courts below. Under these circumstances it is not possible for us in second appeal to decide when the arrears became due to defendant 1. It may however be mentioned here that in the plaint which was filed within three years from the date of defendant 1's dismissal, the plaintiff distinctly admitted that the arrears were recoverable from him and, in fact, he deducted this amount from his claim in the suit. Under these circumstances we are not in a position to hold that defendant's claim for arrears of pay was barred at the date of the written statement which was filed within three years from the date of the filing of the plaint. Defendant 1 is therefore entitled to claim the entire amount, that is Rs. 1,076 both as defensive set off as well as a counter-claim. There is therefore no substance in this contention. The last point urged by the learned advocate for the appellant was about costs. The learned Judge has definitely found that defendant 1 explained all the papers to the plaintiff. The claim of the plaintiff has been found to be substantially false. Defendant's claim for set off has been allowed in full. Under these circumstances I am not prepared to say that the trial Judge was wrong in giving the defendant his costs and in refusing costs to the plaintiff. So far as the cross-

objection by defendant 1 is concerned, the only complaint is that the learned Judge in appeal should have given defendant 1 his costs in appeal. In view of the facts and circumstances of this case, I am not prepared to say that the learned Judge has not used his discretion properly. The cross-objection is therefore dismissed without costs.

The additional Court-fees which defendant 1 is directed to pay must be paid into this Court within one month from this date. On such payment being made the appeal will be dismissed with costs and defendant 1 will be entitled to recover this amount from the plaintiff and the amount will be included in the decree of this Court in favour of defendant 1 for costs. If however the additional Court-fees be not paid within the time aforesaid the appeal will be allowed in part and the plaintiff will get a decree against defendant 1 for Rs. 210-6-6 with proportionate costs throughout.

Henderson, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 279

R. C. MITTER, J.

Maharaj Bahadur Singh — Decreeholder—Petitioner.

v.

Nari Mollani and another — Opposite Parties.

Civil Rule No. 1359 of 1935, Decided on 27th February 1936, from order of Munsif, Second Court, Rampurhat, D/- 5th June 1935.

(a) Bengal Tenancy Act (8 of 1885), Sections 26 B and 26-C—Transfer of holding—Title passes to transferee as soon as document of transfer is registered with retrospective effect from date of execution—Transfer is complete although landlord has not received notice of transfer and his fees from Collector.

As soon as the document transferring a holding is registered, the title to the holding passes from the transferor to the transferee with retrospective effect from the date of the execution of the conveyance. The question whether the landlord is served with the notice of the transfer by the Collector or the Collector sends him the landlord's transfer fee is not material. It cannot be said that the transfer is complete as against the landlord only when he receives the notice of transfer and his fees from Collector: 16 Cal 642; 19 Cal 17 and 1923 P C 88, *Rel. on.* [P 281 O 1]

(b) Transfer of Property Act (1882), S. 52—Suit for rent of agricultural holding is not claim to charge specific immoveable pro-

erty—Doctrine of *lis pendens* does not apply to transfer of holding during such suit.

The doctrine of *lis pendens* does not apply to a suit to enforce a claim to a sum of money in which no question of any right to immoveable property is involved. A suit for rent in respect of an agricultural holding cannot be regarded as a claim to charge specific immoveable property, and if during the pendency of such suit the tenant transfers the holding, the doctrine of *lis pendens* does not apply : 1928 Cal 441, *Rel. on.*

[P 281 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 65, Chap. 14—Suit for rent of occupancy holding—Holding transferred during pendency of suit to the knowledge of landlord—Transferee not impleaded as defendant—Decree in suit does not charge holding under S. 65—Decree-holder cannot take aid of provisions of Chap. 14 in execution of decree—Decree is not binding on transferee—He is entitled to prefer claim under O. 21, R. 58, Civil P. C.

A decree obtained for arrears of rent can charge the holding under S. 65, Ben. Ten. Act, only if at its date the relationship of landlord and tenant between the plaintiff and the defendant subsists. Where, during the pendency of a suit for rent of an occupancy holding, the holding is transferred by the tenant to the knowledge of the landlord but the landlord does not implead the transferee as a defendant, the decree passed in the suit is not a rent decree and does not charge the holding under S. 65 and the decree-holder landlord is not entitled to take the aid of the machinery provided for enforcement of what are really rent decrees which charge occupancy holdings, namely the provisions of Chap. 14, to which he is not entitled and thereby deprive the transferee of the holding from preferring a claim under O. 21, R. 58, Civil P. C. The decree in the suit does not bind the transferee and he is entitled to prefer a claim under O. 21, R. 58, in execution of the decree : 1914 P C 111 ; 1932 Cal 321 (F B) and 1930 P C 193, *Foll.*

[P 281 C 2; P 282 C 1]

Sen Gupta and Urukramdas Chakraburty—for Petitioner.

Nirmal Chandra Chakraburty — for Opposite Parties.

Order.—The question involved in this rule is whether the learned Munsif, Second Court, Rampurhat, had jurisdiction to entertain a claim preferred by opposite party No. 2, Dolejannessa Bibi under O. 21, R. 58, Civil P. C., in Rent Execution Case No. 399 of 1935 started in that Court by the petitioner, Maharaja Bahadur Singh, against the opposite party No. 1, Nari Mollani. The learned Munsif entertained the same and allowed it.

On 17th April 1934 the petitioner instituted a suit for recovery of rent of an occupancy holding from opposite party No. 1 and one Radhika Prosad Mondal.

The period for which rent was claimed in that suit ended with Chaitra 1340. Radhika pleaded that he had no interest in the holding at any time and the suit was dismissed against him on that footing. The Court however passed a decree against opposite party No. 1 on 30th January 1935. It is this decree which was put into execution on 1st March 1935 in the aforesaid execution case under the special procedure provided for in Chap. 14, Ben. Ten. Act. The opposite party No. 1 had during the pendency of the said suit for rent transferred the entire holding to opposite party No. 2 by a registered instrument. The date of this transfer is 26th May 1934, corresponding to 12th Jaistha 1341. In her written statement, filed on 28th June 1934, opposite party No. 1 stated that she had transferred the holding to opposite party No. 2. The petitioner knew of the transfer, but did not add opposite party No. 2 as a defendant in his suit for rent. The notice of the transfer prescribed by Section 26-C, Ben. Ten. Act, and the landlord's transfer fee did not, however, reach the petitioner before the decree in the said suit for rent.

On 4th April 1935 opposite party No. 2 filed her claim under O. 21, R. 58, Civil P. C. It is admitted that if the decree which the petitioner obtained in his suit for rent was a rent decree within the meaning of the Bengal Tenancy Act, which could be executed under Chap. 14 of the said Act, the claim so preferred is not entertainable. The provisions of S. 170 (1), Ben. Ten. Act, are clear on the point. If, however, it is a decree which cannot be executed under the procedure of Chap. 14 it is entertainable. The question in my judgment depends upon the question as to whether S. 65, Ben. Ten. Act, is attracted to the aforesaid decree. In 57 I A 214 (1), Sir George Lowndes, in considering the effect of Section 170 (1), Ben. Ten. Act, made the following observations at p. 222 of the report :

The effect of this provision is that there cannot be an investigation in execution proceedings held under Chap. 14 of the Tenancy Act, of claims by third parties to an interest in the tenure . . . In their Lordships' view it is only arrears of rent that are charged by S. 65 upon the tenure, and it is only such arrears, that

1. Jintendra Nath v. Mon Mohan, 1930 P C 193=126 I C 422=57 I A 214=58 Cal 301=34 C W N 821 (P C).

can be realized in execution by sale of the tenure. Chap. 14 of the Act, does not purport to enlarge or restrict the exercise of this right, but only provides the machinery for working it out. If the landlord seeks to use this machinery for the recovery of something that is not rent, to the prejudice of a third party on whom the decree is not binding, it would be manifest injustice to deny him the right to object, and it would require very clear words in the Act to induce their Lordships to impose this penalty upon him.

In order to decide the question whether the decree for arrears of rent obtained by the petitioner charged the tenure, the position of opposite parties Nos. 1 and 2, on 26th May 1934, the date when the conveyance in favour of opposite party No. 2 was registered, must be considered. S. 26-B, Tenancy Act, has made occupancy holdings transferable. The manner in which such a holding can be transferred by act of parties is laid down in S. 26-C. The registering officer is not to admit to registration the conveyance till he is paid the landlord's transfer fee and the notice of transfer intended for service upon the landlord through the Collector is put in. On these two things being done he is to register the conveyance. In my opinion as soon as the document is registered the title to the holding passes from the transferor to the transferee with retrospective effect from the date of the execution of the conveyance; the question whether the landlord is served with the notice of transfer by the Collector or the Collector sends him the landlord's transfer fee or not is not material. It cannot be said the transfer is complete as against the landlord only when he receives the notice of transfer and his fees from the Collector. This principle has been laid down in connexion with transfers of permanent tenures under the provisions of S. 12, Tenancy Act, which provisions are *pari materia* with Ss. 26-B and 26-C. 16 Cal 642 (2), 19 Cal 17 (3) and 50 I A 155 (4) at pp. 161 to 162. Accordingly on 26th May 1934, opposite party No. 1 ceased to be the petitioner's tenant and opposite party No. 2 became his tenant, although both of them remained liable to pay the arrears of rent (if due) claimed

by the petitioner in his suit. This position is clear from the definition of a tenant given in S. 3. A person is a tenant as long as he holds the land under another person; he ceases to be a tenant as soon as he sells away all the lands of his occupancy holding.

The position then is that at the date of the suit brought by petitioner opposite party No. 1 was his tenant, but at the date of the decree she had ceased to be his tenant. He ceased to represent the holding from 26th May 1934. The decree obtained cannot bind the opposite party No. 2; for, the doctrine of *lis pendens* does not apply. The petitioner's suit was to enforce a claim to a sum of money. In that suit no question of any right to immoveable property was in question. As has been observed by my learned brother Mitter, J., "a suit for rent" in respect of an agricultural holding "can hardly be regarded as a claim to charge specific property:" 32 C W N 268 (5). A decree obtained for arrears of rent can only charge the holding under S. 65, Tenancy Act, if at its date the relationship of landlord and tenant between the plaintiff and the defendant subsists. In 41 I A 91 (6), although the facts were that the plaintiff was the landlord who had parted with his *zemindari* before his suit for the arrears of rent which fell due when he was the landlord, the observations of the Judicial Committee are general. Mr. Amir Ali examined the whole law on the subject and came to the conclusion that the charge under S. 65 on a permanent tenure attaches only if at the date of the decree the relationship of landlord and tenant had continued. The Special Bench in 59 Cal 1202 (7), has also interpreted 41 I A 91 (6) to mean that. In my judgment the petitioner before me cannot take the aid of the machinery provided for the enforcement of what are really rent decrees which charge occupancy holdings—namely the provisions of Chap. 14—to which he is not entitled and thereby deprive the oppo-

5. Jaynal Abedin v. Hyder Ali Khan, 1928 Cal 441=111 I C 340=55 Cal 701=32 C W N 268.

6. Forbes v. Maharaja Bahadur Singh, 1914 P C 111=23 I C 632=41 I A 91=41 Cal 926 (P O).

7. Krishnapada Chatterjee v. Manada Sundari Ghosh, 1932 Cal 321=137 I O 359=59 Cal 1202=36 C W N 518 (S B).

2. Krista Bullav v. Kristolal Singh, (1889) 16 Cal 642.

3. Chintamani Dutt v. Rash Behary Mondal, (1892) 19 Cal 17.

4. Surapati Ray v. Ram Narayan Mukherjee, 1928 P C 88=73 I O 193=50 I A 155=50 Cal 680 (P O).

site party No. 2 from preferring a claim under O. 21, R. 58, Civil P. C. I am cognizant of the fact that it may be contended that a landlord would be deprived of the security of the holding by the tenant selling the holding after the decree and just before its enforcement, but that is a question which I have not to decide in this case. Possibly the addition of the transferee, whose liability for the arrears of his vendor's time is declared by S. 146-A, Tenancy Act, in the execution proceedings would preserve the landlord's security. On the facts of this case where the opposite party No. 2 was not added to the rent suit in spite of the landlord's knowledge of the transfer, the principles laid down in *Forbes' case* (6) and *Krishnapada Chatterjee's case* (7) prevent me from taking the view that the claim of opposite party No. 2 was inadmissible.

The result is that this rule is discharged with costs. Hearing fee one gold mohur.

R.M./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 282

GUHA AND LODGE, JJ.

Barisal Loan Office, Ltd. Barisal—
Judgment-debtor—Appellant.

v.

Sasthi Charan Bhattacharya and another—Decree-holders—Respondents.

Appeals Nos. 70 and 192 of 1934, Decided on 26th June 1935, against order of Sub-Judge, 1st Court, Bakarganj, D/- 8th January 1934, and Dist. Judge, Bakarganj, D/- 3rd March 1934 respectively.

Companies Act (1913), S. 153—Scheme of composition passed and sanctioned under Act applies to all creditors including judgment-creditors—Scheme of composition passed during execution of decree—Execution cannot proceed.

A scheme of composition passed and sanctioned under the provisions of the Companies Act applies to all creditors of the company including judgment-creditors. Where therefore during the execution of a decree against the company, a scheme of composition is filed under S. 153, the execution of the decree cannot proceed. The fact that the decree sought to be executed was passed long before the scheme of composition makes no difference. [P 282 C 2]

Atul Chandra Gupta and Nagendra Ch. Chowdhury—for Appellant.

Satindra Nath Roy Chowdhury and Prolokh Chandra Kar—for Respondents.

Judgment.—These two appeals have arisen out of proceedings in execution of

decrees in which applications under S. 47, Civil P. C., were filed. The question raised in this application under S. 47 related to objection by the judgment-debtor company, appellant in this Court, to the execution of the decrees. It was asserted by the judgment-debtor company that a scheme of composition under S. 153, Companies Act, for payment of money due to the creditors of the judgment-debtor company was filed before this Court on 31st August 1933 and a preliminary sanction having been granted to the same, a meeting of the creditors was held in accordance with the order of this Court, and a scheme of composition was passed. The case of the judgment-debtor company was that after the scheme of composition under S. 153, Companies Act, had been filed in this Court and passed at a meeting of the creditors as provided by law the execution as started by the decree-holders could not proceed under the law. As it appears to be clear from the judgments of the Courts below, there was not and there could not be any dispute as to the facts, on which the judgment-debtor's objection under S. 47, Civil P. C., was based. There was no question also that the decree-holders concerned obtained their decrees against the judgment-debtor company long before the date on which a scheme of composition was agreed to between the creditors at a meeting held in pursuance of the order of this Court.

On the facts of the cases before us the composition as passed and sanctioned under the provisions contained in the Indian Companies Act applied to all the creditors of the judgment-debtor company, including the judgment-creditors. The circumstance that the decrees sought to be executed were passed long before the scheme of composition, could not possibly affect the position created by this scheme of composition. If the decrees passed before the scheme of composition were not affected by the same as contended before us, the whole object of the scheme would be frustrated. In our judgment therefore the learned Judges in the Courts below are wrong in holding that the executions could be allowed to proceed as prayed by the decree-holders, and the reason given by them cannot be supported. In the result, the appeals are allowed, and the orders passed by the Courts below are set aside. The exe-

cution cases started by the decree-holders respondents giving rise to these appeals are dismissed, the objections by the judgment debtor company, appellant in this Court, under S. 47, Civil P. C., being allowed to prevail. There is no order as to costs in these appeals.

R.M./R.K. *Appeals allowed.*

*** * A. I. R. 1936 Calcutta 283**

MUKERJI AND S. K. GHOSE, JJ.

Dharani Mohan Roy—Plaintiff—Appellant.

v.

Pramatha Nath Roy and another—Defendants 1 and 2—Respondents.

Appeal No. 249 of 1932, decided on 10th January 1936, from original decree of Sub.Judge, 3rd Court, Hooghly, D/- 30th June 1932.

*** * Transfer of Property Act (1882), S. 78**—Provision in S. 78 is exception to general rule that prior mortgagee takes precedence over subsequent mortgagee—Onus is on subsequent mortgagee to prove gross neglect on part of prior mortgagee—Question of gross neglect is question of fact—More care is required on part of mortgagee in case of mortgage by deposit of title deeds—If such mortgagee allows title deeds by negligence to be in hands of mortgagor, he will be postponed to subsequent encumbrancer to whom they are delivered.

The provision contained in S. 78 is an exception to the general rule that the prior mortgagee takes precedence over the subsequent mortgagee. The question of postponement of the prior mortgagee to subsequent mortgagee raises the question as to whether the subsequent mortgagee was induced to advance money to the mortgagor on the security of the mortgage property due to the gross neglect of the prior mortgagee. The onus lies on the subsequent mortgagee who asserts exception to the general rule. The question of gross neglect is always a question of fact; its determination must depend upon the circumstances of each case. A slight neglect or carelessness does not constitute the exception for the general law. As a matter of fact, gross neglect must be found and proved. [P 284 C 2]

Negligence consists in omitting to do something which a reasonable man would do or the doing of something which a reasonable man would not do in either case causing unintentionally some mischief to a third party. Gross negligence is a relative term and means the absence of care that was requisite under the circumstances. Gross neglect by itself and apart from fraud or misrepresentation would be a sufficient ground for postponement under S. 78. [P 287 C 2; P 288 C 2]

A man cannot refuse to abide by the consequence of his wilful and unjustifiable neglect if by that means he has armed another person with the power of going into the world under false colours. Wilful and unjustifiable neglect

is something more than mere carelessness or want of prudence. In determining the degree which would satisfy the test of grossness, the test to be adopted is that it must at least be carelessness of so aggravated a nature as a reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks. [P 288 C 2]

Where the essence of the mortgage on the basis of which the prior mortgagee's claim rests is the deposit of the title deeds, with the intention of creating a security on the property to which they relate, much greater care is necessary on his part in the matter of their custody for his own safety and security and also to avoid the risk of the mortgagor being able to represent that the property is unencumbered, merely because there is no document about the transaction which could be traced by an innocent subsequent encumbrancer on search. The principle to be applied is that if the possession of the title deeds is an essential part of the earlier encumbrancer's security then, if he having got the title deeds allows them by negligence to be again, without sufficient reason, in the possession of the mortgagor, he will be postponed to a subsequent encumbrancer to whom they are delivered: 1930 Cal 22; *Dixon v. Muckleston*, (1872) 8 Ch 155 and *Hudston v. Viney*, (1921) 1 Ch 98, *Rel. on*; *English Case law discussed*. [P 289 C 1]

Gunada Charan Sen, Jnan Chandra Roy and Amalendu Sen—for Appellant.

Bijan Kumar Mukerjee, Bijan Behary Mitter, Nirmal Kumar Sen and Baidya Nath Banerjee—for Respondents.

Judgment.—This appeal has merged out of a suit for enforcement of an equitable mortgage. The plaintiff Dharani Mohan Roy is the appellant. On 15th August 1919 plaintiff's adoptive mother purchased from defendant 2, Khitipati Roy, a property known as Ayma Roy Chak subject to an agreement that the price to be paid would be ascertained within a year, and on that basis executed a promissory note in favour of the latter for Rs. 50,000. On 27th August 1919, Khitipati borrowed from one Mohendra Nath Kundu a sum of Rs. 25,000 on executing a pro note for the amount and depositing certain securities and title deeds in respect of some properties amongst which were premises Nos. 25 and 26 Joy Kissen Street in Uttarpara in the District of Hooghly. These premises will hereafter be called the Uttarpara property. On 8th September 1919, Khitipati endorsed over the promissory note of 15th August 1919 in favour of Mohendra and Mohendra returned to him some of the securities which he had previously taken. In 1922 two suits were instituted on the Original Side of this Court. One was a

suit by Mohendra against Khitipati, and the plaintiff on the promissory note dated 27th August 1919, in which Mohendra prayed for a money decree against Khitipati reserving his right to enforce the security created by the deposit of the title deeds. Pending the suit Mohendra on 5th July 1923 executed a deed of assignment in favour of the plaintiff.

It is said that this assignment was in respect of the promissory note as well as the mortgage. On the strength of this assignment the plaintiff got himself transferred to the category of plaintiff in the aforesaid suit in the place of Mohendra and went on with the trial. Later on, on 19th July 1923, the plaintiff obtained a decree against Khitipati for Rs. 34 thousand odd. The other suit was by Khitipati against the plaintiff on the basis of the promissory note dated 15th August 1919. Pending the trial of this suit, the execution of the decree which the plaintiff had obtained against Khitipati as aforesaid was stayed. In this suit, as appears from para. 9 of the plaint in the present suit, the value of the property Ayma Roy Chak which the plaintiff's adoptive mother had purchased from Kitipati was found to be Rs. 23,800. This suit had not been finally disposed of at the date when the present suit was instituted and it has since then come to an end by a decree passed on 17th February 1930. On 11th July 1929 the plaintiff instituted the present suit. He based his claim under the assignment dated 5th July 1923 and prayed for a decree declaring him entitled to enforce the equitable mortgage in Mohendra's favour dated 27th August 1919, in respect of which he had become the assignee. He sought to enforce that mortgage against the properties amongst which were the Uttarpara properties, and he claimed that the said equitable mortgage should be enforced to the extent of the amount which would be found due to him under the decree he had obtained against Khitipati deducting therefrom the amount of the decree which Khitipati had obtained against him (vide, para. 9 of the plaint). Khitipati was impleaded as defendant 2 in this suit. Defendant 1 in the suit was Kumar Pramatha Nath Roy and he was impleaded as defendant for the following reason.

On 20th November 1926 and 17th December 1926, Khitipati and his

son borrowed Rs. 2,300 and Rs. 1,200 from the Bengal Central Bank by depositing the title deeds of the Uttarpara property, the very same title deeds which had been deposited by Khitipati with Mohendra on 27th August 1919. On 17th December 1927, Khitipati in order to pay off the amounts due to the Bengal Central Bank on the loans aforesaid executed a simple mortgage bond in favour of defendant 1, Kumar Pramatha Nath Roy, and the title deeds of the Uttarpara property were produced and made over to the said defendant 1. On 18th July 1928, defendant 1 had instituted a suit on the said mortgage and on 27th September 1928 he had obtained a final decree thereon. It may be mentioned here that during the pendency of the present suit, the plaintiff obtained an injunction restraining the execution of the decree which defendant 1 had obtained as aforesaid. The contesting defendant in the suit was defendant 1. Various defences were taken on his behalf. Amongst them the one that was found in his favour was that his mortgage, though later in date, was to have priority over the equitable mortgage which the plaintiff sought to enforce. This defence having succeeded, a decree on that basis was made by the Court below and from that decree the plaintiff has preferred the present appeal. So far as the aforesaid defence is concerned, the Judge of the Court below has dealt with it on a view of the law which he has expressed in these words :

The question of postponement raises the question as to whether Kumar Pramatha was induced to advance money to Khitipati on the security of the mortgage property due to gross neglect of Dharani Mohan Roy. This provision is made in S. 78, Transfer of Property Act; it is an exception to the general rule that a prior mortgage takes precedence over a later one. In this case we are not asked to decide if the other elements of fraud or misrepresentations which are similar grounds for postponement do exist. The onus of the issue is on the defendant, who asserts the exception to the general rule. The question of gross neglect is always treated as a question of fact; its determination must depend on the circumstances of each case. It is again conceded that a slight neglect or carelessness does not substitute the exception for the general law. As a matter of fact gross neglect must be found and proved.

So far as the view of the law is concerned, no exception is taken to it on behalf of the appellant, but his contention is that defendant 1, the subsequent

mortgagee, has failed to discharge the onus that rests on him in this behalf. In order to see whether this contention is well founded or not we have got to examine the facts. The equitable mortgage in favour of Mohendra was effected on 27th August 1919. In the written statement of defendant 1 it was denied that Khitipati had really deposited the title deeds with Mohendra or had intended to create an equitable mortgage. The Court below has overruled this defence and the conclusion of the Court below on this point has not been challenged before us by either party. In fact it is abundantly clear that Messrs. B. N. Basu and Co., Solicitors for Mohendra, had taken possession of the title deeds at the time of this equitable mortgage. On 14th September 1919 as appears from a receipt Ex. 3 (a) purporting to have been granted by Mohendra himself the title deeds passed from the custody of Messrs. B. A. Basu & Co. to Mohendra. This fact also cannot be and has not been disputed before us. On 9th August 1922 Mohendra instituted his suit on the Original Side of this Court. It appears from the evidence of Mr. J. N. Basu of Messrs. B. N. Basu & Co., that the title deeds came back to the office of Messrs. B. N. Basu & Co., at or about the time when Mohendra's suit was instituted and thereafter they remained there. On 5th July 1923 the deed of assignment was executed by Mohendra in favour of the plaintiff. This deed is not very happily worded but it is fairly clear from its terms that the assignment which it purported to create was in respect of all interests of Mohendra. That is to say, not merely in respect of his interest in the promissory note on which the suit was founded but also of his right as mortgagee under the equitable mortgage. The deed contains no schedule of documents; but on this no conclusion can be built because in English documents it is not customary to put the schedule of the title deeds that are made to the person in whose favour they are executed.

The plaintiff's case is that on 7th July 1923, Messrs. B. N. Basu & Co., made over to his solicitors, Messrs. Kally Nath Mitter and Sarbadhikary the title deeds in question. On this point evidence of Mr. J. N. Basu is important. It is true that he had no personal knowledge of the matters relating to the title

deeds, but his evidence taken in conjunction with a receipt to which reference will presently be made leads reasonably to the inference that the title deeds were as a matter of fact made over to Messrs. Kally Nath Mitter and Sarbadhikary as Solicitors on behalf of the plaintiff. There are certain circumstances to which the learned Judge of the Court below has adverted and which apparently throw some doubt as regards the nature of the transaction relating to the granting of this receipt. In the first place the receipt, as has been deposed to by Mr. J. N. Basu, appears in the hand-writing of a clerk in his office, but that clerk has not been produced for examination. The receipt is on a plain piece of paper without any printed heading of the name, either of the firm of Messrs. B. N. Basu & Co., or of Messrs. Kally Nath Mitter and Sarbadhikary. There is also the fact that the signature of Messrs. Kally Nath Mitter and Sarbadhikary as appearing on this receipt is somewhat dissimilar to the other signatures of the same firm that had to be found in some other documents produced in this case. But of this last mentioned fact the explanation may be that it is not always one partner or member of a firm who signs for the firm in the documents. But there is positive evidence of Mr. J. N. Basu which is, in our opinion, unimpeachable, and which is to the effect that the signature appearing on the receipt is the signature of the firm of Messrs. Kally Nath Mitter and Sarbadhikary.

It is true that there is no entry in the document delivery book of the firm of Messrs. B. N. Basu & Co., as regards the making over of these title-deeds. But of this, sufficient explanation is to be found in the evidence of Mr. J. N. Basu himself, and he has said that when delivery takes place outside the office it is not entered in the document delivery book of the office and he has also said that an entry about this matter may be found in the day book. This matter was not pursued any further or cleared up. The onus being in defendant 1, even though the circumstances to which we have referred are present in the case, we are unable to hold that defendant 1 has succeeded in establishing that as a matter of fact the title-deeds were not taken possession of by Messrs. Kally Nath Mitter and Sarbadhikary as Solicitors on behalf

of the plaintiff, from the firm of Messrs. B. N. Basu & Co. This also is the view which the learned Subordinate Judge has taken. We think he was justified in proceeding on this view in considering the other questions that arise in this case. After 7th July 1923, the next date on which we have any evidence as regards the title-deeds, is 20th November 1926, on which date Khitipati produced them before the Bengal Central Bank in connexion with the first of the two loans he took from them. There is nothing to suggest or explain how Khitipati was able to get hold of the title-deeds in order to enable him to produce them before the Bank for the purpose of raising the loan. The question is whether defendant 1 has succeeded in establishing that there was gross neglect on the part of the plaintiff which made it possible for Khitipati to get the title-deeds into his possession and utilise them in the mortgages that he effected in favour of the Bank and of defendant 1. The plaintiff's case on the point is to be found in para. 8 of the plaint which is in these words :

The said firm of Messrs. Kally Nath Mitter and Sarbadhikary was in charge of all documents on behalf of the present plaintiff, including the original deed of assignment from Mohendra Nath Kundu and the deeds mentioned in Sch. "B" to this plaint which were made over to them by Messrs. B. N. Basu & Co.; Messrs. Kally Nath Mitter and Sarbadhikary did not return the said documents to the plaintiff, and in spite of the best endeavour made by the present plaintiff's Solicitors, Messrs. B. N. Basu & Co., has not been able to get back the said documents. And the plaintiff suspects some fraud and bad thing in respect of the said documents.

The evidence on this point that is to be found in the evidence adduced on behalf of the plaintiff consists of the testimony of three witnesses excluding the evidence of Mr. J. N. Basu which, as already stated, is evidence not given out of any personal knowledge on the part of Mr. Basu himself. P. W. 3 Gopal Chandra Mitter is the Head Clerk of the plaintiff. All that he has said is that the documents had not been received by the plaintiff and that they were not in the plaintiff's sherista. P. W. 6 Suk Lal Mukherjee is the plaintiff's cashier. He has said :

The deed of assignment is not with the plaintiff ; latterly through B. N. Basu & Co., Solicitors, the plaintiff tried to get that document but it failed. The delay in trying to get back

the assignment is due to the fact it was not thought urgent as the decree in this suit against Khitipati was stayed against execution by the latter's suit against the former for price of Ayma Chak.

Assuming that the witness wanted to speak not merely about the deed of assignment but also the title deeds in question, the evidence does not give us any indication as what may be the plaintiff's case on the point, namely, as to how the title deeds went over from the custody of Messrs. Kally Nath Mitter and Sarbadhikary to the possession of Khitipati. The evidence of P. W. 4, Hridoy Krishna Ghose does not take us very far. He simply proves that commencing from June 1928 enquiries were made by him on behalf of the plaintiff in order to find out where the title deeds were and in order to get them back into his custody as solicitor on behalf of the plaintiff. It may be stated here that the suit of defendant 1 on his mortgage was started on 18th July 1928, that is to say, within a very short time after these enquiries commenced and it is not unlikely that in view of the expected suits themselves, enquiries began to be made. A subsequent enquiry no doubt is not a matter of much importance but is not wholly irrelevant on the question of carelessness or otherwise on the part of the plaintiff, a question which we are investigating for the purpose of the present case. We have it on the evidence of D. W. 2 Paresh Chandra Ghose, Solicitor on behalf of defendant 1, that the firm of Messrs Kally Nath Mitter and Sarbadhikary was dissolved sometime in 1923-24 and that thereafter the business of the firm was taken over by one or other of the two firms started separately by the partners, one being the firm of Messrs. K. N. Mitter and Co., and the other the firm of Messrs. Deva Prosad Sarbadhikary. There is also evidence to the effect that there were successive changes of attorneys on the part of the plaintiff, the names of the several firms of Solicitors to which his business was entrusted being the firms in the order named, namely, K. N. Mitter & Co., N. C. Mandal, D. Chakravarty and lastly B. N. Basu & Co. Whether this change of Solicitors was in any particular suit in which the plaintiff was concerned or in the suits generally to which he was connected is a matter which to our mind is not of very great importance.

The fact is that these firms successively became his solicitors and from this fact it is not an unreasonable inference to draw that he was perfectly aware that the old firm of Messrs. Kally Nath Mitter and Sarbadhikary had dissolved. The plaintiff has not examined himself. The evidence which his witnesses have purported to give is evidence which can by no stretch of imagination be taken to have been given with the object of putting forward a plausible explanation as to how the title deeds came out of the possession of his solicitors to that of Kbitipati. It appears from a petition dated 17th February, 1931 that Mr. Dwijendra Nath Mitter, solicitor, who upon the evidence, such as it is, appears to have been conducting the firm of Messrs. K. N. Mitter & Co., after the dissolution of the firm of Kally Nath Mitter and Sarbadhikary and Sir Deva Prosad Sarbadhikary himself were cited as witnesses on behalf of the plaintiff. But our attention has been drawn on behalf of defendant 1 to the fact that neither of these two gentlemen was served for the purpose of getting them before the Court to give their evidence. No witness has been produced either from the firm of Mr. N. C. Mandal or Mr. D. C. Chakravarty and indeed no other evidence in any shape or form has been sought to be adduced for the purpose of offering any explanation or throwing any light upon the question. As matters stand, it will have to be taken that after the title deeds were taken possession of by Messrs. Kally Nath Mitter and Sarbadhikary on behalf of the plaintiff and right up to the time when defendant 1's suit was about to be instituted and certainly not earlier than June 1928 no attempt was made on behalf of the plaintiff to enquire about the title deeds or to take any care in respect of them.

The question in the circumstances is whether upon the facts as found by us it can be said that the necessary conditions of S. 78, T. P. Act, have been fulfilled so as to entitle the Court to hold that the plaintiff's prior mortgage should be postponed to the subsequent mortgage in favour of defendant 1. These are all the facts relevant on the question we have to consider and on them we have to determine whether a case of gross neglect within the meaning of S. 78, T.P. Act, has been made out or not as against the plain-

tiff. A commonsense definition of negligence which has been adopted in authorities too numerous to mention is that it consists in the omitting to do something which a reasonable person would do or the doing of something that a reasonable person would not do; in either case, causing unintentionally, some mischief to a third party. To use the well known words of Rolfe, B., gross negligence is ordinary negligence with a vituperative epithet prefixed to it. Gross negligence is a relative term and means the absence of the care that was requisite under the circumstances. And as Montague Smith, J. said in 1 C P 600, affirmed on appeal (1868) 3 C P 476 (1), the use of the term is only one way of stating that less care is required in some cases than in others. There are some old English decisions in which it was held or at least suggested that where title deeds were delivered to an equitable mortgagee and afterwards, by some unexplained accident, came back into the hands of the mortgagor who deposited them with a third party, upon the latter lay the onus of showing gross negligence on the part of the first Mortgagee, which should not be presumed merely from the absence of title deeds. In Sir Rash Behari Ghose's Law of Mortgage, Edn. 5, p. 443, two cases are cited on this point: 5 Hare 272, on appeal, 11 Jur 527 (2), and 3 K & J 617 (3). English decisions, it should be remembered, are complicated by the distinction that exists between equitable and legal estates and the contest between legal and equitable encumbrances, matters which do not arise under the Indian Law. Apart from this, it may also be noted that 3 K & J 617 (3) has too often come in for adverse criticism: See e. g., (1872) 7 Ch 259 (4).

In 5 Hare 272 (2) there was no question of negligence at all; and the decision proceeded in the absence of a specific case against the plaintiff (the prior mortgagee) charging him with acts whereby

1. Grill v. General Iron Screw Collier Co., (1866) 1 C P 600: 35 L J O P 321=12 Jur N S 727=14 W R 893 Affirmed in (1868) 3 C P 476=37 L J C P 205=18 L T 485=16 W R 796.
2. Allen v. Knight, (1846) 5 Hare 272. On appeal (1881) 16 L J Ch 370=11 Jur 527.
3. Carter v. Carter, (1867) 3 K & J 617=27 L J Ch 74=4 Jur N S 67.
4. Pitcher v. Rawlins, (1872) 7 Ch 259=41 L J Ch 485=20 W R 281=25 L T 921.

the mortgagor was enabled to commit the fraud; and it was expressly pointed out that no circumstances were raised or stated which, coupled with the fact that the title deeds were not with the plaintiff, would deprive the plaintiff of his right. In 17 W R 1091 (5), in which it was found that by some unexplained means a deed which was evidence of title had found its way into the hands of the mortgagor and the mortgagor had utilised it for effecting a second mortgage, James, V. C. observed :

What we have then is that after the deed has got into the possession of the mortgagor, the property which was also in his possession was made the subject of an apparently legal mortgage. Now, I am of opinion that in the absence of any reason why the deed was not given up by the mortgagee but was allowed to remain so many years in his possession, the deed was given back for the purpose of representing to the world that he was absolutely entitled to the property.

3 K & J 617 (3) and 5 Hare 272 (2) appear to have been cited in the above case. In 4 W N 660 (6), it was held that the absence of the deed *prima facie* shows negligence on the part of a person who ought to hold them. The presumption of innocence is an ordinary presumption, and if that presumption is applied, it is not unreasonable, in the absence of any evidence that the mortgagor committed theft or some similar offence to assume that the mortgagor got possession of the title deeds by the permission of one or other of the solicitors with whom it may have been at the time, and if that supposition be correct, then the case would go very near the case of (1864) 2 H & M 242 (7), in which under similar circumstances the prior mortgagee was postponed to the subsequent one. On the other hand in 26 Ch D 482 (8), Fry, L J on an elaborate examination of the authorities classified them under different heads and observed that negligence in the sense in which it is understood in Common Law, as imparting a duty on the part of one person towards another, is not a term which can at all be applied to a prior mortgagee who owes no duty to others but to himself in having to keep the title deeds for his own title and for

his own security. And in that view he held that a prior legal mortgage cannot be postponed to a subsequent equitable mortgage on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee, but will be so postponed if the legal mortgagee had assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in enquiring after or keeping the title deeds may be sufficient evidence, where such conduct cannot otherwise be explained, or where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate.

In 56 Cal 868 (9), Page, J., (as he then was) in an elaborate judgment in which all the important decisions bearing on the subject were referred to and discussed, has pointed out why in dealing with a question of priority arising under the law in this country as contained in S. 78, T. P. Act, the decisions of English Courts do not afford a reliable guide. It is too late in the day to contend the gross neglect by itself and apart from fraud and misrepresentation would not be a sufficient ground for postponement under that section. Page, J., in the case aforesaid has, in construing the meaning of gross neglect as used in the section, adopted the principles enunciated by Lord Selbourne L. C. in (1872) 8 Ch 155 (10), at p. 160, namely that a man cannot refuse to abide by the consequences of his wilful and unjustifiable neglect, if by that means he has armed another person with the power of going into the world under false colours. Wilful and unjustifiable neglect is certainly something more than mere carelessness or want of prudence. In determining the decree which would satisfy the test of grossness a useful guide may be to adopt the test enunciated by Eve, J., in (1921) 1 Ch 98 (11), namely:

It must at least be carelessness of so aggravated a nature as to amount to neglect of precautions which the ordinarily reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks.

5. Jones v. Rhind, (1868) 17 W R 1091.

6. Perrin v. Barbary, 4 W N 660.

7. Dowle v. Saunders, (1864) 2 H & M 242=34 L J Ch 87=12 W R 1074=10 L T 840.

8. Northern Counties of England Fire Insurance Co. v. Whipp, (1884) 26 Ch D 482=53 L J Ch 629=32 W R 626=51 L T 806.

9 Lloyd's Bank Ltd, v. P. E. Guzdar & Co., 1930 Cal 22=121 I C 625=56 Cal 868.

10. Dixon v. Muckleston, (1872) 8 Ch 155=42 L J Ch 210=21 W R 178=27 L T 804.

11. Hudston v. Viney, (1921) 1 Ch 98=90 L J Ch 149=124 L T 305=65 S J 59

Upon the facts we have found, we feel no hesitation at all in finding that the plaintiff was guilty of gross neglect, if that expression is to be understood in the light of the test just referred to. Besides, the essence of the mortgage on the basis of which the plaintiff's claim rests is the deposit of the title-deeds with the intention of creating a security on the property to which they relate. Much greater care, therefore, was necessary on the part of the plaintiff in the matter of their custody for his own safety and security, and also to avoid the risk of the mortgagor being able to represent that the property was encumbered merely because there was no document about the transaction which could be traced by an innocent subsequent encumbrancer on search. In our judgment, the principle on which one should proceed in this case is that if the possession of the title deeds is an essential part of the earlier encumbrancer's security then if he having got the title deeds allows them by negligence to be again, without sufficient reason, in the possession of the mortgagor, he will be postponed to a subsequent encumbrancer to whom they are delivered. To deprive defendant 1 of the benefits of the equitable doctrine contained in S. 78. T. P. Act, it has been contended on behalf of the appellant that the defendant 1 was not a bonafide purchaser without notice but had notice of the prior equitable mortgage. This notice is sought to be attributed to him constructively on the supposition that the searches for prior encumbrances that were made on his behalf were sufficient, and that if they had been more thorough and careful he could have known of the existence of the said prior mortgage. (The judgment then discussed the evidence and proceeded). We must hold that the attempt to affect defendant 1 with constructive notice has failed. The result is that, in our judgment, the appeal fails. It is accordingly dismissed with costs to defendant 1 respondent.

R.M./R.K.

Appeal dismissed.
A. I. R. 1936 Calcutta 289

M. C. GHOSE, J.

Chandra Kumar De—Appellants.

v.

K. C. Mukherjee, Official Receiver—Respondent.

Appeals Nos. 704 to 714 of 1934, Decided on 28th February 1936.

1936 C/37 & 38

(a) Receiver—Power of—High Court appointing Receiver to estate—Authority from High Court to institute suits on behalf of estate may be filed at any stage of suit.

Where a person, appointed by the High Court as a Receiver of an estate institutes suits on behalf of the estate, an authority from the High Court to institute the suits may be filed by the Receiver at any stage of the suit, the authority being required as a question of the bona fides of the Receiver. [P 290 C 1]

(b) Limitation Act (1908), Art. 130—Landlord and tenant—Raiyat holding land of estate without payment of rent—Limitation against landlord arises only 12 years after landlord comes to know that defendants possess land without rent.

As between the raiyats of an estate and the landlords of an estate, when a raiyat holds land of an estate without payment of rent, limitation against the landlord would only arise 12 years after the landlord has come to know that defendant possesses the land without payment of rent. [P 291 C 1]

A suit for assessment of rent instituted within 12 years from the date of the final publication of the record of rights recording that the tenants have not been, paying rent, but are liable to pay the same is therefore not barred by limitation when there is nothing to show that prior to the final publication of the record of rights the proprietor of the estate was aware that the tenants were holding land without payment of rent: 1864 W R Act X, R. 82; 40 Cal 173 and 1922 P C 272, Ref.; 10 M I A 214 (P C) and 1915 Cal 590, Disting. [P 291 C 1]

Atul Chandra Gupta and Nripendra Chandra Das—for Appellants.

Chandra Sekhar Sen and Satis Chandra Sen—for Respondent.

Judgment.—These 11 appeals are by the defendants in suits for assessment of rent on the ground that the defendants have been holding the lands without payment of rent to the plaintiff landlord. Many suits of the same nature were tried by the trial Court which decreed 3 suits ex parte and dismissed all the other suits on contest. In 16 cases the landlord appealed and the Court of appeal below dismissed one of the appeals and decreed the other 15 appeals. Out of those 15 appeals, second appeals have been filed in this Court in 11 suits. The suits which are in appeal to this Court are suits 86 to 91, 111 to 114 and 184 of the trial Court. The same arguments have been made in all the cases. The first point taken by the learned Advocate for the appellants is that the suits are not maintainable at the instance of the plaintiff. The plaintiff is the receiver appointed by the High Court of the estate in question. It is urged that he did not file the authority

of the Court to institute these suits, and without the Court's authority the plaintiff receiver cannot maintain the suits. Upon hearing the learned Advocates on both sides it appears that this point of maintainability was not raised in the trial Court in any of the 11 suits now under appeal and no issue as to maintainability was framed in the trial Court. In only one of the 19 suits tried by the trial Court was the issue of maintainability raised, but the trial Court before judgment recast the issues and tried the issue of maintainability in all the suits. The point was only taken in the argument in the trial Court and at that time on 15th December 1932 the plaintiff receiver filed an application to file the authority of the Court, but the authority which he filed afterwards was found to be an authority to him as receiver of the estate of the ijaradars and not receiver of the present estate.

Afterwards, in the appellate Court, the receiver rectified his mistake and filed an authority granted by an order of this Court in 1920. That authority was granted by Buckland, J., to the Official Receiver of the High Court as receiver of the estate in question. It was not granted by name to the individual holding the position of Official Receiver. That authority therefore covers the plaintiff who was appointed official receiver long after 1920. In the circumstances the plaintiff had authority to institute the suits. Such authority from the Court may be filed by the receiver at any stage of the suit; the authority being required as a question of the bona fides of the receiver. The next point taken by the learned Advocate is that the suits are barred by limitation. This point was dealt with by the trial Judge who held that the defendants were in possession for nearly a century and their possession was open, that the property in suit was tanks, and the defendants had long held possession of them without payment of rent and such open enjoyment made their possession adverse to the plaintiff. The Court of appeal below appears to have committed an error. That Court thought that the trial Court had not decided the issue, but the Court of appeal below upon the facts of the case came to the conclusion that no question of limitation properly arose in these suits. The facts of these cases are that these tanks are within the

revenue paying estate of the plaintiff. The defendants are all raiyats in the estate of the plaintiff and they have been for long possessing these tanks of their landlord without payment of rent. It may be stated that the estate from 1836 onwards was in the hands of ijaradars. It was only in 1931 that the estate came into the possession of the official receiver of the High Court.

The learned Advocate for the defendants has cited the cases of 10 M I A 214 (1) and 22 C L J 135 (2). Upon perusal of those cases it appears that the facts of those cases are entirely different from the facts of the present suits. The learned Advocate for the respondent has quoted the case of (1864) W R Act X Rule 82 (3). In that case it was held that where A holds and cultivates B's land, A is by the universal custom of this country B's tenant and is bound to pay him fair rent. In 40 Cal 173 (4) it was held that mere non-payment of rent does not by itself constitute adverse possession in a tenant against his landlord. In 49 I A 399 (5) the tenants and their predecessors had paid no rent since 1839 but the lands being within the revenue paying estate of the landlord, their Lordships held that the burden was on the tenants to prove that they were entitled to hold them free of rent and that their possession was not adverse to the plaintiff so as to render the claim for assessment of rent barred by limitation. In the present suits the defendants are all raiyats of the plaintiff's estate. In course of time they took possession of the khas tanks of the plaintiff and they held possession for many years without payment of rent. The record of rights were finally published on 24th March 1920. It was there recorded that these tanks were within the estate of the plaintiff, that the defendants, tenants of the estate, were possessing these lands as settled raiyats of the villages, that they had been

1. *Mt. Chundrabullee Bebia v. Luckhea Debia Chowdrain*, (1865) 10 M I A 214=5 W R 1 =1 Suther 602=2 Sar 119 (PO).
2. *Gagan Chandra v. Birendra Kissorsore*, 1915 Cal 590=30 I C 931=22 C L J 135.
3. *Nityanund Ghose v. Kissen Kishore*, (1864) W R Act X Rule 82.
4. *Prasana Kumar Mukerji v. Srikantha Rout*, (1912) 40 Cal 173=16 I C 365.
5. *Jagadeo Narain Singh v. Baldeo Singh*, 1922 P C 272=71 I C 934=49 I A 399=2 Pat 36 (PO).

paying no rent for the same but were liable to payment of rent.

The suits were instituted on 24th March 1932 just within 12 years of the final publication of the record of rights. As between the raiyats of an estate and the landlords of an estate, when a raiyat holds land of an estate without payment of rent limitation against the landlord will only arise 12 years after the landlord has come to know that the defendant possesses the land without payment of rent. In these cases there is nothing to show that before the final publication of the record of rights, the proprietor of the estate was aware that the defendants were holding these tanks without payment of rent. These suits are not therefore barred by limitation. In the result these appeals are dismissed with one set of costs. Leave to appeal under S. 15 of the Letters Patent is refused.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 291

NASIM ALI AND EDGLEY, JJ.

Haripada Roy — Defendant—Appellant.

v.

Gopinath Roy and others—Respondents.

Appeal No. 690 of 1934, Decided on 28th February 1936, from appellate decree of Sub-Judge, 1st Court, Midnapur, D/- 30th November 1933.

Limitation—Right to shebaitship—Right to office extinguished by 12 years adverse possession—Right to turn of worship also ends.

Where a person is in possession of the office of the Shebait which was held by another for more than 12 years and adversely to such person, Art. 124, Lim. Act, applies. As the office is extinguished by adverse possession the right to claim a turn must share the same fate.

[P 291 C 2]

Panchanan Ghose and Bholanath Roy —for Appellant.

Sarat Chandra Janah—for Respondents.

Judgment.—This appeal arises out of a suit for declaration of the plaintiff's title to a certain share in the pala or turn of worship of an idol Sri Iswar Krishna Rai Jiu. The plaintiff's case briefly stated is as follows: One Rajjadhar Ray founded this deity. The shebaitship of the deity devolved upon his six grandsons, Nabani Ghanshyam, Lakshman, Pranballav, Rasikram and Dukhuram. There had been a parti-

tion of these palas between these six persons. Six of these palas out of Lakshman's 60 palas devolved on Ramgopal by gradual succession. After his death, three of these have devolved upon the plaintiffs and the remaining three upon defendants 2 and 3. Defendant 1 who is the direct descendant of Lakshman's brother Nabani in the male line dispossessed the plaintiff from these three palas on the basis of a gift from Ramgopal. The pala of the deity is not transferable to any person other than the next heir. The material defences of defendant 1 are these: (1) that there is a custom of transfer of palas among the male descendants of the founder, Rajjadhar Ray, for more than hundred years, (2) that defendant 1 being the male descendant of the founder the transfer by Ramgopal of his share in the pala to him is valid and (3) that the plaintiff's claim is barred by limitation. The trial Court dismissed the suit. On appeal by the plaintiff to the lower appellate Court the learned Judge has reversed the decision of the trial Court and has decreed the suit. Hence this second appeal by defendant 1.

The first point urged by the learned advocate for the appellant is that the plaintiff's claim is barred by limitation. It is clear from the finding of the trial Court that defendant 1 is in possession of the office of the Shebait which was held by Ramgopal for more than 12 years before the institution of the present suit. The learned Judge has not reversed this finding of the trial Court. The evidence in this case also indicates that defendant 1 is in possession of the office held by Ramgopal at least from the year 1915, adversely to Ramgopal and the plaintiff who claims the shebaitship held by Ramgopal by hereditary right in accordance with the Dayabhaga law of succession. There cannot be any doubt therefore that Art. 124, Lim. Act, applies to this case. The plaintiff's claim to the office of the Shebait is therefore barred by limitation (see the case of 27 I A 69 (1) at p. 76). The right to the pala is attached to the office of the Shebait. As the right to the office was extinguished by adverse possession of the defendants the right to claim the pala must share the same fate. Plaintiff's suit is

1. Gnanasambanda Pandra Sannadhi v. Velu Pandaram, (1900) 23 Mad 271=27 I A 69=7 Sar 671 (P O).

therefore barred by limitation. The result therefore is that this appeal is allowed. The judgment and the decree of the lower appellate Court are set aside and the decree of the trial Court is restored. Parties will bear their own costs throughout.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 292

CUNLIFFE AND HENDERSON, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Petitioner.

v.

Jiban Kumar De and others—Opposite Parties.

Criminal Revn. No. 985 of 1935, Decided on 25th February 1936.

(a) Criminal Trial—Plea of guilty — Informal admission as to guilt does not amount to formal plea of guilty—Informal admission of guilt in proceedings under S. 110, Criminal P. C., and similar proceedings does not amount to formal plea of guilty.

A plea of guilty in a criminal Court can only be made in response to a charge made by the Court and informal admission as to guilt does not amount to a formal plea of guilty and such an admission has not the same binding effect as a plea of guilty. It has not the same effect in fact and it has not the same effect in law.

[P 293 C 1]

An admission of guilt in proceedings under S. 110, Criminal P. C., or in proceedings of a more informal character does not amount to a formal plea of guilty.

[P 293 C 1]

(b) Criminal P. C. (1898), Ss. 110, 123—Proceedings under S. 110—Court should not hamper prosecution or defence in any way—Proceedings transferred to Sessions Judge—Order by Sessions Judge directing that no further prosecution witnesses should be examined held improper.

In proceedings under S. 110 and in enquiries of a similar kind, neither the prosecution nor the defence should be hampered in any way. Where the Sessions Judge, on the proceedings under S. 110, being transferred to him under S. 123, passed an order directing that the plea of guilty made by the accused, should be cancelled as it appeared that the accused had pleaded guilty and refused to cross-examine further witnesses by reason of an impression created by the Police Officer conducting the investigation that they would be let off easily on making a confession and further directed that the accused should be allowed to examine further defence witnesses if any but ordered that no further prosecution witnesses were to be examined:

Held: that the order regarding the cancellation of the so-called pleas of guilty was reasonable, as they were really nothing more than mere admissions. But the Sessions Judge had no right to direct that no further prosecution witnesses should be examined.

[P 293 C 2, P 294 C 1]

Anil Chandra Chaudhuri — for Petitioner.

J. C. Gupta and Amrita Lal Mukherjee —for Opposite Parties.

Cunliffe, J.—The petitioners here are the Crown. They obtained a rule nisi on a number of grounds, of which we need only now consider the first two. The rule was directed against an order passed by the Sessions Judge of Faridpur. The learned Judge was dealing with an order made by one of his subordinates, if that is the proper expression to use, Mr. De who is a Sub-Divisional Officer and a First Class Magistrate at Madaripore.

It became De's duty to preside over an inquiry under S. 110, Criminal P. C. That is one of the so-called preventive sections which deals with the liability in time of disturbance of persons implicated to execute bonds for good behaviour. The state of affairs down in Mr. De's district seemed to have been, before this inquiry took place, of a somewhat serious nature. There was apparently a rebellious agitation going on, people were being terrorised on the one hand and other persons were apparently arming themselves. It is obvious from Mr. De's order that living in the midst of scenes like this, he appreciated to the full, in fact, one might almost say, was obsessed with what was going on around him. Having examined over 70 witnesses for the prosecution, nine of whom were cross-examined, the accused were, I imagine, asked to make some statement and in the statements they made, there appeared to have been certain admissions for the purpose of notifying the Court that they would submit to the giving of security. As a result of this inquiry, Mr. De ordered each of the accused and they were ten of them to execute a bond of Rs. 1,000 with two sureties each for the same sum binding themselves over to be of good behaviour for three years, and the Magistrate added that, considering the nature of the evidence against them, the dangerousness of their character, and the enormity of their record, the order cannot be at all regarded as severe a curious piece of self criticism which does not often find in this type of order. Apparently, the securities were not forthcoming and the matter got into the hands of the Sessions Judge at Faridpur under the provisions of S. 123 of the Code and

the learned Judge does not seem to have seen very much eye to eye with the Sub-Divisional Officer. In the course of his judgment and at the end of it he says :

For the present I would only order that as the accused refused to cross-examine the witnesses who deposed against them and also pleaded guilty from an idea that they would be let off easily on making a confession and since this impression was created in their minds undoubtedly by the Subordinate Police Officer who was entrusted with the investigation, it would be proper for me under S. 123 (3), Criminal P. C., to direct that the accused should be allowed to cross-examine the prosecution witnesses, that their plea of guilty should be cancelled and they should be questioned again under S. 342, and that, if they want to examine any defence witness, they should be allowed to do so.

The order of the Sessions Judge terminates in this way :

After taking down the deposition in this manner, the S. D. O. should submit the record again to the District Judge for considering the evidence on its merits. No further prosecution witnesses will, however, be examined. The record is accordingly sent back to the S. D. O. for necessary action.

It is against that order of the Sessions Judge that the Crown obtained the rule and the first two grounds that we are considering may be regarded as preliminary grounds which are drafted as follows :

(1) For that the learned Judge's order directing the cancellation of the plea of guilty is unauthorised by law ; and (2) for that the learned Judge's order directing that no further prosecution witness would be allowed to be examined is illegal and erroneous.

As regards the first ground, it seems to me that there is a fallacy underlying the contentious argument which consists of the criticism of the learned Judge's direction in relation to the plea of guilty on the part of the accused persons. In point of fact, and in point of law, this plea was not a plea of guilty at all. Strictly speaking a plea of guilty in a criminal Court can only be made in response to a charge made by the Court and an informal admission as to guilt does certainly not amount to a formal plea of guilty and such an admission has not, of course, the same binding effect as a plea of guilty. It has not the same effect in fact and it has not the same effect in law. It is quite obvious that an admission of guilt in proceedings such as this or in proceedings of a more informal character could not support, for example, the plea of *autrefois* convict and that being so, I think it is only right and

proper that we should regard the whole of the action of the Sessions Judge to which exception has been so strongly taken on technical grounds by the Crown from a fair and reasonable standpoint. I think that the learned Judge was of the opinion that having regard to the atmosphere which existed in the Madaripur District to which I made a brief reference at the beginning of my judgment with a purpose that the whole conduct of these proceedings was perhaps of a rather less unimpassioned kind than one would usually find in a Court of justice.

He seems to have suspected too and those of us, who have practical experience in this matter, know that such a thing is not impossible that there might have taken place a bargain on the part of the accused and the Subordinate Police Officers with regard to these admissions. A Sessions Judge is entitled to take that view if he chooses. It is, in my opinion, of very great importance that the Judge in his position should take this broad line and should more specially regard the local difficulties both of the accused and of the prosecution when they are perhaps living in an atmosphere electric with unrest. I think it was reasonable that he should have ordered the cancellation of the so called pleas of guilty which, as I have already pointed out, were really nothing more than admissions. I think that the whole of the rest of his order was perfectly correct and proper, with the exception that I consider that he had no right to direct that no further prosecution witnesses should be examined. Neither the prosecution nor the defence, in enquiries of this kind, ought to be hampered in any way. It ought to be open to the defence to cross-examine these prosecution witnesses if they wished to. The reason for this is that the learned Judge with his experience has referred to the abstention, as if it was part of the bargain possibly between the authorities and the accused, so that the accused should not give further trouble. Therefore, our order on this application is that this rule will be made absolute to a limited extent. It will be on this basis that the learned Judge ought not to have directed that no further prosecution witnesses should be allowed to be examined and on that ground alone his final direction, to which I have referred, be altered.

Henderson, J. — Proceedings were drawn up under the provisions of S. 110, Criminal P. C., against the opposite parties. 70 witnesses were examined for the prosecution. None of them was cross-examined. The opposite parties were then examined under the provisions of S. 342, of the Code and, in reply to the questions asked, they made use of the Bengali words :

An order was then made, directing them to give security for a period of three years. As they were unable to do so, the proceedings automatically came before the learned Sessions Judge under the provisions of S. 123 and he passed an order, the terms of which have been set out by my learned brother.

In my opinion the first ground upon which this rule has been supported is entirely misconceived. The ground taken is that a plea of guilty cannot be withdrawn or cancelled. Of course, the answer to that technical plea is that there never was a plea of guilty, because such a thing is unknown in an inquiry under Ch. 8 of the Code. I entirely agree with my learned brother that a plea of guilty means a plea made to a regular charge at a trial. S. 117, sub-s. (2) specifically lays down that in an enquiry under this chapter, no charge need be framed, and in fact, no charge was framed. The statements made by the opposite parties are, therefore, nothing more than admissions and the position is as follows: When the proceedings came before the learned Judge, the opposite parties made a case to the effect that their conduct at the trial was due to an inducement made by the investigating Police Officer; that they were led to suppose that their security would be accepted, and although they led no serious objection to execute bonds, they strongly objected to being given rigorous imprisonment for a term of three years. Now, there were materials before the learned Judge which would certainly justify him, if he saw fit to do so, to come to the conclusion that there was something in this. Indeed, it is difficult to explain their behaviour at the trial on any other hypothesis. I can find nothing in the law to suggest that in such circumstances, a Sessions Judge is forbidden to direct that the accused persons should be examined again. Taking the view that he did, and it is not for us to say here whether that view was

right or wrong, this order was a thoroughly sensible order.

The second ground appears to me to be equally plain. The opposite parties induced the Judge to accept their contention that their conduct was due to an inducement and that their admissions were, therefore, made under a misapprehension. In such circumstances, they asked that they might be allowed to re-open the matter. But it is exactly the same with the prosecution; owing to the attitude adopted by the opposite parties, they did not think it necessary to produce all the evidence which they had at their disposal. I entirely agree with my learned brother that if the matter is to be re-investigated at all, it ought to be a proper and complete investigation. I am bound to say that I find it difficult to appreciate why Mr. Gupta should have thought it worth his while to oppose the rule on this ground and to attempt to shut out evidence which was not produced merely because of the attitude adopted by his own clients. I accordingly agree that this rule should be made absolute to the limited extent indicated by my learned brother.

R.M./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 294

CUNLIFFE AND HENDERSON, JJ.

Jitendra Nath Gorai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1087 of 1935, Decided on 18th March 1936.

Practice — Appeal — Pleader should be heard before dismissing appeal summarily.

Before dismissing an appeal summarily, a Judge ought to give the pleader an opportunity of arguing the case. [P 295 C 1]

Sudhansu Sekhar Mukherjee — for Petitioner.

Henderson, J.—This is a Rule calling upon the District Magistrate of the 24-Parganas to show cause why an order summarily dismissing the petitioner's appeal should not be set aside. The learned Magistrate in reply says that he has no cause to show and the Crown does not oppose the Rule. The petitioner filed this appeal through a pleader. After hearing the pleader, the learned Judge thought it necessary to call for the record and fixed 24th September. On that date,

without giving the pleader an opportunity of being heard, he dismissed the appeal summarily. We do not think there was much use in calling for the record, if the learned Judge was not prepared to hear the pleader. We are of opinion that before dismissing the appeal summarily, he ought to have given the pleader an opportunity of arguing the case. In his explanation the learned Judge says that had the pleader followed him to his chamber at the end of the day and asked for a hearing, he would have been prepared to consider his application. We, accordingly, make this Rule absolute, set aside the order dismissing the appeal and direct the learned Judge to rehear it after giving the petitioner's pleader an opportunity of being heard. The petitioner, who is on bail, will surrender to his bail pending further orders by the Sessions Judge.

Cunliffe, J.—I agree.

B.D./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 295

JACK, J.

Dr. Kasiruddin Talukdar—Plaintiff—Appellant.

v.

Dr. Mafizuddin Ahmed and others—Respondents.

Appeal No. 949 of 1935, Decided on 4th March 1936, from appellate decree of Sub-Judge, Bogra, D/- 12th April 1935.

(a) Bengal Local Self Government Act (3 of 1885), Ss. 9 (2), 138.-A—Rules under S. 138-A—R. 59—Persons staying with father in residence belonging to him for some months in year—No evidence to show that he has title to house—He cannot be said to have place of residence within meaning of S. 7 of Village Local Self Government Act—Such person not nominated to vote for joint undivided family—He is not only member of family entitled to vote.

A person who stays with his father in a residence belonging to him for only some months of the year cannot be said to have a residence within the meaning of S. 7, Village-Local Self Government Act, so as to entitle him to vote unless there is evidence that he has some title to the place of residence; nor can such person be deemed to be the only member of a joint family entitled to vote within meaning of S. 7, unless he is nominated to vote on behalf of the family. Such a person not having the necessary qualification for a Local Board is not qualified to be member of a District Board.

[P 296 C 2; P 297 C 1]

(b) Election—Validity of—One member found to be not duly qualified—Whole elec-

tion is not invalidated—Invalid election of member not affecting election of Chairman or vice-Chairman—Their election is not invalid.

The mere fact that one of the members has been found not to be duly qualified does not invalidate the whole election. [P 298 C 2; P 299 C 1]

So also where it is not shown that the invalid election of a member has in any way affected the election of the Chairman or vice-Chairman, the election of the latter is not invalid. [P 299 C 1]

(c) Bengal Local-Self Government Act (3 of 1885), S. 138-A—Election rules framed under S. 138-A—Rr. 1, 26-A, 26-B, 56—Civil Court has no jurisdiction to decide dispute as to qualification of members of District Board—Such disputes are to be decided by District Magistrate whose decision will be final.

A civil Court has no jurisdiction to decide a dispute as to the qualification of the members of the District Board. [P 297 C 1; P 299 C 1]

A dispute as to the qualification for membership of the District Board is a dispute under the rules framed under S. 138-A laying down the qualifications; and under R. 1-A all disputes arising under the rules shall be decided by a Magistrate whose decision will be final. It is clearly intended by the Legislature that the procedure should be a summary one so that disputes as to qualification should not be kept pending in civil Court. [P 297 C 2; P 298 C 1]

Dr. Mukherjee and Subodh Chandra Sen—for Appellant.

Dr. Basak, Amarendra Mohan Mitra, Atul Chandra Gupta and Dwijendra Narain Ghosal—for Respondents.

Judgment.—This appeal has arisen out of a suit for a declaration that the constitution of the present District Board of Bogra is illegal and ultra vires; that the election of the Chairman was illegal and that they are not entitled to assume office as such. The District Board, as at present constituted, consists of 18 members, 12 elected from the two Local Boards, namely the East Bogra Local Board and the West Bogra Local Board, and 6 nominated by the Government. Defendants 1 to 7 were the members from the West Bogra Local Board, defendants 8 to 12 from the East Bogra local Board, and defendants 13 to 18 are nominated members. Defendants 5 to 7 are the nominated members of the West Bogra Local Board and defendants 1 to 4 are the elected members. Defendants 8 to 10 are the elected members, and defendants 11 and 12 are the nominated members of the East Bogra Local Board. Defendant 18 is the father of defendant 5. The plaintiff is an elected member of the West Bogra Local Board and the pro

forma respondent who was originally plaintiff 2, and was made a pro forma defendant on his choosing not to proceed with the suit, is an elected member of the East Bogra Local Board. The plaintiff's case is that defendants 5 and 11 had not the residential and other qualifications required by law, and as such they were not eligible for election as members of the District Board; that by the illegal election of defendants 5 and 11 the plaintiff lost his chance of being elected to the District Board, and that the election of defendants 5 and 11 having been illegal, the election of the other elected members and the other office bearers of the District Board was illegal and ultra vires.

The contesting defendants pleaded that the civil Court had no jurisdiction to try the suit, that defendants 5 and 11 had the necessary qualifications for being elected as members of the District Board, and that the suit was mala fide and brought in collusion with and at the instance of defendant 3. The trial Court dismissed the suit holding that defendant 5 was qualified for election but that defendant 11 was not so qualified as he had not the necessary residential qualification required by law and that the civil Court has no jurisdiction to try the suit. The lower appellate Court came to the same conclusion as regards qualification of defendants 5 and 11 but held that the civil Court had jurisdiction to try the suit, and that the present plaintiff had no right to challenge the election of defendant 11. It therefore dismissed the appeal. In this appeal it is urged that defendant 5 had not the requisite qualification for membership of the District Board and that as a voter of the Local Board the plaintiff was entitled to challenge the election of defendant 11. Under S. 138-A, Bengal Local Self-Government Act, it would be lawful for the Local Government to make rules consistent with the Act for any District Board for the purpose of determining the qualifications and disqualifications of members. On referring to S. 9 (2), of the same Act we find that every person who is qualified to vote at an election of members of a Union Board within the area under the authority of a Local Board shall be entitled to be a member of the Local Board if duly elected thereto. Under R. 59 of the Election Rules under the Local Self-

Government Act, the only persons qualified for election as members of the Local Board in the district are qualified for election as members of the District Board. So that rules have, in fact, been framed laying down the qualifications of members of the District Board. S. 7, Village Self-Government Act, lays down the qualifications of voters and members of the Union Board:

Every male person of the full age of 21 years who, during the year immediately preceding the election has paid a sum of not less than one rupee as cess under the Cess Act, 1880, in respect of lands situated wholly or in part in such Union or who during the year immediately preceding such election has been assessed at and paid a sum of not less than one rupee for the purpose of the Union rate payable under this Act, or who is a member of a joint undivided family, which during the year immediately preceding the election has paid a sum of not less than one rupee as such cess, rate or tax, shall be entitled to vote at an election of members of the Union Board.

By virtue of S. 9 (2), Bengal Local-Self Government Act and R. 59, of the Election Rules under that Act, these electors are qualified to be members of the District Board. The question then is whether defendant 5 and defendant 11 were qualified to vote for the election of members of the Union Board under this rule. It was found that defendant 11 had no place of residence within the Union and he is, therefore, not qualified. As regards defendant 5, it is urged that he has a place of residence within the Union and that he is entitled to vote under sub-cl. (3) of S. 7. It is also claimed that he is entitled to vote under sub-cl. (1), but on the facts found he is clearly not so entitled. It has been urged on the other hand that on the facts found he is also not entitled to vote under sub-cl. (3) as well as owing to the fact that he has no place of residence within the Union. He claims to have a place of residence at Sultanganj within the Union where for some months of the year during the mango season he lives with his father, defendant 18. The finding is that this residence belongs to his father, that he lives in joint family with his father, and that therefore he is entitled to come in under sub-cl. (3). It is clear however that unless there is evidence that he has some title to this place of residence, he will not be eligible as having a place of residence within the Union. It has been found that he and his father both inherited shares in the property left by his mother

and it is claimed, therefore, that they are members of a joint undivided family.

The evidence however shows that defendant 5 is mainly supported by his father and that the father has married another wife by whom he has other children and that it would be more correct to say that they are two members of a family having a joint interest in inherited property rather than that they are members of a joint undivided family. In any case, even if they can be regarded technically as members of a joint undivided family, the evidence shows that the cess was paid not by the joint family but by defendant 18, and therefore defendant 5 was clearly not qualified under this rule. It is doubtful also whether he comes under the proviso which states that only one member of a joint undivided family is entitled to vote. It is true that defendant 18 asked that his son, defendant 5, should be allowed to vote in his place. But it is questionable whether he can be said to have been nominated to vote on behalf of a joint family. But both on the ground that he possessed no place of residence within the Union and that he was not a member of a joint undivided family which paid more than one rupee as cess during the year immediately preceding the election, it is clear that defendant 5 had not the necessary qualification to vote for the election of the members. Therefore, he is not qualified to be a member of the District Board. The other point that remains to be decided is whether the civil Court had jurisdiction to decide the dispute as to the qualifications of the members of the District Board. In this connection the relevant rules are first of all R. 1-A of the Election Rules under the Local Self-Government Act which states:

All disputes arising under these rules other than objections under Rr. 15 and 42 shall be decided by the Magistrate of the District and his decision shall be final.

Rule 24 says:

Every person whose name does not appear in the register of voters and who claims to vote may at least, six weeks before the date fixed for the election, apply in writing to the Magistrate of the District or to such other officers as the Magistrate of the district may appoint in this behalf stating distinctly the grounds of his application to have his name inserted in the register or substituted for any name in the register,

namely in the register of the elections,

for members of the Local Board; and S. 25 says:

Any person whose name is in the register and who considers that any name appearing in the register ought to be omitted, may, at least six weeks before the date fixed for the election, apply in writing to the Magistrate of the district or to such other officer as the Magistrate of the district may appoint in this behalf, stating distinctly the grounds of his application to have such name omitted.

Rule 26-B says:

Every application made under R. 24 or 25 shall be duly considered by the Magistrate of the district, or such other officer as may be appointed by him in this behalf on the date fixed under R. 26-A and the decision of the Magistrate of the District or of the officer so appointed, as the case may be, shall be final.

Rule 56 says:

The names of the persons elected to serve on the District Board shall be forwarded without delay to the Magistrate of the District, who shall ascertain if they are duly qualified and are willing to serve.

Rule 57 says:

If any person having been elected, declined to take office or be found not to be duly qualified, the unsuccessful candidate, if any, who received the largest number of votes, shall be declared to be duly elected. If there is no unsuccessful candidate, a fresh election shall be held to fill the vacancy thus created.

Rule 59 referred to before states:

Only persons qualified for election as members of a Local Board in the district are qualified for election as members of the District Board.

It seems to me that under R. 56, it is for the Magistrate to ascertain whether the persons elected to serve on the District Board are duly qualified or not and it is also the District Magistrate who, at an earlier stage under R. 26-A, is entitled to decide whether any person who claimed the right of voting for the Local Board had or had not that right. Under R. 26-B it is clear that the decision of the Magistrate on such claims is final. Any one can claim to have the necessary qualification and it is open to any one to dispute the qualification of any person who claims to have the necessary qualification and has been elected; both can apply to the Magistrate whose duty it is to ascertain who is duly qualified, and under R. 1-A all disputes arising under the rules shall be decided by the Magistrate and his decision is to be final. It is urged on behalf of the appellant that this is not a dispute arising under the rules. But any dispute as to the qualification for membership of the District Board appears to be a dispute under the rules

which lay down the qualifications. It was clearly intended by the legislature that the procedure should be a summary one so that disputes as to qualifications for membership and as to election should not be kept pending in the civil Court. In support of the appellant's claim that the civil Court has jurisdiction, the case in 14 Pat 24 (1) has been referred to. That case was decided with reference to R. 68 of the rules framed by the Bihar and Orissa Government under their Local Self-Government Act which states that all disputes arising under these rules in regard to any matter other than a matter the decision of which by any "authority is declared by these rules to be final, shall be decided by the District Magistrate whose decision shall be final."

In that case it was held that the decision of the Returning Officer as to the validity of a ballot paper being made final by the rules, the District Magistrate had no power to decide that dispute and, therefore, that R. 68 did not bar the jurisdiction of the civil Court to entertain the suit. So that that case is no authority for holding that in a case with reference to the rules framed under the Bengal Local Self Govt. Act the civil Court had jurisdiction. However, the argument in favour of the appellants is based on the reference made in that case to S. 138, Bihar and Orissa Local Self-Government Act of 1885 which is in terms similar to the Bengal Local Self-Government Act with regard to which it was held that it was the intention of the legislature that an election tribunal should be set up by the Local Government for deciding all disputes relating to elections upon petitions to have an election declared invalid for any reason such as, for example, such irregularity in the conduct of the election as has materially affected the result thereof, or upon such general grounds as wholesale bribery or public disorder which prevented the voters from exercising their franchise, and that the District Magistrate does not constitute the election tribunal to decide all disputes as contemplated by S. 138; his authority is limited to deciding any dispute relating to the procedure of the election save and except such disputes as are to be decided by the Presiding Officer or the Returning Officer

and that where the tribunal so contemplated by the legislature has never been brought into existence, the subject has the right to proceed in the ordinary civil Courts unless and until the legislature carries out its duty of appointing a special tribunal.

It may be that under S. 138 it was the intention of the Local Government to set up a tribunal for determining disputes other than those provided for in the rules already in existence or the rules which have since been framed, but in the case of the qualifications and disqualifications of members of the District Board inasmuch as rules had already been framed laying down the qualifications and stating that the Magistrate of the District was to decide who was qualified, it is not clear why the Local Government should have contemplated the establishing any special tribunal to decide such matters. The rules have already determined the qualifications of the members of the District Board and as regards disputes arising under these rules, it has been laid down that the decision of the District Magistrate shall be final, so that, in my opinion, if the Local Government had the idea of establishing the tribunal, it must have been with reference to other disputes than those already provided for in the rules. The Patna case is only authority for the special case which was then decided with reference to the rules of the Bihar and Orissa Government. The finding of the appellate Court, that the plaintiff had no right to dispute the qualification of defendant 11, has been attacked on the ground that the plaintiff had the right of a voter, i. e., as a member of a Local Board in the district, he was entitled to vote for the members of the District Board and, therefore, he was entitled to dispute the election of defendant 11. But in the plaint his right of action was based only on the fact that he lost his chance of being elected in the District Board owing to the illegal election of defendants 5 and 11. But it is clear that the election of defendant 11 from the Local Board of East Bogra in no way affected the plaintiff's chance of election from the West Bogra Local Board. It was only through the West Bogra Local Board he could be elected and, therefore, his election was not in any way influenced by any illegal election of defendant 11 from the East Bogra Local Board. It is, however, con-

1. Lachmi Chand Suchanti v. Ram Pratap Choudhury, 1934 Pat 670=152 IC 805=15 P L T 623=14 Pat 24 (F B).

tended now that in any case as a voter for the election or even as a ratepayer he was entitled to dispute the election of defendant 11. But even if he be held to be entitled to dispute the election of defendant 11 it would not follow that the whole election was illegal. R. 57 of the Election Rules states that:

If any person having been elected, decline to take office or be found not to be duly qualified, the unsuccessful candidate, if any, who received the largest number of votes, shall be declared to be duly elected. If there is no unsuccessful candidate, a fresh election shall be held to fill the vacancy thus created.

But the fact that one of the members has been found not to be duly qualified would not invalidate the whole election; and, as regards the election of the Chairman and the Vice-Chairman, in this case it has not been shown that the invalid election of defendant 5 or 11 has in any way affected the election of the Chairman or the Vice-Chairman. So that there seems to be no foundation for the plaintiff's claim for a declaration that the whole election or the election of the Chairman or Vice-Chairman is invalid. However, on the general ground that the civil Court has no jurisdiction this appeal is dismissed with costs. Leave to appeal under S. 15 of the Letters Patent is prayed for and is rejected.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 299

NASIM ALI AND HENDERSON, JJ.

Sheikh Alam and others — Plaintiffs—Appellants.

v.

Atul Chandra Roy and others — Respondents.

Appeal No. 317 of 1933, Decided on 20th August 1935, from appellate decree of Sub-Judge, 4th Court, Mymensingh, D/- 29th June 1932.

(a) Bengal Tenancy Act (1885), Sch. 3, Art. 3—"Dispossession."

"Dispossession" in Art. 3, Sch. 3 of the Act means dispossession by landlord. [P 300 C 1]

(b) Bengal Tenancy Act (1885), Sch. 3, Art. 3—Suit to recover possession by tenant wrongfully dispossessed is governed by Art. 3 even though dispossession is brought about through process of Court.

The provisions of Art. 3 are attracted if the raiyat wants to recover possession by a suit from his landlord who has wrongfully dispossessed him from his holding. The reason or excuse given or supposed to be given by the landlord for dispossessing the raiyat has no bearing on the enactment. The mere fact that

the dispossession of the plaintiffs is brought about through the process of the Court cannot take away the case from the operation of Art. 3, because the responsibility for the dispossession is on the landlord who resorts to the process of the Court as a mode of effecting ouster: 1927 Cal 488, *Rel. on.* [P 300 C 1]

(c) Bengal Tenancy Act (1885), Sch. 3, Art. 3—Suit for possession by usufructuary mortgagee wrongfully dispossessed is governed by Art. 3.

Usufructuary mortgagees who have been dispossessed by the landlord have a right to put to an end to the trespass by the landlord by bringing a suit for ejectment within the time prescribed by law and such a suit is governed by Art. 3. [P 300 C 1]

Basak, Gopal Chandra Das and Bhuban Mohan Saha—for Appellants.

Ramendra Mohan Mujumdar for Dy. Registrar—for Respondents.

Nasim Ali, J.—This appeal arises out of a suit for possession. The trial Court decreed the suit. On appeal the learned Judge has affirmed the finding of the trial Court on the question of plaintiffs' title. He has, however, dismissed the suit on the ground that it is barred by limitation under Art. 3, Sch. 3, Ben. Ten. Act. Hence this second appeal by the plaintiffs.

The only point for determination in this appeal is whether the suit is barred by special limitation. The facts which are material in this connexion are these:

The disputed lands appertain to the occupancy holding of one Meajan under defendants 1 to 5 and some other persons. Meajan died leaving behind a widow Jokarjan, a son Tukani and three daughters Matijan, Rabjan and Mamjan. Plaintiffs 1 to 5 and 9 to 13 claim title to the disputed lands on the basis of certain usufructuary mortgages executed by Meajan and after his death by Tukani. The other plaintiffs are Rabjan, Mamjan and the husband of the deceased Matijan. Defendants 1 to 5, who are co-sharer landlords of the holding purchased the right, title and interest of Tukani's heirs in execution of a money decree on 8th August 1922, and took delivery of possession through Court under O. 21, R. 95, Civil P. C., on 5th February 1923. On 29th May 1923 a proceeding under S. 145, Criminal P. C., was started, and by an order of the Criminal Court passed on 9th November 1923 defendants 1 to 5 were declared to be in possession. After this one of the defendants brought a criminal case under S. 426, I. P. C., against the plaintiff Anam who was in possession

of the disputed lands on behalf of all the plaintiffs. This case was compromised on 4th April 1924. In the petition of compromise it was admitted by Anam that the lands were in possession of defendants 1 to 5. The present suit was instituted on 26th February 1926.

It is therefore clear that the present suit was not commenced within two years from the date of the dispossession of the plaintiffs from the disputed lands by defendants 1 to 5. Defendants 1 to 5 are admittedly co-sharer landlords. "Dispossession" in Art. 3, Sch. 3, Ben. Ten. Act, means dispossession by landlord. The fact that defendants 1 to 5 dispossessed the plaintiffs as auction-purchasers cannot take the case from the operation of Art. 3 inasmuch as it would not be reasonable to add to Col. 3, not merely the words "by the defendants," not merely the words by the landlord, but the words "by the landlord as such": see 31 C W N 634 (1). The provisions of Art. 3 are attracted if the raiyat wants to recover possession by a suit from his landlord who has wrongfully dispossessed him from his holding. The reason or excuse given or supposed to be given by the landlord for dispossessing the raiyat has no bearing on the enactment. Again the mere fact that the dispossession of the plaintiffs is brought about through the process of the Court cannot take away the case from the operation of Art. 3 because the responsibility for the dispossession is on the landlord who resorts to the process of the Court as a mode of effecting ouster. See the observations of Page, J., and Rankin, C. J., in the case cited above.

The usufructuary mortgagees are also hit by Art. 3 inasmuch as they were in possession at the time of the dispossession and therefore they had a right to put an end to the trespass by the landlord by bringing a suit for ejectment within the time prescribed by law. The learned Judge was therefore right in holding that the suit is barred by limitation. The appeal is therefore dismissed. The cross-objections are not pressed and are dismissed without costs.

Henderson, J.—I agree.

K.S./R.K.

Appeal dismissed.

1. Satish Chandra v. Hashem Ali Kazi, 1927 Cal 488=103 I C 124=54 Cal 450=31 C W N 634.

A. I. R. 1936 Calcutta 300

GUHA AND KHUNDKAR, JJ.

Mahim Chandra Guha Deb Barman—
Plaintiff—Appellant.

v.

Secy. of State—Defendant 1 and others
—Respondents.

Appeal No. 95 of 1932, Decided on 19th June 1935, from original decree of Sub-Judge, First Court, Chittagong, D/- 18th December 1931.

(a) Bengal Tenancy Act (1885), Ss. 104-J and 111-A — Re-opening of area and rent settled by Revenue Officers—Plaintiff must proceed under S. 104-J and not by declaration under S. 111-A.

Where the main reliefs prayed for, relates to the question of area of the tenancy and to the question whether the rent payable by the tenant is liable to enhancement or not, it is incumbent upon the plaintiff to proceed under S. 104-J if he wants to have the question of area decided and to have the question of rent settled by Revenue Officers re-opened, and this cannot be allowed to be done by an indirect method of having a declaration under S. 111-A. The civil Court would not be justified in granting a discretionary relief by way of declarations, if the remedy by way of consequential relief is unquestionably barred, and which consequential relief is the ultimate object of the relief prayed by way of simple declarations. [P 301 C 1, 2]

(b) Bengal Tenancy Act (1885), S. 104-J—Enhancement of rent—Progressive rent for certain number of years—Maximum rent to be in force for fixed period—No rent fixed after existing settlement—On revision of settlement, rent can be enhanced.

There was progressive rent for a certain number of years, and a maximum rent was mentioned which was to be in force for the last five years of the period of the existing settlement and there was no mention about the rent to be paid after the period of that settlement:

Held: that when there was the occasion for a revision of settlement, there could be no bar to the rent being enhanced and the rent was not fixed in perpetuity: 1927 P C 20, Ref.

[P 301 C 2; P 302 C 1]

Bejoy Kumar Bhattacharjee, Nagendra Nath Bose and Tarakeswar Nath Mitra—for Appellant.

Bijan Kumar Mukherjee—for Respondents.

Judgment.—The plaintiff-appellant in this appeal instituted the suit in which this appeal has arisen, prayed for a declaration that a raiyati jama held by him which was the subject of the litigation comprised an area of 117 drones odd of land and that the Record of Rights as prepared in the last revisional survey was incorrect and inaccurate; the main relief sought by the plaintiff in the suit was for

a declaration that rent in respect of the raiyati holding was not liable to enhancement. The Secretary of State for India in Council was made a defendant in the suit, and the claim, as made in the suit, was contested by him. On the pleadings of the parties, one of the issues raised in the case related to the question whether the suit as instituted was barred by the provisions contained in S. 104-J, Ben. Ten. Act. On this part of the case, the plaintiff asserted that the suit was clearly maintainable in view of the provisions contained in S. 111-A, Ben. Ten. Act, and that the plaintiff was entitled to have the declaration prayed for, irrespective of S. 104-J. The scope of the suit, as indicated by the plaint filed in the case, regard being specially had to the nature of the relief claimed, has to be primarily looked at for the purpose of arriving at a conclusion on the point thus raised. In our opinion there can be no doubt that the question raised by the plaintiff in the suit, related to matters specifically enumerated in Cls. (d) and (e), sub-s. (3), S. 104-A, Ben. Ten. Act; and the general provisions contained in the last paragraph of S. 111-A, could not be invoked for the purpose of nullifying the effect of Section 104-H read with S. 104-J of the Act. The declarations prayed for in the suit related to matters specifically referred to in the Act in regard to which there was no right of suit unless the provisions of the law made in that behalf were complied with, which provisions involved the question of limitation. The main reliefs prayed for related to the question of area of the tenancy and to the question whether the rent payable by the tenant was liable to enhancement or not. It was incumbent upon the plaintiff to proceed under S. 104-J, Ben. Ten. Act, if he wanted to have the question of area decided, and to have the question of rent settled by the Revenue Officers reopened. What was not attempted to be done by having recourse to the specific provisions laid down by law could not be allowed to be done by an indirect method of having a declaration under S. 111-A, Ben. Ten. Act. The civil Court would not be justified in granting a discretionary relief by way of declarations, if the remedy by way of consequential relief was unquestionably barred, and which consequential relief was the ultimate object of the relief prayed by way of simple

declarations. In the above view of the case we are clearly of opinion that the learned Judge in the Court below was right in holding that the suit as instituted was not maintainable, regard being had to the provisions contained in S. 104-J, Ben. Ten. Act.

The trial Court has decided the question raised before it on the merits, and we proceed to give our decision on the points raised in support of the appeal, so far as the merits of the case were concerned. In the first place, the question of area as raised in the suit, could not possibly be decided on the materials before the Court. The plaintiff-appellant laid the blame at the door of the contesting defendant in the suit, as papers called for from the Secretary of State for India in Council were not produced in Court. We are unable to hold on the materials, that it was not possible for the plaintiff to place on record materials for the purpose of determining the question of area of the tenancy as raised by him. The lands comprised in the plaintiff's tenancy were not pointed out to the Revenue Officers at the time when revisional settlement was in progress; and the plaintiff was unable to specify the lands which had been omitted from his tenancy. In these circumstances, on the materials before us, the declaration relating to the area comprised in the plaintiff's tenancy could possibly be granted to him. The main controversy in the case centred round the question whether the rent payable by the plaintiff was liable to enhancement or not. The position must be recognized that the landlord had the right to enhance rent payable in respect of a tenancy, unless he was debarred from doing so.

The question to be considered on this part of the case was whether the entry in settlement records on which very strong reliance was placed on the side of the plaintiff-appellant could lead to the conclusion that the landlord had abandoned his right to enhancement: see 54 I A 48 (1). There was nothing on the record which could lead to the inference that the rent payable by the plaintiff was not liable to enhancement. There was progressive rent for a certain number of years, and a maximum rent was men-

1. Krishnendra Nath Sarkar v. Kusum Kamini Debi, 1927 P C 20=100 I C 93=54 I A 48=54 Cal 166 (PO).

tioned which was to be in force for the last five years of the period of the existing settlement. There was no mention about the rent to be paid after the period of that settlement; and when there was the occasion for a revision of settlement, there could be no bar to the rent being enhanced as was done by the Revenue Officers. The trial Court has on the materials on the record rightly held that there was nothing tangible to show that the rent was fixed in perpetuity or that it could be so fixed in respect of lands situate in a temporarily settled area. Reliance was placed in support of the appeal on statements contained in a compromise petition filed in Court by some of the co-sharer landlords, that the plaintiff was a kaimi mokarari tenant. The statement contained in Ex. 9 (a) in the case was not a statement by the entire body of landlords, and any statement of that kind, even though made by all the landlords concerned, could not bind the revenue authorities, in the matter of settlement of fair and equitable rent under S. 104, Ben. Ten. Act. The plaintiff was recorded as settled raiyat, and not as a raiyat at a fixed rate; the fact that he was a settled raiyat did not imply that the rent payable by him could not be enhanced.

The conclusion arrived at by us lead to the result that the decision of the trial Court has to be affirmed. In our judgment there can hardly be any doubt that the real object of suit as instituted was to get reliefs which could not be granted in view of the specific provisions contained in S. 104-H and S. 104-J, Ben. Ten. Act. The plaintiff cannot be allowed to have a declaration the ulterior object of which is to have a revision of the fair rent settled in respect of his tenancy, by invoking the aid of S. 111-A, Ben. Ten. Act. Furthermore, on the merits, as indicated above, the plaintiff has not established his right to any of the declarations prayed for in the suit. The appeal is dismissed with costs; the hearing fee is assessed at three gold mohurs. The cross-objections are not pressed and are dismissed. We make no order as to costs in the cross-objections.

K.S./R.K.

*Appeal dismissed.***A. I. R. 1936 Calcutta 302**

JACK, J.

Nabin Chandra Roy and another—Defendants—Appellants.

v.

Rajendra Kumar Nag Choudhury and others—Plaintiffs—Respondents.

Appeal No. 196 of 1934, Decided on 4th March 1936, against decree of Sub-Judge, 2nd Court, Sylhet, D/- 22nd August 1933.

Evidence Act (1872), S. 91—Terms of kabuliyat clearly showing a contract by lessor to give khas possession—It is not open for lessor to give evidence to prove any other arrangement under S. 91.

Where it is clear from the terms of the kabuliyat that the contract was that the lessee would get khas possession of the lands and in the circumstances, the oral evidence to show that there was any other arrangement between the parties is not admissible under S. 91.

[P 304 C 1]

Nripendra Chandra Das—for Appellants.

Nuruddin Ahmed and Amiruddin Ahmed—for Respondents.

Judgment.—This appeal has arisen out of a suit for recovery of rent for the years 1334 to 1338 at the rate of Rs. 16 per annum on the basis of a registered kabuliyat together with damages at the rate of 25 per cent on the rent due. The suit was contested on the ground that the plaintiffs had not put the defendants into possession of the land which was leased to them, and that the plaintiffs were not the sole landlords having only an eight annas share, a fact which was concealed from the defendants at the time when the kabuliyat was executed. The trial Court dismissed the suit on the ground that the defendants had not been put into possession of the land. On appeal, the learned District Judge decreed the suit. The kabuliyat on which the suit is based states that the holding in question which was described therein as "owned and possessed by me, namely, the lessor, is mourashi right" and the lessee says:

I, having applied for taking a permanent patni settlement and you having agreed to grant the same, I, do hereby take from you this permanent Mokurari Patni Patta to the following effect.

The deed continues:

We have been owners possessing the aforesaid land with other lands since the time of our ancestors in Maliki right. Your having applied for taking a permanent Patni Settlement of the aforesaid land; we have agreed to grant your

prayer, and we having received in cash to-day from you Rs. 225 as Nazarana in respect of the 4½ Kedars of land described in the schedule below and after having accepted the kabuliyat executed by you grant this permanent patta fixing the annual kaimi rent at Rs. 16.

The document goes on to state :

You shall be entitled to own and possess the aforesaid patni right and shall be entitled to make gifts, sales, grant leases and make all sorts of transfers. You, your heirs, representatives and successors in interest shall be entitled to own and possess the patni by exercising all sorts of rights such as rights of digging ditches and pools, constructing pucca houses and pucca walls and by cutting the trees and by burning bricks, etc.

From this it is clear that the intention was that the lessee should get khas possession. Ordinarily, in such a case if the landlord fails to put the lessee into possession he will not be entitled to recover rent. The learned Judge, however, holds that this case stands on a different footing; in the first place, because the kabuliyat is silent on the fact that the lessor will have to put the lessee in possession of the lands demised to the latter; and secondly, because it is the specific case of the plaintiffs that defendant 1, who was eager to have the disputed lands in connection with his business, took settlement of the lands knowing full well that they were in the occupation of certain tenants of the plaintiffs and that he agreed to manage matters somehow with regard to getting khas possession of the lands leased out to him. He points out that the defendants who had their brick-fields and other lands in the vicinity and who were actually conversant with the nature of the lands in suit would have surely insisted on the insertion of a clause relating to the delivery of possession of the lands to them by the plaintiff in the kabuliyat, had the plaintiffs actually agreed to put them in possession of the lands. He says that the absence of such a clause, together with the subsequent conduct of defendant 1 in taking steps to get possession of certain portions of the lands even after expenditure of money, lends support to the plaintiffs' story that defendant 1 who was very eager to have the lands in suit undertook to manage matters somehow regarding his khas possession of the lands in suit. He referred to some evidence, with regard to this kabuliyat, of one Jogendra Nath Guha to the effect that this was agreed between the parties at the time of the execution of the kabuliyat. On the other

hand, it is contended that under S. 91, Evidence Act, oral and other evidence is not admissible. Under S. 91 when the terms of a contract have been reduced to the form of a document, no evidence shall be given to prove the terms of the contract, grant or other disposition of property except the document itself. On the other hand, under S. 92, Evidence Act, the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved. It is argued that, in this case, since the document is silent as to whether the lessor was to put the lessee into possession, oral evidence is admissible to show that there was no such agreement. However, although it is not expressly stated that the lessor will put the lessee into possession, that this was understood is quite clear from the terms of the document. The document states that the lessee would be entitled to own and possess the putni by exercising all sorts of rights, such as rights of digging ditches and pools, constructing pucca houses and pucca walls and by cutting the trees and by burning bricks. It is thus clear that the intention was that the lessee will be entitled to have khas possession and, in the circumstances, I think that S. 92, Evidence Act, can have no application.

For the appellant the case in 59 I A 29 (1), has been referred to. There it was held by their Lordships of the Privy Council that where the tenant denies that he ever got possession of the land it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. In that case it was held that the respondent knew when he executed the kabuliyat that the whole 16 annas would not be available. The learned Subordinate Judge held that the tenant could not turn round and say that because the landlord could not put him in possession of the whole 16 annas he was not liable to pay rent or that the kabuliyat was not binding on him. Their Lordships agreed with the conclusion of the Subordinate Judge on the evidence that the respondent got possession of that share of the land that was available for possession and that it

1. Jogesh Chandra Roy v. Emdad Meah, 1932 P C 28=136 I C 398=59 I A 29=59 Cal 1012 (P C).

would be an injustice that the respondent should escape from payment of rent in respect of the possession which he has got under the kabuliyat. In the present kabuliyat however no mention is made to the fact that there were other tenants in possession under the superior landlord and there is no indication that the landlord made any attempt to give possession to the tenants or to give those who were in possession under him notice of the lease to the lessee. It is clear from the terms of the kabuliyat that the contract was that the lessee would get khas possession of the lands and in the circumstances, the oral evidence to show that there was any other arrangement between the parties was not admissible under S. 91, Evidence Act. The trial Court points out that the intention of defendant No. 1 in seeking to recover the riverside lands from the plaintiff's father was to dump his limestone there and burn the same for despatch by boats and that it was not as a mere rent collector or tenure-holder that he sought this settlement so eagerly. The lease stated that the lessor was in possession of the lands and from its terms it is clear that this was a contract for khas possession. In the circumstances, it was not open to the defendant to prove that there was any oral agreement that he should get possession on his own account.

This appeal is, accordingly, allowed. The decree of the lower appellate Court is set aside and that of the trial Court restored with costs in all Courts. The prayer for leave to appeal is rejected.

M.D./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 304

R. C. MITTER, J.

Sharfuddin Ahmed—Auction-purchaser
—Petitioner.

v.

Jagadish Nath Ray Bahadur and another—Opposite Parties.

Civil Rule No. 1068 of 1935, Decided on 13th January 1936, from order of Munsiff, Raigunj, D/- 10th June 1935.

(a) Bengal Tenancy Act (8 of 1885), Ss. 26-J and 158 (c)—Composite application seeking two reliefs—Common point for decision—No appeal filed against decision under S. 158 (c)—Revision does lie against order under S. 26-J.

The relief under S. 158, sub-s. (c) must in substance be in the form of a declaration and that

under S. 26-J in the form of a decree for recovery of money. Where an application which is filed is a composite application comprised of two applications under S. 158 (c) and S. 26-J, and contains a common point for decision, although no appeal is filed against a decision under S. 158 (c) yet a revision can lie challenging the order under S. 26-J. [P 305 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 26-B—Holding transferable—Recognition of landlord is immaterial—Statutory right of landlord to recover transfer fee—Holding under transfer wrongly described—Right of landlord for transfer fee is not affected.

When the law has made holding transferable under S. 26-B, there is no scope for theory of recognition by the landlord. The transfer is good, and passes title from the transferor to the transferee, whether the landlord signifies his acceptance or not. The landlord's right to the transfer fee is now a statutory right. If the deed of transfer describes it as an ordinary occupancy holding and no landlord's fee is paid to the Sub-Registrar he would not register it and the title would not pass; for, the transfer of such a holding can only be by registered instrument. If the document falsely described the holding to be mukarari one, and a fee prescribed by S. 12, Ben. Ten. Act is paid, the document would be accepted for registration by the Sub-Registrar and he would register it, if execution is admitted and document presented in time in accordance with the rules for registration of documents. The false description of the tenancy would not affect the transfer of title. This is plain by reason of the provisions of S. 26-J which proceeds on the basis of a transfer of title, giving right to the landlord to recover, together with the compensation, the money of which he had been deprived by reason of the registration being effected on the basis of the false recital.

[P 306 C 1, 2]

(c) Bengal Tenancy Act (8 of 1885), S. 26-J—Principle underlying S. 26-J—Obligation to pay transfer fee arises when instrument of transfer is presented for registration—Transfer in fact and not in law should be considered.

Section 26-J is based on the principle that the transferee cannot be allowed to escape from the liability to pay the landlord's transfer fee by taking a transfer with a false or incorrect recital as to the nature of the tenancy purchased which has led to the Sub-Registrar to register it. The obligation to pay the same arises at that point of time when the instrument is presented for registration. Whether the instrument of transfer is effective in passing title to him, the purchaser, or not, cannot be investigated at the time of the presentation of the instrument for registration. The registering officer has no power to investigate the question, and on principle the legislature has given him no such power, for to do so would be to invest him with the functions of a civil Court.

[P 306 C 2; P 307 C 1]

On principle and on the language of S. 26-C and S. 26-J, when the transfer has been accepted by the purchaser, that is, when there has been a transfer in fact, the transferee is bound to pay the landlord's transfer fee in full, and if not paid amicably it can be recovered by

the landlord through the help of the Court, under the provisions of para. 2, S. 26-J. Whether the transfer has in law passed title to him is entirely foreign to the inquiry held by the Court in proceedings started under S. 26-J.

[P 307 C 1]

Saadulla and Serajuddin Ahmed—for Petitioner.

G. P. Sanyal and Sourindra Narayan Ghose—for Opposite Parties.

Order.—An occupancy holding belonged to one Abdul Kader, which he held under the opposite parties, who obtained a rent decree against him and in execution thereof in Rent Execution Case No. 226 of 1932 attached the holding on 2nd March 1932. While the attachment was subsisting the petitioner purchased the same from Abdul Kader by a registered conveyance dated 30th June 1932. In the conveyance the property was described as mukarrari mourashi holding and at the time of the registration the sum of Re. 1 only was deposited with the Sub-Registrar as the landlord's fee. The consideration recited in the conveyance is Rs. 849. Out of the consideration the purchaser undertook to discharge the rent decree and to discharge a mortgage on the holding. It is the case of the petitioner that no consideration passed as he did not accept the conveyance on finding that the property was under attachment at the time, but this part of the case has not been adjudicated upon as the learned Munsiff has held that he is not entitled to go into the said question. In rent Execution Case No. 226 of 1932 the holding was ultimately sold on 3rd August 1932 and purchased by the petitioner. Thereafter the opposite parties made an application against the petitioner under S. 26-J, Ben. Ten. Act, for recovery of the transfer fee payable under S. 26-C, after deducting the sum of Re. 1 already paid, together with compensation. In the said application they also prayed for the determination of the nature of the tenancy under the provisions of S. 158, sub-s. (c), Ben. Ten. Act. The basis of their claim made under S. 26-J is that the holding is an occupancy holding, but has been falsely described as a mukarrari holding, in the aforesaid conveyance of 30th June 1932.

Although the question of status of the tenant has been gone into fully by the learned Munsiff, the order only gives the opposite party a decree for the recovery of Rs. 168-12-9, the balance of the land-

lord's transfer fee payable under S. 26-C and Re. 1 as compensation. In the order there is no declaration given that the tenancy is an occupancy holding. A preliminary objection is raised on behalf of the opposite parties that no revision lies as the said order is appealable, being an order passed not only on an application made under S. 26-J, but also under S. 158, an order under the last mentioned Section being appealable. I cannot give effect to this preliminary objection.

The relief under S. 158, sub-s. (C) must in substance be in the form of a declaration, and that under S. 26-J in the form of a decree for recovery of money. The petitioner not having appealed against the order, regarding it as in part an order under S. 158, sub-s. (C) cannot challenge the finding that the holding is an occupancy holding, but in my judgment he can attack the order for payment of Rs. 169-12-9 to the opposite parties in a manner which would not involve a challenge to the finding that the holding is an occupancy holding. In fact, the petitioner's advocate does not challenge the said finding. In my view the application filed by the opposite parties is a composite application, two applications combined into one, but different in scope though for their adjudication there is a common point involved, namely the status of the tenant. If a memorandum of appeal had in fact been lodged before the learned District Judge, the prayer for discharging the order for payment of Rs. 169-12-9 could not have been urged before him in the appeal. For that reason I hold that the application for revision which has only challenged the said order for payment of money based on S. 26-J is maintainable.

On the merits the points made by Sir Saadulla, appearing for the petitioner, are four in number, namely: (i) that the conveyance having been executed during the pendency of the attachment made at the instance of the opposite parties was not valid against them, and there being no valid transfer in law, no transfer fee is payable under S. 26-C by his client; (ii) that the transfer fee payable under S. 26-C or 26-E is for the purpose of getting recognition of the transferee from the landlord and when the landlords in this case have by their conduct refused such recognition by proceeding to execute the rent decree under Ch. 14, Bengal Tenancy

Act, against Abdul Kader, without making his client a party to the execution proceedings, no transfer fee is payable under S. 26-C; (iii) that his client having purchased in execution of a decree for arrears of rent due in respect of the holding no transfer fee is payable under S. 26-E; and (iv) that even if the other contentions are not tenable, the Court below ought to have gone into the question as to whether his client had accepted the conveyance; and if the facts alleged by him are found to be true, no transfer fee is payable by him and the landlord's application under S. 26-J ought to have been dismissed.

The third contention proceeds upon a misapprehension. The opposite parties have not laid their claim, basing the cause of action on the petitioner's purchase at the Court sale. They have based it on the petitioner's private purchase, that is, by the conveyance mentioned above. There is accordingly no substance in this point, and I overrule it. In dealing with the first and second contentions, I will proceed on the basis that the conveyance was accepted by the petitioner, and that it represents a genuine transaction. The second point urged by Sir Saadulla does not appeal to me. At a time when occupancy holdings were not transferable by law, fees or selamis paid by a transferee were no doubt a price for recognition of the transfer by the landlord. But when the law has made such holdings transferable, (S. 26-B) there is no scope for theory of recognition by the landlord. The transfer is good and passes title from the transferor to the transferee, whether the landlord signifies his acceptance or not. The landlord's right to the transfer fee is now a statutory right. If the deed of transfer describes it as an ordinary occupancy holding and no landlord's fee is paid to the Sub-Registrar he would not register it and the title would not pass, for the transfer of such a holding can only be by registered instrument. If the document falsely described the holding to be mukurari one, and a fee prescribed by S. 12, Bengal Tenancy Act, is paid the document would be accepted for registration by the Sub-Registrar and he would register it, if execution is admitted and document presented in time in accordance with the rules for registration of documents.

The false description of the tenancy

would not affect the transfer of title. This is plain by reason of the provisions of S. 26-J which proceeds on the basis of a transfer of title, giving right to the landlord to recover, together with compensation, the money of which he had been deprived by reason of the registration being effected on the basis of the false recital. When the landlord's non-recognition of the transfer has no effect on the transfer, I fail to see how the conduct of the opposite parties in proceeding with the rent execution in the manner indicated above is material. The petitioner having purchased pendente lite cannot claim to be made a party to the execution proceedings and there was no obligation on the part of the landlords to make him a party thereto. Still the petitioner's purchase by the aforesaid conveyance gave him valuable rights against the landlords, for he, by depositing the amount recoverable under the rent decree and the statutory compensation, could have had the sale set aside, or could have applied for setting aside under S. 174 (1) and S. 174 (3) respectively of the Bengal Tenancy Act if a stranger had purchased the holding at the Court sale. I hold accordingly that the opposite parties are entitled to recover the balance of the transfer fee and compensation if they are not otherwise debarred from doing so. This leads me to consider the first and the fourth contentions urged on behalf of the petitioner, which, in my opinion, are the only substantial points involved in this Rule. For the reasons hereafter appearing I do not agree with the first contention but hold that the fourth contention is a sound one and as the facts bearing upon it have not been investigated by the lower Court, I must remand the case. In dealing with the first point, I accordingly proceed on the assumption that the transfer had been accepted by the petitioner and he paid the sum of Re. 1 as transfer fee.

Although S. 26-C, unlike S. 26-E, does not indicate by whom the landlord's transfer fee has to be paid, para. 1 of S. 26-J makes it clear that it is the purchaser who is under the obligation to pay it to the Sub-Registrar at the time when the instrument of transfer is presented for registration. S. 26-J is in my judgment based on the principle that the transferee cannot be allowed to escape from the liability to pay the landlord's

transfer fee by taking a transfer with a false or incorrect recital as to the nature of the tenancy purchased which has led the Sub-Registrar to register it. The obligation to pay the same arises at that point of time when the instrument is presented for registration. Whether the instrument of transfer is effective in passing title to him, the purchaser, or not, cannot be investigated at the time of the presentation of the instrument for registration. The registering officer has no power to investigate the question, and on principle the legislature has given him no such power, for to do so would be to invest him with the functions of a civil Court. The following illustration may serve to make the point clear. A, the occupancy ryot, sells his entire holding to B, but later on sells the same over again to C, who, not knowing of the transfer to B, accepts the transfer and pays the consideration money. C's instrument of transfer is then presented for registration.

In this case he has to pay the landlord's transfer fee, for without it his instrument of transfer would not be registered, although by the transfer he got no title, the property having been already transferred to B. In this case, when he finds no title has passed to him, his remedy would be against his vendor, and he can recover the landlord's transfer fee from him as damages. On principle and on the language of Ss. 26-C and 26-J, I hold that when the transfer has been accepted by the purchaser, that is, when there has been a transfer in fact, the transferee is bound to pay the landlord's transfer fee in full, and if not paid amicably it can be recovered by the landlord through the help of the Court, under the provisions of para. 2, S. 26-J. Whether the transfer has in law passed title to him is entirely foreign to the inquiry held by the Court in proceedings started under S. 26-J. For these reasons I overrule the first contention urged by Sir Saadulla. In view of what I have said above the fourth point does not present any difficulty. I have held above that there must be a transfer in fact to attract the operation of S. 26-J. A transfer of property implies two parties, the person proposing to sell and a person proposing to buy and the terms being agreed to by the said two parties. Suppose an occupancy ryot A, the terms of whose tenancy are

onerous, executes a conveyance with a recital that the property is rent free and purports to transfer it to B, his enemy, without the knowledge of the latter, goes to the registration office, presents it for registration and pays out of his pocket the landlord's fee of Rs. 2 to the Sub-Registrar and gets it registered, it would be unreasonable to fix the liability for the payments of the balance of the landlord's transfer fee and compensation on B under the provisions of S. 26-J. In such a case I hold it would be open to B, when proceedings are started against him under S. 26-J, to show that there was no transfer to him in fact, on the ground that he has not accepted the instrument at all. On the said principle, I hold that in this case it was open to the petitioner to plead and prove that before the presentation for registration he resiled from the bargain. In deciding this question, the question whether he paid the sum of Re. 1 as landlord's fee at the time of registration, as also the question as to whether he took possession before his purchase at the rent sale, would be material questions. I accordingly remand the case to the lower Court for adjudication on the limited point which I have indicated above.

The Rule is accordingly made absolute. Hearing fee one gold mohur, to abide final result.

B.D./R.K.

Rule made absolute.

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NASIM ALI AND EDGLEY, JJ.

Suprabhat Chandra and others — Plaintiffs—Appellants.

v.

Bhupati Bhushan Mandal and others — Defendants—Respondents.

Appeal No. 563 of 1934, Decided on 2nd March 1936, from appellate decree of Dist. Judge, D/- 24th October 1933.

(a) Bengal Tenancy Act (1885), S. 109—Amendment in 1928 — Effect of—Amendment affects procedure only—Right of action is untouched.

By giving the landlord and the tenant option either to continue the proceeding in the revenue Court and get a judgment from that Court or to withdraw from the revenue Court and to endorse the right of action in the civil Court, the legislature did not alter the rights of

the parties by destroying or creating a new right of action. The right of action is not touched. The bar imposed by the old section to the trial of the matter in the civil Court is removed. The enactment merely affected the procedure. There can be no objection to an enactment relating to procedure having effect immediately although it should affect past transactions and the mode of enforcement of vested rights: *Case law referred.*

[P 309 C 2; P 310 C 1]

(b) Bengal Tenancy Act (1885), Ss. 30 (b) and 109—Suit in civil Court—Maintainability of—Application under S. 105 to Revenue Court withdrawn in 1929—S. 109 amended in 1928—Suit in civil Court in 1932 under S. 30 (b) is maintainable.

Section 109 as it stood before the amendment deprived the landlord or the tenant of their right to have the question of rent settled by civil Court once an application under S. 105 was made before the Revenue Officer. The section as it stood before its amendment was doing injustice both to the landlords and the tenants inasmuch as it deprived them of having their rights adjudicated even though the matter was not decided in the revenue Court. The proviso was enacted to remedy this evil. In construing such a measure the Court ought to give to it the widest operation which its language will permit. The Court has got to see whether a particular case is within the mischief to be remedied: 3 Bom 422 (P C), *Foll.* [P 310 C 1]

Hari Prosanna Mukherjee—for Appellants.

Muktipada Chatterjee—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of arrears of rent and for enhancement of rent under S. 30 (b), Ben. Ten. Act. The material defences to the suit were: (1) that the arrears were paid and (2) that the claim for enhancement was not maintainable in the civil Court. The Courts below have decreed the claim for arrears of rent but have disallowed the claim for enhancement. Hence this second appeal by the landlords. The only point for determination is whether the plaintiffs are entitled to have the rent of the holding enhanced under S. 30 (b), Ben. Ten. Act. It appears that the landlords instituted proceedings under S. 105, Ben. Ten. Act, before the Revenue Officer some time in 1928. The claim for enhancement of rent of the holding under S. 30 (b) of the Act was the subject-matter of this application. On 26th February 1929, when this application was pending before the Revenue Officer, the Bengal Tenancy Amendment Act of 1928 came into force. It was withdrawn on 24th July 1929. The present suit was instituted on 19th

January 1932. The contention of the tenants is that the claim for enhancement in the civil Court is barred by S. 109, Ben. Ten. Act, as it stood before the amending Act of 1928. S. 109 is in these terms:

Subject to the provisions of S. 109-A a civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under Ss. 105 to 108 (both inclusive).

In 52 Cal 894 (1), the effect of the withdrawal of an application under S. 105 came up for consideration before a Full Bench of this Court. Walmsley, J. (Newbould J., C. C. Ghose J., and B. B. Ghose, J., concurring and Subrawardy, J., dissenting) in that case observed as follows:

In my opinion, therefore, it is the making of the application that brings into play the prohibition of S. 109, and the answer that I would give to the reference is to this effect, namely, that if an application is made under S. 105, Ben. Ten. Act, and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of S. 109, Ben. Ten. Act.

This decision was given on 6th May 1925. In 1928 the Bengal Tenancy Amendment Act was passed and the following proviso was added to S. 109:

Provided that nothing contained in this Section shall debar a civil Court from entertaining a suit concerning any matter which: (a) was the subject-matter of an application under S. 105, or S. 105-A, or of a suit under S. 106, if such application or suit has been dismissed for default or withdrawn; or (b) has not been finally adjudicated upon in such proceeding or suit.

In 1929 the observations of Walmsley, J., were approved by their Lordships of the Judicial Committee of the Privy Council in 56 I A 179 (2). In the latter case their Lordships laid down:

The policy of S. 109 is to prevent multiplicity of procedures by enacting that where an application is made in one or other of the competent Courts it shall be prosecuted in that Court and in no other.

The contention of the learned advocate for the tenants however is that S. 109, as it stood before the amendment, is more than a matter of procedure. In support of his contention he relied upon

1. Purna Chandra v. Narendra Nath, 1925 Cal 845=88 I C 637=52 Cal 894=41 C L J 456=29 C W N 755 (F B).
2. Raja Reshee Case Law v. Satish Chandra Pal, 1929 P C 134=116 I C 396=56 I A 179=57 Cal 118 (P C).

the decision in 35 C W N 1147 (3). In that case it was held that S. 109, as it stood before this amendment, did not merely lay down a procedure, but by taking away the ordinary right of suit of the plaintiff conferred a very valuable right on the defendant in some cases, viz., the immunity from a civil suit and the right to hold the property in the right mentioned in the Record of Rights without further litigation. On behalf of the landlords it is contended that under the terms of the section, as it stood before its amendment, there was no question of anybody acquiring any right and that the section imposed the disability on intending suitors of which their opponents could take advantage. This contention is supported by the observations of Mukherji, J., in 61 C L J 127 (4). It is not easy to state with precision the exact nature of the distinction between the substantive law and the law of procedure. It is suggested that substantive law defines rights while adjective law determines remedies. There are rights however which belong to the sphere of procedure, as for example, right of appeal.

To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available. The law of procedure may be defined as that branch of the law which governs the process of litigation. Although there is a distinction in theory between substantive law and procedure there are many rules of procedure which in their practical operation are wholly or substantially equivalent to rules of substantive law. (Salmond on Jurisprudence, Edn. 5, pp. 437—439).

Whether a landlord or tenant has a legal right to have fair rent settled of the tenancy is a question of substantive law. This legal right implies a power of instituting legal proceedings for its enforcement in Courts. This power of obtaining in one's favour the judgment of a Court of law is called a right of action (Salmond on Jurisprudence, p. 192). The landlord or the tenant has therefore a right to sue in the Court of law for enforcement of his right. In what Court the right is to be enforced is a question of procedural law, *ibid* p. 438. The selection of forum in no way affects the right of suit itself. See the observation of Sulaiman, A. C. J.,

in 1931 All 635 (5). The policy of S. 109 as has been observed by their Lordships of the Judicial Committee of the Privy Council in 56 I A 179 (2) is to prevent multiplicity of procedure.

While provisions of a statute dealing merely with matter of procedure may properly, unless that construction be textually inadmissible, have no retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

Provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights: 54 I A 421 (6). If S. 109 as it stands now does not debar the civil Court from entertaining a suit concerning a matter which was the subject-matter of an application under S. 105 which was withdrawn before the Amending Act of 1928 came into force, it would touch existing rights, as it would deprive the order of withdrawal of its finality under the section in its old form. If by the addition of the proviso to the old section the Legislature removed the bar under the old section in cases in which no final order was made at the time the proviso came into force, there would be no question of depriving any order of its finality. It is true that it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to that rule, namely where enactments merely affect procedure and do not extend to rights of action: 1 Ch D 48 (7).

By giving the landlord, not the tenant, option either to continue the proceeding in the revenue Court and get a judgment from that Court, or to withdraw from the revenue Court and to enforce the right of action in the civil Court, the Legislature did not alter the rights of the parties by destroying or creating a new right of action. The right of action is not touched. The bar imposed by the old section to the trial of the matter in the civil Court

3. Gosta Behari v. Nawab Bahadur of Murshidabad, 1932 Cal 207=136 I C 606=35 O W N 1147.

4. Debendra Lal Khan v. Sudharam Ray, 1936 Cal 173=61 C L J 127.

5. Ram Karan Singh v. Ram Das Singh, 1931 All 635=136 I C 145=1931 A L J 1018 (F B).

6. Delhi Cloth and General Mills Co. v. Income Tax Commissioner Delhi, 1927 P O 242=106 I C 156=54 I A 421 (P O).

7. In re Joseph Suche & Co., Ltd., (1876) 1 Ch D 48.

is removed. The enactment merely affected the procedure and comes within the exception to the general rule laid down in 1 Ch D 48 (7). There can be no objection to an enactment relating to procedure having effect immediately although it should affect past transactions and the mode of enforcement of vested rights, see 3 A C 582 (8) at p. 603, provided of course' as Mellish, J., said in 3 Ch D 69 (9), that no injustice is done: [22 Cal 767 (10).] Again in 4 Ch A 740 (11) Lord Hatherley observed as follows:

Baron Parke did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the Section which had to be construed and said that the question in each case was whether the Legislature had sufficiently expressed an intention. In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law and what it was that the Legislature contemplated.

Section 109, as it stood before the amendment, deprived the landlord or the tenant of their right to have the question of rent settled by the civil Court, once an application under S. 105 was made before the Revenue Officer. The interpretation put upon the language of the section by the Full Bench of this Court must have been brought to the notice of the Legislature. The section, as it stood before its amendment, was doing injustice both to the landlords and the tenants inasmuch as it deprived them of having their rights adjudicated even though the matter was not decided in the revenue Court. The proviso was enacted to remedy this evil. In construing such a measure the Court ought to give to it the widest operation which its language will permit. The Court has got to see whether a particular case is within the mischief to be remedied: see the case of 6 I A 137 (12). In view of the language used in the proviso I am inclined to think that the present case is within the mischief intended to be remedied by the proviso. *Gosta Behari's* suit in the civil Court was instituted before the Amend-

ing Act. In 57 Cal 796 (13), Rankin, C. J., observed as follows:

I cannot help observing that I think this Court would be making an extraordinary mess of the rights of the agriculturists of Bengal, if it started to apply the 1928 Act retrospectively so as to turn a suit, which had been bad at the time it was brought, into a good suit that could be decreed, merely because it had been kept in existence for two or three years.

The present suit however was instituted after the Act of 1928 came into force. For the reasons given above, I allow this appeal, set aside the judgments and the decrees of the Courts below so far as they relate to the appellants' claim for enhancement of rent. The suit is remanded to the trial Court. The learned Munsif is directed to try and determine the plaintiffs' claim for enhancement of rent, after taking such evidence as the parties may choose to give in support of their respective cases.

There will be no order for costs in this appeal.

M.D./R.K.

Appeal allowed.

13. *Jnanendranarayan Bagchi v. Saradasundari Dasi*, 1931 Cal 25=129 I C 355=57 Cal 796.

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HENDERSON AND R. C. MITTER, JJ.

Dakshina Ranjan Choudhury—Defendant—Appellant.

v.

Surendra Lal Das Gupta—Plaintiff—Respondent.

Appeal No. 431 of 1934, Decided on 29th May 1935, from appellate order of Addl. Sub-Judge, Chittagong, D/- 18th June 1934.

(a) **Prescription—Period of user after suit cannot be added.**

The period of user after the institution of the suit cannot be added for the purpose of acquiring by prescription a right of easement. Such user is not peaceable but disputed after the institution of the suit. [P 312 C 1]

(b) **Easements Act (1882), S. 13—Right of way is not generally quasi-easement of an apparent and continuous nature unless there is a formed road.**

Where two tenements are severed, the grantee takes by an implied grant all quasi-easements of an apparent and continuous nature. A right of way is not classed generally amongst quasi-easement of an apparent and continuous character. It is only when there is a formed road that the quasi-easement can be classed as one of an apparent and continuous nature. [P 312 C 2]

Narendra Kumar Das and Durges Prosad Das—for Appellant.

Chandra Sekhar Sen and Rahini Benode Rakshit—for Respondent.

8. *Gardner v. Lucas*, (1878) 3 A C 582.

9. *Republic of Costa Rica v. Erlanger*, (1878) 3 Ch D 69.

10. *Jogodanandh Singh v. Amrita Lal Sircar*, (1895) 22 Cal 767 (F B).

11. *Pardo v. Bingham*, (1870) 4 Ch A 740.

12. *Ujmauddin Khan v. Zia-ul-missa Begum*, (1878) 6 I A 137=3 Bom 422 (P O).

R. C. Mitter, J. — This appeal is on behalf of the defendant, and is directed against an order of the Addl. Subordinate Judge of Chittagong, dated 18th June 1934, by which he reversed the judgment and decree of the Munsif, First Court, Chittagong, and remanded the case to the trial Court. The judgment is not very clear and the ordinary portion is ambiguous.

One Uma Charan Choudhury and others were the owners of a long strip of land which is described as Dag 792. He divided this Dag into three portions, the eastern portion, middle portion and the western portion. On 27th April 1911 he sold the eastern portion to Tara Charan and Jogendra. The plaintiff purchased it from Tara Charan and Jogendra. The middle portion was sold to the defendant and the western one to one Ishan. There are measurements given in all these three conveyances, it being stated that the breadth of each of these parcels of land is eighteen cubits and four fingers. The defendant constructed his house and to the east of his house there is admittedly a pucca drain belonging to the defendant. The disputed land is a small strip of land north to south in length to the immediate east of this drain. The plaintiff filed the suit on the allegation that this strip of land appertained to the land which was sold by Uma Charan and others to his vendors Tara Charan and Jogendra. He asked for a declaration of title to this piece of land, for confirmation of possession therein for a declaration that the defendant had no right of way over it, and for a permanent injunction restraining him from entering upon the land.

The defendant pleaded that the suit land appertained to the parcel of land which was sold to him by Uma Charan and others. He put forth an alternative plea that if the suit land or a portion of it did not belong to him, he got a right of way over it, and this right he claimed on three grounds. Firstly he says that it is a way of necessity, secondly he has acquired the right by prescription, and thirdly there was an implied grant to him by Uma Charan and others, the common vendors of himself and of the vendors of plaintiff. There was a Commissioner appointed for a local investigation by the Munsif and he submitted a report. The learned Munsiff could not agree with all the findings of the Com-

missioner but found that the strip of land 2'-10" broad immediately to the east of defendant's pucca drain, belonged to defendant, and the rest of the suit land belonged to the plaintiff. On the alternative defence he found that the defendant had established a right of way over the portion of the suit land belonging to the plaintiff.

There was an appeal by the plaintiff. He contended that the finding of the learned Munsiff that a portion of the strip of land belonged to the defendant was wrong as also the finding of the learned Munsiff that the defendant had a right of way over the rest of the land. The defendant filed cross-objections and contended that the learned Munsiff ought to have found that the whole of the disputed land belonged to him in proprietary right. The learned Subordinate Judge was of opinion that as both the parties had attacked the Commissioner's report, the Court of first instance ought to have appointed another commissioner for local investigation. In this view of the matter he said that for the purposes of determining the proprietary right to the land in suit a new Commissioner, ought to be appointed. For this purpose he remanded the case to the trial Court and directed that Court to determine the question of title on the evidence already on the record. With regard to the form of this remand order the appellant has raised no question nor has the respondent attacked the form of the remand order.

With regard to the claim of easement by the defendant, the Court of appeal below held that inasmuch as the suit was instituted nineteen years, eleven months and twenty five days from the date when Uma Charan and others sold their property to the defendant and the plaintiff's vendor, the claim of the defendant to an easement based on prescription could not be justified. We think that this view of the lower appellate Court is right. During the time of Uma Charan and others, if any portion of Dag 792 was used by them for the purposes of going to the tank, that user was in their character as owners of the land. It is only on 27th April 1911, that Uma Charan and others divided the land into three parts. It is from this date there could be scope for acquisition of a right of easement by prescription. Inasmuch

as the suit was instituted before the defendant could use the strip of land as a pathway for a period of twenty years. We agree with the learned Additional Subordinate Judge in holding that the claim based on prescription could not be sustained, because the user of the defendant was not for the requisite period. We do not agree in the contention of Mr. Das that inasmuch as the defendant had in fact been using the pathway after the institution of the suit, his client is entitled to add the period of user after the institution of the suit, for the purpose of acquiring by prescription a right of easement. Such user was not peaceable but disputed after the institution of the suit. In this view of the matter, as we have already said, the claim of the defendant based on prescription, cannot stand.

The learned Additional Subordinate Judge has also found that there could not be any claim based on necessity. He pointed out that the disputed strip of land was not absolutely necessary for the enjoyment of the defendant's land, because he has got other ways to go to the tank. This finding at once demolishes the defendant's claim to the pathway as a way of necessity. Mr. Das in the end very fairly conceded that he could not place his case on the basis that the disputed strip of land is a way of necessity. There remains only the question as to whether the defendant can claim a right of way over the disputed strip of land on the basis of implied grant. In this respect the learned Subordinate Judge is not very happy in his expressions, for in one part of the judgment he makes the following observations:

In Bengal the rule of implied grant does not apply: 96 I C 913 (1); So 8 Cal 956 (2) is not good law, as it was referred to in 8 C L J 289 (3), where there was no pucca metalled road.

If he meant to lay the proposition in the broad way that in Bengal the rule of implied grant does not apply certainly he is wrong. But the last portion of this involved sentence introduces a qualification by saying "where there is

no metalled road." Although we are of opinion that this sentence is not a very happy sentence, on the facts which are admitted, there cannot be any question of there being an implied grant in favour of the defendant. The facts are these. Three conveyances were executed on the same day to three sets of persons whom we have already named. In the conveyance in favour of the defendant there was no grant of any right of way over any other land which was conveyed to the other sets of persons. From para. 8 of the written statement it is quite clear that there was no formed road during the time the whole dag belonged to Uma Charan and others. The defendant clearly states in that para that after his purchase of the middle portion and the purchase of Tara Prasanna and Jogendra of the eastern portion the disputed land was left as a common passage by agreement between them. The law on the subject is well settled. Where two tenements are severed, the grantee takes by an implied grant all quasi-easement of an apparent and continuous nature. A right of way is not classed generally amongst quasi-easements of an apparent and continuous character. It is only when there is a formed road that the quasi-easement can be classed as one of an apparent and continuous nature. At p. 165 of "Gale on Easements," 11th Edn., the law is summarized by the learned author, after an exhaustive examination of the leading cases in England on the subject thus:

Where two tenements are severed and at the time of severance a formed road exists over one (the quasi servient) tenement for the apparent use of the other (the quasi dominant) tenement, such formed road being necessary for the reasonable and convenient enjoyment of the quasi dominant tenement, a right to use such formed road will, it is submitted, pass by implied grant with the quasi dominant tenement, even where the only apparent sign is the state of the road on the quasi servient tenement itself. And where the apparent sign of user is a part, not of the tenement retained, but of the tenement conveyed, such as a substantial and permanent door-way or a formed road extending over both tenements, there is ample authority for saying that the doctrine of implied grant applies.

As regards the cases, however, where there is no formed or defined road over the quasi servient tenement so that the way is not evidenced by any apparent sign the rule in the older authorities was clear that upon severance there was no implied grant, in other words, that quasi easements not continuous and apparent in their nature (like an ordinary

1. Shiv Dayal v. Ram Das, 1926 Lah 473=96 I C 913.

2. Charu Surnokar v. Dokouri Chunder, (1882) 8 Cal 956=10 C L R 577.

3. Purnendu Narain v. Dwijendra Narain, (1907) 8 C L J 289.

right of way) did not pass on severance unless the owner used language to show that he intended to create the easement de novo.

We have already said that in the conveyance in favour of the defendant, there is nothing which would imply that an easement was intended to be created. The admission of the parties is that during the time of Uma Charan and others, there was no formed or defined road way in any portion of Dag 792. In this view of the matter we hold that there is no scope for the application of the doctrine of implied grant to the case before us, and on this ground we support the decree of the Court below by which the defendant's claim to easement has been negatived. The result is that the order of the Court below is affirmed, but as there is ambiguity in the order of the learned Subordinate Judge we think it right to summarize the result of the appeal. The result is that the claim of the defendant that he has got a right of easement over the disputed strip of land or any portion thereof is negatived, and the remand order of the learned Subordinate Judge would cover only the question of title to the disputed strip of land. The respondent is entitled to the costs of this appeal; hearing fee is assessed at two gold mohurs. Further costs will abide the result. No order is necessary on the application.

Henderson, J.—I agree.

K.S./R.K. *Appeal dismissed.*

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M. C. GHOSE, J.

Rajani Nath Sil — Defendant 3—Appellant.

v.

Enntali Howladar and others — Respondents.

Appeal No. 985 of 1934, Decided on 12th February 1936, from appellate decree of Sub-Judge, First Court, Bakarganj, D/- 22nd January 1934.

(a) Mortgage — Validity — Usufructuary mortgage—Subsequent mortgagee also taking usufructuary mortgage, redeeming prior mortgage — Subsequent mortgage is not invalid.

Where a subsequent mortgagee, taking a usufructuary mortgage, redeems forthwith the prior mortgage which is also usufructuary, there can be no conflicting interest as to possession as there are no two usufructuary mortgages subsisting at one and the same time. [P 314 C 1]

(b) Mortgage — Subrogation — Three mortgages executed in respect of same property—Third mortgagee expressly told that there is only one mortgage, namely first mortgage—First mortgage redeemed by third mortgagee with part of consideration of his mortgage—He is entitled to be subrogated to rights of first mortgagee. Second mortgagee is bound to pay to third mortgagee amount paid by him in redeeming the first mortgage.

In deciding whether a subsequent mortgagee is entitled to be subrogated to the rights of the prior mortgagee each case must be judged on its own facts.

Where the mortgagors having mortgaged the same property with two different persons, expressly state to the third mortgagee that there is only one mortgage subsisting on the property and the third mortgagee redeems the first mortgage with a part of the consideration of the third mortgage and obtains the first person's mortgage bond without notice of the intermediate mortgage, he must be presumed to have intended to keep the prior alive as a shield against any intermediate mortgagee who might be discovered later and is entitled to be subrogated to the rights of the first mortgagee whose mortgage he redeems. The second mortgagee bringing a suit on his mortgage is therefore bound to pay the third mortgagee the amount paid by him in redeeming the first mortgage before he can satisfy his own mortgage out of the mortgaged property : 29 Cal 154 (P C) and 39 Cal 527 (P C), *Ref.* [P 314 C 2 ; P 315 C 1]

Prafulla Kumar Roy — for Appellant.

Jitendranath Guha and Kalikenkar Chakrabarti—for Respondents.

Judgment. — This is an appeal by defendant 3 in a suit for sale by enforcing a simple mortgage bond executed by defendants 1 and 2 in favour of the plaintiff in April 1923. The facts which are necessary to discuss the issue raised in this Court are that defendants 1 and 2, who may be called the mortgagors, mortgaged the property in dispute in March 1923 to Moslem Khan. About a month thereafter, in April 1923, they again mortgaged the same property to the plaintiff. Four years later, in April 1927, they mortgaged the same property to defendant 3. In that mortgage bond they stated that the properties were previously mortgaged to Moslem Khan, that about Rs. 700 was due on that mortgage and the mortgagors agreed that defendant 3 should keep the required amount in deposit to pay off the said mortgage, and that on redemption thereof, defendant 3 would keep the bond. They also stated that except that mortgage in favour of Moslem Khan, the properties were not otherwise encumbered. Thereafter defendant 3 paid a sum of Rs. 680 to Moslem Khan and redeemed the first

mortgage and obtained the mortgage bond. The present suit was instituted in 1932. Defendant 3 contested the suit. He raised various defences which were repelled by the Court of appeal below and the suit was decreed in full.

In appeal the learned advocate has urged only one issue, namely whether the appellant is entitled to be subrogated to the rights of the first mortgagee Moslem Khan. The Court of appeal below decided the issue against the appellant on the grounds that both the first and third mortgages were usufructuary mortgage bonds and two usufructuary bonds could not subsist at one and the same time, and that there could be no subrogation if the subsequent mortgagee paid off the first mortgage out of his mortgage money. Upon hearing the learned advocates on both sides it appears that the first ground of the learned Subordinate Judge is of no weight. The appellant obtained a usufructuary mortgage and though the first mortgage was usufructuary he redeemed it forthwith and there could be therefore no conflicting interest as to possession.

The second point, that there can be no subrogation if the subsequent mortgagee paid off the prior mortgage out of the mortgage money, is a more difficult question of law. It was urged on one side that the issue is governed by S. 92, T. P. Act. On the other side it was urged that that Section had no application as the mortgages were effected before April 1930, when S. 92 came into force. The question is of mere academic importance. If S. 92 does not apply then Ss. 74 and 75 which were repealed would apply and the effect of those Sections is the same as of S. 92 in this case. The question here is whether in the circumstances of his case the Court should presume an intention on the part of defendant 3 to keep the first charge alive for his own benefit. Many cases were cited by the learned advocates on both sides. On the side of the respondent the case in 36 C W N 4 (1) was cited. In that case where the vendee of a half share of a property already mortgaged stipulated to pay, as part of the consideration, half the mortgage-debt, but afterwards he paid the whole of the

mortgage money to defeat a Court sale, it was held that in redeeming the mortgage in suit, the said vendee would get no credit for that half of the sum which he was bound to pay under the terms of the purchase, but would get credit for the other half. In that case the vendee had bound himself to pay half of the mortgage money, and it was his duty to pay that half, therefore he could not get subrogation for that half. The case in 62 Cal 677 (2) was also cited. In that case the subrogation was claimed by a purchaser of a portion of the equity of redemption; it was refused by this Court.

On the other side is quoted the case in 29 I A 9 (3). In that case the property was mortgaged first to A and then to B and then attached by a certain creditor of a mortgagor. The mortgagor raised money by a third mortgage to C agreeing with him that he would pay the two prior mortgages out of the consideration of the third mortgage and would make over the mortgage-deeds to the third mortgagor. Accordingly the mortgages to A and B were paid off and the reconveyances handed over to C. Their Lordships of the Judicial Committee held in the circumstances that there was no intention to extinguish the prior mortgages and that the mortgagor paid the debts in pursuance of a mortgage with C for the benefit of C. C was therefore allowed subrogation against the attaching creditor. In the case of 39 Cal 527 (4), where the fifth mortgagee paid off the first mortgage and there were 3 intermediate mortgages, their Lordships of the Judicial Committee held that he must have intended to keep the first mortgage alive and to stand in the place of the first mortgagee. Every case must be decided upon its own facts. In the present case the mortgagors stated solemnly to the appellant that there was only one prior mortgage subsisting on the property, namely that due to Moslem Khan, and that the properties were otherwise unencumbered. They stated that if afterwards it was found that they

1. Jagmohan Das v. Jugal Kishore, 1932 P C 99=137 I C 475=36 C W N 4=54 C L J 407 (P C).

2. Mukaram Marwari v. Mohammad Hossain, 1936 Cal 42=161 I C 48=62 Cal 677.
3. Dinobundhu Shaw v. Jogmoya Das, (1902) 29 Cal 154=29 I A 9 (P C).
4. Mohammad Ibrahim Hossain Khan v. Ambika Pershad Singh, (1912) 39 Cal 527=39 I A 68=14 I C 496=16 C W N 505 (P C).

made a false statement they could be criminally prosecuted for cheating the appellant. In these circumstances the appellant made an agreement with the mortgagors that they would, out of the consideration money, pay the mortgage of Moslem Khan and make over the deed to him. This was, in fact, done. In the circumstances there can be no doubt that the appellant intended to keep that prior mortgage alive as a shield against any intermediate mortgagee who might be discovered afterwards. There cannot be any doubt about the intention of the appellant.

The next question is whether in justice and equity his prayer for subrogation should be allowed. If the appellant had not paid off the prior mortgage, the plaintiff could not sell the property without the charge of that first mortgage. He would have only got the property after the charge of the first mortgage was satisfied. The appellant has saved the plaintiff from that liability. In justice therefore the plaintiff is bound to pay that sum of Rs. 680 to the appellant before he can satisfy his own mortgage out of the mortgage property. In the result the appeal is allowed with costs. The plaintiff's suit is decreed in part subject to the first charge of Rs. 680 to be paid to defendant 3. Defendant 3 will get his costs against the contesting plaintiff in this Court, and in the lower Courts the parties will bear their own costs. Leave to appeal under S. 15 of the Letters Patent is refused.

R.M./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 315**

NASIM ALI AND EDGLEY, JJ.

Amir Chand—Plaintiff—Appellant.

v.

Krishna Chandra Bhowmik—Defendant—Respondent.

Appeal No. 1781 of 1933, Decided on 27th February 1936, from appellate decree of Sub-Judge, 2nd Court, Mymensingh, D/. 4th May 1933.

(a) Promissory Note—Suit on — Executant not proved to have received any consideration—Instrument does not create any obligation between parties.

Where it is proved that the executant of the promissory note did not receive any consideration for it, the negotiable instrument does not create any obligation between the holder and the executant.

[P 315 C 1]

(b) Negotiable Instruments Act (1881), S. 78—Holder of promissory note manager of firm—Holder electing to treat payment to firm as payment to himself — Payment amounts to payment to holder — Debtor is discharged from liability.

Although under S. 78, payments must be made to the holder of the promissory note, yet if the holder who is the Manager of a firm elects to treat the payment to his firm as the payment to himself, the payment is payment to the holder within the meaning of S. 78 and the debtor is discharged from the liability under the promissory note: *Field v. Carr*, (1828) 5 Bing 13, *Rel. on.* [P 316 C 1]

*Gopal Chandra Das and Bhuban Mohan Saha—*for Appellant.

*Rajendra Chandra Guha and Amiya Kumar Som—*for Respondent.

Judgment. — This appeal arises out of a suit for recovery of money due on a promissory note for Rs. 1,000. The plaintiff's case is that he lent Rs. 1,000 to the defendant in cash on the basis of this handnote. The defendant denied this. The Courts have come to the conclusion that the defendant did not receive Rs. 1,000 as consideration for the handnote in question. The suit has been dismissed by the Courts below. Hence this second appeal by the plaintiff.

In view of the concurrent findings of the Courts below that the defendant did not receive any consideration for this promissory note, the negotiable instrument did not create any obligation between the plaintiff and the defendant. It is however contended on behalf of the plaintiff that as the defendant's case is that he executed the promissory note in consideration of the advances made by the firm of which the plaintiff is the managing partner, and as no payment was made to the plaintiff who is the holder of the negotiable instrument, the defendant is liable to pay the amount mentioned in the handnote to the plaintiff. I am unable to accept this contention. From the evidence of Abhoy Saha, whom the learned Judge has believed, it appears that at the time of settlement of accounts between the Firm of which the plaintiff is the managing partner and the Firm of which the defendant is the managing partner, a certain quantity of jute worth Rs. 1,000 delivered by the defendant Firm to the plaintiff Firm was accepted by the plaintiff in full discharge of the obligation under the handnote in question, and the plaintiff agreed to return the promissory note in suit to the

defendant. It is true that under S. 78, Negotiable Instruments Act, payments must be made to the holder, but if the plaintiff, that is the holder of the promissory note, elected to treat the payment to his Firm as the payment to himself, the payment was a payment to the holder within the meaning of S. 78, Negotiable Instruments, Act and the debtor was discharged from the liability under the promissory note. See 5 Bing 13 (1). The Courts below were therefore right in dismissing the plaintiff's suit. The appeal is accordingly dismissed with costs.

R.M./K.S. *Appeal dismissed.*

1. Feld v. Carr, (1828) 5 Bing 13=2 M & P 46=6 L J (O S) C P 203.

A. I. R. 1936 Calcutta 316

CUNLIFFE AND HENDERSON, JJ.

Kalijiban Bhattacharjee and others—Appellants.

v.

Emperor—Opposite Party.

Appeals Nos. 169, 170, 174, 175, 176, 177 and 196 of 1936, Decided on 17th February 1936.

(a) Government of India Act (1919), S. 49—Order by Bengal Government directing, in exercise of power conferred by S. 25 of Bengal Suppression of Terrorist Outrages Act, prosecution of certain persons for offences under Arms Act, affixed with Government Seal, is not required to be proved according to S. 78 of Evidence Act—It is original document within meaning of S. 49 and cannot be called into question—*Henderson, J., contra.*

An order passed by the Government setting out the names of certain persons as having committed various offences under the Arms Act and directing, in exercise of powers conferred by S. 25, Bengal Suppression of Terrorist Outrages Act, that they should be tried by a Magistrate, invested with the power of a special Magistrate, which ends with "by order of the Governor-in-Council" and is signed by the under Secretary to the Government of Bengal and is also affixed with the official seal of the Government of Bengal, is not a copy but an original document within the meaning of S. 49, Government of India Act, and cannot be called into question or required to be proved according to the usual mode of proof of Government documents, which do not prove themselves, as laid down in S. 78, Evidence Act. [P 317 O 2]

Per *Henderson, J.*—There is nothing in the terms of S. 49 that the proof of the order is dispensed with. S. 49 does not, in plain terms, empower the Court to take judicial notice of such an order. It is, however, open to the prosecution to adopt any legal mode of proof they please. Although S. 78, Evidence Act, provides

a convenient mode, it is by its very terms not exhaustive. [P 321 O 1]

(b) Evidence Act (1872), Ss. 8, 27—Police visiting place where arms are concealed on information given by accused in confession—Arms found concealed there—Conversation taking place between accused and police at time of search is admissible in evidence as proof of conduct.

Where on information, contained in the confession made by an accused, a visit is made by police officers to a spot where arms are concealed and the arms are dug on the information of the accused, and at such time various conversations take place between the accused and the police, the conversations are also admissible in evidence as proof of conduct and the whole evidence cannot be excluded on the ground that it is tainted by verbal communications made by the accused to the police at the time of search, especially when the police act with complete propriety, summoning the search witnesses and conducting the search in their presence: 1935 Cal 184, *Foll.*; 1919 Bom 162, *Disting.* [P 318 O 1,2]

(c) Criminal Trial—Confession—Retracted confession—It is unsafe to use retracted confession against co-accused—Judge can, however, after due consideration and considering all extraneous facts such as statements by police, by Magistrate taking down confession and general tone of confession, accept it.

When a confession is retracted it becomes very unsafe to use the contents of that confession against any co-accused who is undergoing a joint trial with the person who made the retracted confession as to his responsibility for the crime that he is accused of. On the other hand a Judge sitting alone after due consideration and taking into consideration all extraneous facts such as the statements made by the police officers who were originally in charge of the persons confessing, the statement of the Magistrate who took down the confession, and, the general tone of the confession itself together with the probabilities to be attached to the explanatory statement retracting confession, can accept the confession as being a true and proper account of the necessary happenings to support the prosecution case before the Court: 22 Cal 164 and *Rex v. Thompson*, (1893) 2 Q B 12, *Rel. on.*

[P 319 C 2; P 320 O 1]

(d) Deed—Mode of proof—Proof of document—Objection as to mode of proof of document must be raised when it is sought to be put in evidence—If raised later, it does not deserve serious consideration.

An objection relating to the mode of proof of a document must be raised when the document is sought to be put in evidence and if raised at a later stage, it does not deserve serious consideration. [P 321 O 1]

(e) Criminal Trial—Confession—Confession not voluntary—Facts proved that inducement of some kind although outside terms of S. 24, Evidence Act, was given—Court may refuse to accept confession as true.

If a confession is not voluntary in the wider sense of the term, *ex hypothesi* the person who made it did not do so with the desire to

tell the truth. This fact in itself, introduces an element of suspicion. In such circumstances if facts are proved which suggest, that an inducement of some kind, although outside the terms of S. 24, was in fact given, the Court may well refuse to accept the confession as true. [P 321 C 2]

Priya Nath Bhattacharjee, Santosh K. Basu, Priya Nath Bhattacharjee for Dharendra Nath; G. P. Sanyal for Sibendra, G. P. Sanyal, Subdhansu Bhusan Sen, Madan Mohan Malhotra, Radhika Ranjan Guha, S. C. Taluqdar and Surajit Ch. Lahiri—for Appellants.

D. N. Bhattacharjee and Nirmal Chandra Das Gupta—for the Crown.

Cunliffe, J.—In the month of December 1934, 15 persons consisting of young men and boys were put upon their trial for the crime of being engaged in a conspiracy to commit various offences under the Arms Act. The Government had ordered that these 15 persons should be tried by a Magistrate with special powers. The Magistrate convicted 13 of the accused and acquitted the other two. Of the 13 convicted men, two were given light sentences and did not appeal. The remainder are before us now in this group appeal.

Two points of law were taken both before the learned Magistrate and before this Court which I think it is convenient I should deal with at once. The first point was a plea of the jurisdiction of the Court. It was argued that Ex. 1 in the case, Government's order for the prosecution, had not been properly proved; and as it was an order of such a kind that under S. 25, Bengal Terrorists Act, it deprived the accused persons of the right of trial before a Judge and a jury, this want of proper proof was more than a mere technical omission. As I understood the argument which was placed before us, it was this: that the letter in question was not the original order from Government but was merely a copy and as it was a copy only, it was necessary that the provisions of S. 78, Evidence Act, should be closely followed. On the other hand, it was argued by the Crown that this was not a copy of an order at all, that it was an original order and that under S. 57, Evidence Act, the Court in such circumstances would take judicial notice of such a letter without proof; and if judicial notice could be taken, and was taken, of the letter, then the presumption in law set out in S. 79 of

the Act, would at once arise and there was no evidence that presumption in law had ever been rebutted or had been attempted to be rebutted. The document in question is headed "Government of Bengal, Political Department, Political Branch, No. 12783 p. Order dated Calcutta 16th November 1934." It then sets out the names of 18 persons who in the opinion of the Governor in Council have committed offences under various sections of the Indian Arms Act and under each and all of these sections read with the criminal conspiracy section of the Indian Penal Code. The letter goes on to say:

Now, therefore, in exercise of the power conferred by S. 25, Bengal Suppression of Terrorist Outrages Act, 1932 the Governor in Council is pleased to direct that the said persons shall be tried by the Sadar Subdivisional Magistrate of Rangpore, Babu Purna Chandra Acharji, who has been invested with the powers of a Special Magistrate.

The letter ends with:

By order of the Governor in Council.

J. George.

Under Secretary to the Government of Bengal.

16th November 1934.

On the left hand bottom corner of the letter is affixed the official seal of the Government of Bengal. It is my opinion that this letter is not a copy at all. It is an original document within the meaning and intention of S. 49, Government of India Act, 1919, the material portion of which runs thus:

All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province.

As I have said, I consider that this letter, which is in the form of an official order, fulfils the requirements of that Section of the Government of India Act, and if it does so, it cannot be called into question. The necessity, therefore, of the usual mode of proof of Government documents which do not prove themselves, and which is alluded to in S. 78, Evidence Act, the Section which embodies the well known English principle of the law of evidence, has no application.

The second point of law which was raised in the case on behalf of one of the accused was this (and it may be said at once that if this contention was good in law, it would have a most material effect on the appeals before us) that whereas, evidence was given before the learned Special Magistrate that on information contained in the confession of an accused a visit was made by that accused himself, together with certain witnesses and Police Officers, to a spot where arms were concealed, and during the time that the arms were dug up on the information of the accused person in custody various conversations took place between the accused and the police which amounted to conversation to the detriment of the accused person and actually adding to the confession he had already made then, on the authority of a decision of the Bombay High Court in 20 Cr L J 681 (1), the whole of this evidence must be excluded because, presumably, the whole incident is tainted by the verbal communications which the accused made to the police at the time of the search. In fact, what we are asked to do is to apply the provisions of S. 27, Evidence Act, the section which deals with statements made to Police Officers, a highly artificial reservation of the law of evidence peculiar to the Indian Empire, which controls and circumscribes the provisions of S. 8, Evidence Act, which deals with the proof of conduct. This section (S. 8) embodies in a statutory form the rule of evidence that the testimony of *res geste* is always allowable when it goes to the root of the matter concerning the commission of the crime.

The first criticism to be made of this argument is this: that if we examine the Bombay case, we find that the facts on which the Bench of the Bombay High Court acted are by no means cognate to the facts here. There was very little conduct called into question in that case. It was all talking. What, however, is a much stronger criticism of the contention is that such an argument runs straight in the teeth of what a Special Bench of this High Court decided not so long ago in 39 C W N 368 (2), where

Mukerji, J., in very cogent language shows how conduct in these circumstances should always be allowed to be proved. I respectfully agree with the view he takes which in my opinion is both good law and good sense, because, if proof of conduct in such circumstances was to be excluded, it seems to me that a certain type of peculiarly subtle crime would probably never be detected at all and it could be effectively withdrawn from detection by some clumsy handling of the case by the police. Here, in my opinion, the Police Officers acted in this regard with complete propriety. They summoned the search witnesses and they conducted the search in those witnesses' presence.

It now becomes necessary for me to refer generally to the facts of this case as shown by the record of the evidence proved before the learned Special Magistrate. It appears that there is in this province a revolutionary society which is known as the Jugantar party. It is a society whose aims are the overthrow of the British Government and it recruits outsiders and prepares for that contemplated overthrow by the collection and provisions of arms to those persons whom it is possible to enlist in its ranks. At the town of Rangpore there were a number of young men undergoing their education and if one may say from the general impression made on one's mind at any rate by the evidence very ordinary simple typical schoolboy individuals they were. The methods of the senior revolutionaries, the persons who were already in the association, were effective and cunning. They would get hold, either by themselves or through likely younger members who had already been recruited, of these boys. They would first encourage them in the habit of reading the books in the Tarun Samiti Library. At the beginning these boys would be encouraged to read works of adventure and romance, books such as Victor Hugo's 'Les Miserables', 'Gulliver's Travels', Lamb's 'Tales from Shakespeare' and Rider Haggard's 'She' (all works perfectly innocuous in themselves). After they had given these books out of the library to these lads to read and had discussed them with them, they then began to increase their education. The boys were given books about national heroes who had achieved the freedom of their country

1. Emperor v. Hira Gobar, 1919 Bom 162=52 I C 601=20 Cr L J 681=21 Bom L R 724.

2. Emperor v. Rafiqueuddin Ahmed, 1935 Cal 184=1935 Cr C 241=155 I C 687=36 Cr L J 803=63 Cal 572=39 C W N 368 (F B).

from foreigners. They were given, for example at this stage of the life of Terrence MacSwinney (who starved himself to death in prison), 'Ma' by Gorky, Sun-Yat-Sun, also the life of De Valera and a number of works referring to the revolutionary heroes of their own country. Mixed with these, there were also books about Soviet Russia. We find for example among them the life of Lenin and various other volumes devoted to communist aims and the communist system. By the time the boys had digested this literary collection in a number of cases they were quite ripe for another approach.

They were enrolled as minor conspirators and informed of the aims of the association. They were asked if they would join the underground arms traffic and were duly tested by being given from time to time revolvers, automatic pistols, ammunition for the same and daggers. One cannot help being struck by the fact that it was either part of the system or it was part of the test of these young men that they never seem to have had these arms in their possession and custody for any long time; they were constantly being taken away to somebody else. No doubt that system was very valuable to the revolutionaries for the purpose of putting the police off the scent. Other features of the association which attracted the young men were that it had its athletic side. There is evidence that the boys were extremely interested in a game called the Hadudu in which various teams took part and there was actually a knock-out tournament for this fashion, because we find from the evidence that on a certain day the final of the Hadudu tournament was played and one of the accused was the Secretary of the Hadudu League. For the purpose of interesting them and, no doubt, educating them also, in the evening they used to be taught dagger play and one of the accused also relates how they formed a dramatic society together under supervision and performed a play of a patriotic character in which the boys took the parts of various Hindu patriots headed by the well known historical figure Rana Pratap who was throughout his life in opposition to the Emperor Akbar. That is the outline in brief of what these boys were doing and were persuaded to do.

The evidence before the Special Power Magistrate consisted of confessions; every one of these appellants made confessions except the appellant Dhirendra and, as is not unusual in these cases, every one of them retracted his confession. Then there is the evidence of police watchers, the local persons who were employed by the police to watch the activities of the society and that of course affords very valuable evidence of association necessary to prove where criminal conspiracies were concerned. Then again we have the evidence of various persons who were present when the arms and the ammunition were detected. We have also an arms expert who gives his testimony as to the condition of the revolvers and pistols when they were found and, perhaps outstanding of all, we have the evidence of 3 boys who were the accomplices of the accused persons, but who had turned King's evidence or to use the expression employed in India, had become approvers. I have mentioned that the confessions on which the learned Magistrate placed great reliance were all retracted. It is hardly necessary for me to re-state the law of retracted confessions. As I understand it the old English rule which was laid down, or exemplified perhaps I should rather say, in (1893) 2 Q B 12 (3), which has been followed in this Court in the well-known decision of 22 Cal 164 (4) is this, that when a confession is retracted it becomes very unsafe to use the contents of that confession against any co-accused who is undergoing a joint trial with the person who made the retracted confession as to his responsibility for the crime that he is accused of.

On the other hand a Judge sitting alone after due consideration and taking into consideration all extraneous facts such as the statements made by the Police Officers who were originally in charge of the persons confessing, the statement of the Magistrate who took down the confession and the general tone of the confession itself together with the probabilities to be attached to the explanatory statement retracting confession can accept the confession as being a true

3. *Rex v. Thompson*, (1893) 2 Q B 12=62 L J M C 93=41 W R 525=17 Cox C C 641=57 J P 412=69 L T 22.

4. *Deputy Legal Remembrancer v. Karuna Balstobi*, (1895) 22 Cal 164.

and proper account of the necessary happenings to support the prosecution case before the Court. That is what the learned Magistrate has done here and as I know Mr. Justice Henderson's great experience in these matters, I asked him to prepare for me an analysis of the various confessions which I had the benefit to have and that is incorporated in his concurring judgment. I may say I entirely agree with his conclusions about the actual intrinsic value of the confessions themselves. That leaves me with a less heavy task with regard to the remaining evidence. (His Lordship then discussed the evidence and proceeded.) Before I come to the question of the convictions and sentences I wish to say this. I have been a little disturbed by one or two circumstances in this case. I know very little about terrorism and terrorist cases.

This is the first time I have ever presided over an appellate tribunal dealing with revolutionary activity in Bengal. No doubt if I were hand in glove with high personages of Government, if I were to use the elegant expression employed in the Bengal Legislative Council, accustomed to 'hobnob' with eminent gentlemen in the Executive and the Police services, I should not have had to ask the questions that I had to ask during the trial. What disturbed me is this, that in every confession and each statement by an accomplice, there are a number of what I imagine to be senior revolutionaries identified, who have never been put on their trial at all. I had to ask what was the reason of this. An experienced police officer who gave evidence as to the antecedents of the appellants subsequently informed me that the reason was that the authorities had evidence against these men, but it was of such a secret character and if brought to light, so dangerous to the person who gave it, that Government was forced to put these men in detention without placing them on their trial. I have no reason whatever to doubt that this is true. All I can say is that as far as this case is concerned, I think before a Magistrate determined to do his duty (as this Magistrate appears to have been) it would not have been impossible even without collecting any extra evidence at all, to have placed a certain number of these older persons in the dock beside these boys whom, on the

evidence of the prosecution itself, the older men had corrupted. It leaves a somewhat nasty taste in the mouth that this should not have been done. (His Lordship then dealt with the conviction and sentence of each of the accused.)

Henderson, J.—Before dealing with the evidence in detail I should like to give the reasons which have led me to the conclusion that the preliminary objection with regard to the jurisdiction of the Special Magistrate ought to be overruled. In order that a Special Magistrate may have jurisdiction to try any accused person it is necessary that the Local Government should make an order in writing within the terms of S. 25, Bengal Act 12 of 1932. What purports to be such an order was put in by the prosecution and marked Ex. 1. I may note that at the trial it was admitted without objection and it was only at the time of the argument that this question was raised. The point which has been argued is that that order has not been properly proved. On behalf of the Crown, it has been contended by the learned Deputy Legal Remembrancer that in view of S. 49, Government of India Act, such an order proves itself and it is unnecessary to give any evidence. The effect of an order of this character is frequently to deprive an accused person of his ordinary right to be tried by a Judge and a Jury or at any rate to render him liable to a sentence which could only otherwise be passed upon him at such a trial. The question is therefore of great importance and we have thought it necessary to examine it with the greatest possible care.

It seems reasonably plain that S. 49, Government of India Act was enacted in order to provide a means for putting the orders of the Government into proper shape. Sub-S. 1 lays down the form which such orders are to take and then provides for their authentication, that is to say, it provides a method by which it may become known that they really are orders of Government. The method of authentication is to be determined by rules made by the Governor and there can be no question that Ex. 1 purports to be an order drawn up in the proper form and properly authenticated in accordance with the rules of business made by the Governor. Finally, it is provided that an order so authenticated

cannot be called in question in any legal proceeding on the ground that it was not duly made by the Government. It seems to me that in a matter of this kind there are two quite distinct questions which arise for the consideration of the Court; (1) Whether in fact any order has been made at all. (2) If so, whether it is one which under the provisions of S. 49, Government of India Act, cannot be called in question in any legal proceeding. Approaching the first question, I cannot find anything in the terms of S. 49 to suggest that proof of the existence of the order is dispensed with. The section does not in plain terms empower the Court to take judicial notice of the existence of such an order. I would therefore overrule the first contention made on behalf of the Crown, and I have accordingly reached the conclusion that Ex. 1 requires to be proved.

It was next contended by the learned Deputy Legal Remembrancer that in fact that order has been properly proved. While on this point, I only desire to say that in my opinion it is open to the prosecution to adopt any legal mode of proof they please. Although S. 78, Evidence Act, provides a convenient mode it is by its very terms not exhaustive. In the present case, the prosecution chose to produce the original order itself sealed with the seal of the Government of Bengal and signed by Mr. J. George, the Under Secretary to that Government in the Political Department. S. 56, Evidence Act, lays down that no fact of which the Court will take judicial notice need be proved, and under S. 57, sub-s. 7 of that Act the Court shall take judicial notice of the signature of any officer if the fact of his appointment is notified in the Gazette. The most, therefore, that can be said is this that strictly the prosecution should have produced the Gazette in which the appointment of Mr. George as Under Secretary to the Political Department was notified. This objection relates to the mode of proof only and should have been raised when the prosecution sought to put the document into evidence and I am not prepared to say that it deserved serious consideration when it was raised at a later stage. But in any view of the case it has never even been suggested that Mr. George was not the Under Secretary to the Government of Bengal and the proceedings in the

lower Court were extremely protracted. In these circumstances, when the evidence has been minutely examined both here and in the Court below, rather than order a retrial I would allow the prosecution to produce the notification in this Court had I thought it necessary to insist upon the point.

The prosecution seeks to bring the charge home to the various appellants mainly by their own confessions and by proof of the recovery of various arms and ammunition. In addition to this, there is the evidence of three accomplices. My learned brother has fully dealt with that evidence and it is not necessary for me to say anything more with regard to it. All the learned advocates who have appeared on behalf of the various appellants have asked us to hold, first, that the confessions were not admissible in evidence at all and, secondly, they were not true. With regard to their admissibility, the learned Deputy Legal Remembrancer has pointed out that the term "voluntary" is wider in meaning than the terms of S. 24, Evidence Act. He has then argued that the true position is this. If it appears to the Court that S. 24 applies, the confession must be excluded and there is an end of it. On the other hand, when once it is admitted into evidence, the defence must definitely prove that it was not voluntary in the wider sense of the term before the Court can be asked to refuse to believe it. In my opinion, the second proposition is too broadly stated. If a confession is not voluntary in the wider sense of the term, *ex hypothesi* the person who made it did not do so from any desire to tell the truth. This fact in itself introduces an element of suspicion. In such circumstances if facts are proved which suggest that an inducement of some kind, although outside the terms of S. 24, was in fact given, the Court may well refuse to accept the confession as true.

Applying these considerations to the confessions which are now before us, the learned Deputy Legal Remembrancer first contended that even if we accept the allegations made by the various appellants in their examination by the Magistrate as true, the confessions would not be excluded under the strict terms of S. 24. This argument clearly would not apply to the case of every appellant. Hari Narain says that he was promised

that he would be released. Shibendra says that he was told that he would be made an approver. Satyendra refers to some inducements the precise nature of which has not been specified. Romesh refers to a statement which could be interpreted as a promise that he would be let off. Lal Chand and Nagendra do not state the exact reasons which led them to make their confessions. Purnendu says that in addition to other threats he was told that if he did not confess he would be sentenced to undergo solitary confinement. In fact the only two appellants who did not make any very clear statement were Biroo and Shubal who said that after having been beaten in order to extract statements from them they were threatened with another beating in the event of their refusal to confess before another Magistrate. In the result they made their statements out of fear. In my opinion, it is chiefly a matter of academic interest to discuss whether in such circumstances these confessions would be inadmissible in evidence or admissible but practically worthless. Unless we are satisfied that they are voluntary in the ordinary sense of the term we should not be prepared to attach any weight to them.

The appellants make allegations and suggestions to the effect: (1) that they were subjected to ill-treatment and that improper inducements or threats were held out, and (2) that the confessions were in fact false; the police wrote them all out on paper and compelled the appellants to learn them by heart and repeat as much of them as they could remember to the Magistrate; and (3) that the revolvers and the ammunition were all planted in the places where they were found by the police themselves. It is quite obvious that their confessions, though involuntary, may yet be true; but in the present case the contention of the defence is that they were not only involuntary but also false. We have no hesitation whatever in rejecting the story of tutoring. It is entirely opposed to the real facts. What it implies is this: that the police themselves manufactured an entirely imaginary case, that they had everything cut and dried, but statements were written out in order that persons might be induced to learn them by heart and that ammunition and arms were concealed and scattered in various parts

of the town. It seems hardly necessary to say that this is a most fantastic suggestion. The plain fact of the matter is that the Police were working in the dark and were not in a position to engineer a case on this scale. They knew of the existence of the Jugantar Party. They were also aware that there had been a good many thefts of arms during the past few months in the town of Rangpore. But apart from that, their knowledge was so scanty that when they made the first arrest, that of Purnendu, they were not in a position to send him up for trial on any charge at all, but were compelled to arrest him under the provisions of the Bengal Criminal Law Amendment Act.

It was only as a result of the statements made by him and other persons arrested, that the Police were able to collect materials such as would justify them in making a specific charge. No facts whatever have been proved which suggest that the arms and the ammunition were planted. The confessions themselves are full and coherent statements and we have not been able to find in them anything which reflects the mind of some person other than the maker. They do not suggest that they were mere repetitions of false stories which had been committed to memory. Some statements cannot possibly have been due to tutoring by the Police. In particular I may refer to a statement made by Subal:

After Biroo's arrest I told Lal Chand, 'People say that 7 revolvers have been imported to Rangpur and the Saheb recovered all of them after sound beating.' Whereupon he said 'we have connections with Calcutta—If we send intimation there revolvers are despatched.'

It appears to me incredible that any Police Officer would have tutored anybody to make a statement of this kind. We have therefore no hesitation in rejecting the suggestion that these confessions were not spontaneous but were mere repetitions of statements dictated by the Police. When the accused persons are capable of making one false suggestion, they are equally capable of making another, and it would be impossible to accept their allegations of beating without proof. There is no evidence of any such thing. None of them had any marks of beating on their persons. Before they made their confessions proper warnings were given to them and they had ample time for reflection. They never made any allegation that they had been

beaten. They were produced before the Magistrate on several occasions merely in order that the Police might get a further remand. On none of these occasions did they make any complaint or retract their confessions. It was only when the Police Officers were cross-examined at the trial itself that it became apparent that these allegations would be made. In such circumstances, we cannot accept the bare statements of the appellants themselves and it is therefore necessary to examine the evidence in detail to see whether any facts have been proved which would support an inference that particular confessions were not voluntary. (His Lordship then discussed the evidence concerning each accused and came to the conclusion that the confession made by each was voluntary and was corroborated by recovery of arms and ammunition.)

R.M./K.S. Order accordingly.

A. I. R. 1936 Calcutta 323

NASIM ALI AND HENDERSON, JJ.

Sabaratulla Sheikh—Appellant.

v.

Manikjan Bibi—Respondent.

Appeal No. 2497 of 1932, Decided on 9th July 1935, from appellate decree of Addl. Dist. Judge, 2nd Court, Rangpur, D/- 1st August 1932.

(a) Bengal Tenancy Act (1885), S. 153—Question as to whether certain rent is payable or nothing at all is one deciding question of amount of rent annually payable by tenant—Second appeal is competent.

It is difficult to distinguish on principle a case of total suspension of the rent from a case of abatement of rent or a decree for rent at a rate lower than that claimed by the plaintiff. [P 323 C 2]

Where the Court will have to decide whether rent payable is a certain amount, or in the alternative nothing at all, the question is of the amount of rent payable annually by the tenant, and as such a second appeal is competent: 1917 Cal 208, *Rel. on*; S. A. No. 1520 of 1924, *not Foll.* [P 323 C 2]

(b) Landlord and Tenant — Suspension of rent—Sale of land by owner, but his wife continuing in possession subject to payment of certain rent — Suit for rent by purchaser — No question of being put in possession arises.

Where certain land is sold by a person but the property continues to be in possession of the family as before, and the wife of the vendor is to pay rent to the purchaser, in a suit for rent by such purchaser, the wife cannot plead that she has not been put in possession. No such question arises as the wife has got such pos-

session of the demised land as it was capable of being made over to her. [P 324 C 1]

Wahed Hussain and Jnan Chandra Roy—for Appellant.

Birendra Kumar De—for Respondent.

Nasim Ali, J.—This is an appeal by the plaintiff in a suit for rent. The defence of the tenant defendant was that as the plaintiff did not put her in possession of a portion of the land, and that as she was also dispossessed by the plaintiff from another portion of the land, the entire rent ought to be suspended. The trial Court accepted the defence and dismissed the suit. On appeal to the lower appellate Court the decision of the trial Court has been affirmed. Hence the present second appeal.

A preliminary objection has been taken to the competency of this appeal on the ground that the value of the suit is below Rs. 100 and the decree of the lower appellate Court did not decide the question of the amount of rent annually payable by the tenant to the landlord. I am unable to give effect to this preliminary objection. In view of the defence taken the Court will have to decide whether the rent payable is Rs. 17 or in the alternative nothing at all. It is difficult to distinguish on principle a case of total suspension of rent from a case of abatement of rent or a decree for rent at a rate lower than claimed by the plaintiff. This view of the matter is supported by a decision of this Court in 34 I C 851 (1), decided on 18th April 1916. The learned advocate for the respondent drew our attention to an unreported case decided by Cuming and Mallik, JJ., (in S. A. 1520 of 1924), decided on 3rd May 1927. No reasons were given in that case and further the attention of the learned Judges does not appear to have been drawn to the case reported in 34 I C 851 (1) cited above. Under these circumstances I am not prepared to hold that the present appeal is incompetent.

It appears that the defendant's husband was the owner of this property. He sold this property to the plaintiff on 8th May 1928 and on that very day his wife took a lease of the lands purchased by the plaintiff from him. There cannot be any doubt therefore that the plaintiff did not take actual possession of the property for a single day. The evident in-

1. *Dina Nath v. Sarat Chandra*, 1927 Cal 208 = 34 I C 851.

tention of the parties was that the property would continue to be in the possession of the family as before, but the wife would have to pay Rs. 17 as rent. Omrauddin who is in possession of a portion of the homestead is in possession from a very long time and the defendant knew full well that he was in possession at the time when the land was sold by her husband and leased out to her. There cannot be any doubt therefore that the defendant got such possession of the demised land as it was capable of being made over to her. By these transactions the title of the property was transferred to the plaintiff but the possession, as it was with the husband before the sale was allowed to be continued in the wife on payment of a certain amount of rent. No question of being the lessee being put into possession of the property therefore arises in view of the admitted facts of the present case.

As regards the plea of dispossession from some portion of the land by Daulat, the finding of the learned Judge is that the plaintiff had no hand in that dispossession. The proper remedy of the defendant is to take such steps as he may be advised to eject Daulat. Under these circumstances the plaintiff is entitled to get a decree for rent at the full rent. The result, therefore, is that this appeal is allowed, the judgments and decrees of the Court below are set aside and the suit is decreed in full with costs throughout.

Henderson, J.—I agree.

K.S./R.K. *Appeal allowed.*

A. I. R. 1936 Calcutta 324

LORT-WILLIAMS AND JACK, JJ.

H. K. Shaw—Appellant.

v.

Suresh Chandra Mitter—Respondent.

Criminal Appeal No. 82 of 1935, Decided on 20th June 1935.

Penal Code (1860), Ss. 420 and 30—Goods already delivered—Post dated cheque subsequently given dishonoured and receipt obtained—Receipt held not valuable security and offence of cheating held not proved—Complainant's remedy is in civil Court.

Where the accused gave a post dated cheque for certain goods delivered to him at an earlier date and got a receipt, but the cheque was dishonoured :

Held : that the receipt was not a valuable security within the meaning of S. 30, and the accused was not guilty of cheating. The remedy of the complainant lay in a civil Court for breach of contract. [P 325 O 2 ; P 326 O 1]

Sures Chandra Talukdar and Hiren-dra Chunder Ghose—for Appellant.

Sarat Chandra Janah and Mritunjoy De—for Respondent.

D. N. Bhattacharji—for the Crown.

Lort-Williams, J.—In this case the appellant was convicted by a Presidency Magistrate of an offence under S. 420, Penal Code, and sentenced to be detained till the rising of the Court and to pay a fine of Rs. 600 in default six months' rigorous imprisonment. Out of the fine, if realized, Rs. 300 was to be paid to the complainant as compensation. The offence complained of was that of cheating the complainant's firm on or about 3rd July 1934, at Calcutta, by dishonestly inducing the said firm to deliver a bill, that is to say an invoice for Rs. 264-15-0, in exchange for a cheque No. A-7,55,136, upon the National Bank of India, which was subsequently dishonoured.

The case for the prosecution was that the complainant's firm, the Atlas Agency of 20 Strand Road, Calcutta, cleared certain goods on behalf of the firm of M. L. Shaw & Co. Ltd., of which the accused was the Managing Director, from K. P. Dock No. 4 per S. S. "Clan Macnair." The complainant firm sent a bill, Ex. 7, showing that the sum of Rs. 264-15-0 was due in respect of these services rendered and for out of pocket payments in respect of customs duty and other charges. The bill was sent on 21st June 1934, and was acknowledged by the firm of M. L. Shaw & Co. Ltd., on the same date. No payment was made, but on 2nd July 1934, Bholanath Mullick, an assistant in the firm of the Atlas Agency, met the accused and pressed him for payment. It is alleged that the accused then gave a cheque for the amount of the bill and Bholanath receipted the bill by writing upon it "Received by cheque No. A-7,55,136." Underneath that writing is a one anna revenue stamp which is cancelled by a rubber stamp with Atlas Agency upon it. Underneath that is the signature of B. Mullick.

The evidence shows that Bholanath's recollection is not accurate as to the date when the cheque was given. The accused stated that he gave a post dated cheque, and this is confirmed by the fact that in the counterfoil of the cheque book of the firm of M. L. Shaw & Co., the cheque to the Atlas Agency is dated 3rd July 1934, but the next cheque, in

favour of the Electric Supply Corporation, is dated 28th June 1934. It seems reasonably clear, therefore, that the cheque was given to the Atlas Agency, either on the 28th, or prior to 28th June 1934. The cheque was dishonoured and returned on 4th July 1934. The complainant's firm then wrote to the firm of M. L. Shaw & Co., and received a reply regretting the dishonour of the cheque and asking the Atlas Agency to send their representative to receive payment of their bill on 9th July. But on this day no payment was made and, therefore, the complaint was lodged on 11th July 1934.

The defence was that the dispute was of a civil nature and that the firm of M. L. Shaw & Co. Ltd., had gone into liquidation, and that these criminal proceedings had been started to put pressure on the accused. M. L. Shaw & Co., went into liquidation about the middle of July 1934. The Magistrate came to the conclusion that these facts showed that the accused had an antecedent intention to defraud the complainant. But that is not the question which he had to decide. S. 420, Penal Code, provides that :

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished

The advocate, who has appeared on behalf of the complainant, has argued that what the accused did amounts either to inducing the complainant to deliver property to him, or to make a valuable security, or something which was signed, and which was capable of being converted into a valuable security. With regard to the first part of the argument the goods, which were the subject-matter of the clearing charges, had been delivered to M. L. Shaw & Co. Ltd., on or before 20th June 1934. It is clear, therefore, that the accused did not induce the complainant to deliver any property in exchange for the cheque, because the goods had already been delivered at an earlier date. It can hardly be contended that the piece of paper upon which the account is written is property within the meaning of this Section, or that the receipt is property within that meaning. The learned advocate relied more upon

the second part of his argument and contended that the receipt is a valuable security within the meaning of S. 30, Penal Code. That section provides that :

The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

The receipt does not extinguish or release any legal right. Until payment of these charges, the rights of the Atlas Agency against M. L. Shaw & Co. Ltd. remain, and the giving of the receipt does not cancel or extinguish them. The receipt could be given in evidence to prove that the payment had actually been made, but it would always be open to the Atlas Agency to rebut this evidence by showing that in fact no payment had been received by them. Moreover, the receipt does not even purport to be an acknowledgment of payment. It amounts only to an acknowledgment that a cheque, No. A-7,55,136, has been received by the Atlas Agency. Even if the cheque had not been post dated, this receipt would not have amounted to any more than an acknowledgment that the cheque had been received, and it would always be open to the Atlas Agency to show that the cheque had never been paid. Still more is this so, when the cheque was post dated. In either case a cheque is only a promise to pay, either on demand, or upon the date to which it has been post dated. Therefore, the only effect of the receipt is an acknowledgment that a promise to pay has been given by M. L. Shaw & Co., to the Atlas Agency by means of the cheque in question. It is clear, therefore, that this receipt cannot even come within the last part of S. 30 which says "whereby any person acknowledges that he lies under legal liability, or has not a certain legal right."

The Atlas Agency, by writing "received by cheque" on the back of the bill, did not acknowledge that they had not a certain legal right. As I have already stated, all that they acknowledged was that they had received a promise to pay the money, which, if paid, would have extinguished their legal right to receive the amount, Rs. 264-15-0, stated upon the invoice.

It is clear, therefore, in my opinion, that the facts in this case do not support the charge made against the accused. His contention, that no crime has been committed, but that the Atlas Agency has rights against him in a civil Court is correct. The remedy of the complainant lies in a suit for breach of M. L. Shaw & Co.'s contract to pay the amount of the invoice or in insolvency proceedings. Consequently, the conviction and sentence are set aside, and the accused is acquitted. The fine, if paid, must be refunded.

Jack, J.—I agree.

K.S./R.K. Conviction set aside.

A. I. R. 1936 Calcutta 326

M. C. GHOSE, J.

Yeajuddin Pramanik and another—
Defendants 2 and 3—Appellants.
v.

Rup Manjuri Dasi and others—
Respondents.

Appeal No. 94 of 1934, Decided on 25th February 1936, from appellate decree of Sub-Judge, Second Court, Pabna, D/- 23rd May 1933.

(a) Mahomedan Law—Alienation—Guardian—Absolute necessity or minor's benefit should be proved—To record necessity in document is advisable.

In the case of a sale by a guardian of a Mohammedan minor there must be an absolute necessity for the sale, or it must be for the benefit of the minor: 1918 P C 11; 20 Bom 116 and 35 Cal 320, Ref. [P 326 C 2]

Where the property is mortgaged by a guardian of a Mahomedan minor, the same rules apply, i. e., the mortgage also must be for absolute necessity or at least for the minor's benefit. It is always advisable that in such cases the necessity of the mortgage should be recorded in the deed, but in the absence of such record, other evidence of necessity is sufficient. [P 326 C 2; P 327 C 1]

(b) Interest—Compound interest at twenty four per cent with three months rest is excessive.

Interest of 24 per cent if it is simple interest probably will not be too high, but if it is compounded every three months, the interest is excessive and should be reduced: 40 C W N 409, Rel. on. [P 327 C 1]

Syed Farhat Ali—for Appellants.

Girija Prosanna Sanyal and Bijali Bhusan Sanyal—for Respondents.

Judgment.—This is an appeal in a suit on a mortgage bond. The bond was executed in May 1926 for a sum of Rs. 200 at interest of 2 per cent per men-

sem with rests of three months. The due date having passed and the defendant not having paid the amount the suit was instituted in November 1931. The bond was executed by a widow, defendant 1, and by defendant 4, husband of her deceased daughter, and by defendants 2 and 3, minor sons of defendant 4 and the deceased daughter. The bond was executed by defendant 4, the father in respect of the shares of his sons, defendants 2 and 3. Various defences were taken. The Court of appeal below decreed the suit fully against the defendants. In appeal the first point taken is that the minor defendants 2 and 3 are not legally bound by the mortgage bond. Under Mahomedan Law the father is the legal guardian of his minor sons, but his power to sell the minors' immoveable property is not absolute. He may sell the immoveable property of the minor in certain conditions stated in S. 263 of Mulla's Principles of Mahomedan Law. The learned Advocate has also quoted the cases of 45 I A 73 (1), 20 Bom 116 (2) and 35 Cal 320 (3). On perusal of those cases it appears that in the case of a sale by a guardian of a Muhammadan minor there must be an absolute necessity for the sale, or it must be for the benefit of the minor. In this case it was a mortgage but a mortgage bond should be governed by the rules applicable to sales.

The question is whether in this case there was necessity for the mortgage and whether it was for the benefit of the minors. In the document it was merely stated that the mortgage bond was made for urgent necessity. No details were given. In the evidence in Court which the Court of appeal below has accepted, it was stated that about Rs. 80 was spent for payment of arrears of rent for 4 years and about Rs. 60 was spent for purchase of plough cattle and about Rs. 60 was spent in getting mutation in the landlord's books. It is urged by the learned advocate that it was the duty of the plaintiff to have it clearly stated in the document for what particular purpose the money was borrowed and that the omission of any such record in the deed is

1. Imambandi v. Mutsaddi, 1918 P C 11=47 I C 513=45 I A 73=45 Cal 878 (P C).

2. Hurbai v. Hiraji Byramji, (1896) 20 Bom 116.

3. Bhawal Sahu v. Baijnath Pertab Narain Singh, (1908) 35 Cal 320=12 C W N 256.

fatal to the success of the plaintiff. This extreme proposition cannot be accepted. The plaintiff would have been wise to have recorded the purpose of the loan in the bond itself, but the evidence which has been accepted by the Court of fact cannot be neglected. When Rs. 80 was spent for arrears of rent, and Rs. 60 was spent for purchasing plough cattle, it may be legally held that the mortgage was for the benefit of the minors. As to the payment of the mutation fee, it appears clear that there was no necessity for this on behalf of the minors, but the same cannot be said about the payment of arrears of rent or the purchase of plough cattle. In the circumstances the finding of the Court of appeal below is correct namely that the sale was for the benefit of the minors.

The next point taken is that the interest charged in the bond is excessive and the transaction was substantially unfair to the defendants. There is force in this contention. Interest at 24 per cent, if it was simple interest, probably would not be too high, but it was compounded every three months so that the original amount of Rs. 200 increased in 4½ years to Rs. 570. Following the decision of 40 C W N 409 (4), the interest in this case should be reduced. The appeal is allowed in part, namely that the interest is reduced to 18 per cent per annum with yearly rests. The decree of the Court of appeal below is varied accordingly. The parties will get their costs in proportion to their success in all the Courts.

B.D./R.K.

Decree varied.

4. Radharani Dassya v. Kshetra Mohan, (1935)
40 C W N 409.

A. I. R. 1936 Calcutta 327

COSTELLO AND PANCKRIDGE, JJ.
Marwari Stores, Ltd.—Appellant.

v.

Gouri Shanker Goenka—Respondent.

Appeal No. 28 of 1935, Decided on
13th November 1935.

(a) Companies Act (1913), S. 55—Petition for reduction of capital—Proof of loss of capital is not always essential—Question for decision is whether or not company had duly passed special resolution for reduction—Court should, however, proceed on evidence.

It is not always essential or necessary for the Court to whom a petition for reduction of capital is presented to satisfy itself that there

has been a loss of the capital. The only serious question with which the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital be reduced. [P 329 C 1, 2; P 330 C 1]

Where, however, the reduction of the capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. Where the person opposing the petition accepts the statement of the company that there has been a loss of capital, the Court should act upon the assumption that there is evidence of loss of capital. [P 330 C 1, 2]

(b) Companies Act (1913), Ss. 38, 40 and 55—Application by company for reduction of capital opposed by shareholder on ground that persons voting for resolution for reduction were not duly qualified to vote—No steps taken by shareholder to have register altered or rectified under S. 38—Burden is on him to substantiate his allegations.

According to S. 40, Companies Act, the register of members is prima facie evidence of any matters directed or authorised by the Act to be inserted therein. Where the names of certain persons are entered in the register as shareholders it can be taken for granted that such persons are qualified shareholders. [P 331 C 2]

Where an application by a company for reduction of its capital is opposed by a shareholder on the ground that certain persons who have voted for the resolution for the reduction of the capital of the company were not duly qualified as shareholders so to vote, or to vote at all, by reason of their names not having been properly entered in the register or by reason of their names not having been on the register for a length of time sufficient to entitle them to vote, but no steps have been taken by the shareholder to have the register altered or rectified under S. 38, the burden is on the shareholder opposing the petition to substantiate his allegations, and where he fails to do so the application should be allowed. [P 331 C 1, 2]

K. P. Khaitan and G. P. Kar—for Appellant.

S. Chaudhury—for Respondent.

Costello, J.—This matter comes before us by way of appeal from an order made by Cunliffe, J., on 18th March 1935, whereby he refused with costs an application made on behalf of the Marwari Stores Ltd. for permission to reduce the share capital of that company. The application was opposed by Gouri Shanker Goenka who is a shareholder of that company and the respondent in the present appeal. The Marwari Stores Ltd., was originally incorporated as a private company on 15th March 1919, having a nominal capital of Rupees two lacs divided into fifty shares of Rs. 4,000 each. On 22nd March 1921, by

an extraordinary resolution, the capital of the company was increased by Rs. 3 lacs making a total capital of Rs. 5 lacs represented by 5,000 shares of Rs. 100 each. Shares of the value of rupees two lacs were applied for and issued and a sum of Rs. 1,92,000 was paid up. Shares out of the balance to the extent of Rs. 8,000 were forfeited. The present position, therefore, is this: that the paid up capital of the company is Rs. 1,92,000. A sum of Rs. 4,000 which had been paid in respect of forfeited shares was transferred to the profit and loss account. The Articles of Association of the company contained the usual kind of provision entitling the company to reduce its capital. The relevant article is No. 43. It appears from the petition and from an affidavit of Motilal Lath, who is described as a Managing Director of the company, that up to 31st March 1920 the company made a profit of Rs. 10,026 odd, and up to 31st March 1921 the profit was Rs. 10,105 and some odd annas.

The present respondent became connected with the company on 6th April 1921. It appears that he was taken into the service of the company on or about that time. Towards the end of the year 1921, that is to say on the 30th November of that year, the company was converted into a public company and in the following year the present respondent Gouri Shanker Goenka became a shareholder in the company to the extent of 80 shares. It appears from the years 1922 to 1924 the company sustained a loss amounting to the sum of Rs. 1,10,000 and that is shown in the balance sheets for the years 1922, 1923 and 1924. That fact is stated in para. 8 of the petition on which the present proceedings were founded. It is also set out in that paragraph that the loss has ever since been carried forward. It is further stated that the company was not able to make any profit during the years 1923 and 1924, but since 1925 the company has been making a profit. The amount of the loss has now been reduced to Rs. 96,000. The said sum of Rs. 96,000 was stated to be a loss and not to be represented by any available assets. In the year 1932 the respondent Gouri Shanker Goenka became a director of the company. It appears that in 1933 he was party to the passing of the draft balance sheet which was submitted at the directors' meeting.

Actually from 6th April 1921, the date on which the respondent joined the company down to 4th August 1934 he was functioning as the Assistant Manager and, as such, he assisted in the preparation of each one of the accounts and must be taken to have known the contents of those accounts. On 4th October 1934 Gouri Shanker ceased to be a director of the company. At the end of October 1934 there was a transfer of certain shares which had been held by the Managing Director, Motilal Lath, to some of his relations and in December of that year, Mr. P. D. Himatsingka and Mr. Baijnath Prasad Deora resigned from the Board of the company and in their places, about a month later, two of Motilal Lath's nominees, if they can properly be called his nominees, namely Mr. Bholaram Tibrewalla and Mr. Luxminarain Lath were appointed directors of the company. On 20th January 1935 an ordinary general meeting of the company was held, accounts were passed, and at that meeting the present respondent was in attendance in his capacity as a shareholder of the company. On the same day, namely on 20th January 1935, there was an extraordinary general meeting at which a resolution was passed for the reduction of the capital of the company. That appears from para. 9 of the petition set out at p. 3 of the paper book. That paragraph reads as follows:

Under the provisions of S. 50, Companies Act, and in pursuance of the power contained in that behalf in the Articles of Association the company by special resolution of its shareholders duly passed and confirmed at extraordinary general meetings duly convened and held on 20th January 1935 and 4th February 1935 respectively resolved: that the paid up capital of the Marwari Stores Limited be reduced from Rs. 1,92,000 divided into 1920 Ordinary Shares of Rs. 100 each to Rs. 96,000 divided into 1920 Ordinary Shares of Rs. 50 each and that such reduction be effected by cancelling the paid up capital to the extent of Rs. 96,000 which had been lost and is not represented by available assets and by reducing this nominal amount of all the shares in the company's paid up capital from Rs. 100 to Rs. 50 per share.

It appears therefore that the resolution which was passed at the meeting on 20th January 1935 was duly confirmed at the subsequent extraordinary general meeting held on 4th February 1935. A week later, namely on 11th February 1935 a petition for reduction of capital was admitted by Cunliffe, J. The petition had been verified on 7th February 1935. The 11th

March 1935 was fixed as the date for hearing of the petition and directions were duly given for necessary advertisements. Those advertisements appeared in certain papers on 20th February 1935 as directed by the Court. On 6th March 1935 Gouri Shanker affirmed an affidavit in opposition to the company's petition and on 12th March he put in a supplementary affidavit in opposition. On 18th March there was an affidavit in reply by Motilal Lath on behalf of the company. Then finally, as I said at the outset, the matter came before the Court on 18th March 1935 when the application which the company was making was refused by Cunliffe, J. The company now comes before this Court asking that the order made by Cunliffe, J., be set aside and the company be authorised to reduce their capital in the manner asked for in their petition.

The application of the company is opposed by Gouri Shanker Goenka on two grounds, and Mr. Chowdbury on behalf of the respondent says: (1) there was no evidence before the Court that there had been in fact any loss of capital as averred by the company, and (2) the resolution which purported to have been passed on 20th January 1935 and confirmed on 4th February 1935 was not valid in law by reason of the fact that certain persons who voted for the resolution were not duly qualified as share-holders so to vote or to vote at all. The respondent Goenka, so far as the second point is concerned, challenged the validity of the transfer of certain shares made by Motilal Lath during the month of October as I have already stated. The allegation made on behalf of Goenka was to the effect that although the names of these transferees appear in the register of share-holders of the company, the entry in that register is not a proper or a genuine entry and the transfers could not have taken place at the time when they are alleged to take place, by reason of the fact that Motilal was not in Calcutta on the dates which appears on the transfers or on 30th October, the date on which the entries were made by Motilal in the register of share-holders of the company.

With regard to the first mentioned point, it is not at all certain that it is always essential or necessary for the Court to satisfy itself in proceedings of this kind, that there has been a reduction

of capital. The principles on which a Court ought to act in a matter of this description, were laid down by Lord Macnaghten in (1907) A C 229 (1) at pages 238-239. The relevant passage in the judgment of his Lordship is this:

Such being the views expressed in this House without any dissent or qualification, I was surprised to hear it argued by the learned counsel for the appellants that the Court has no jurisdiction to entertain a petition for the reduction of capital unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets. No doubt some countenance for that proposition may be found even in cases which have occurred since the decision of this House in (1894) A C 399 (2). In (1900) 2 Ch 846 (3), where the scheme proposed was obviously unfair to the preference shareholders and the petition was very properly dismissed, there are some expressions in the judgment of the learned Judge who decided the case which, taken apart from the context, may appear to support that contention. The decision of Buckley, J., in (1902) 2 Ch 845 (4) goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specified certain cases and declared that the power conferred by the Act of 1867 'includes' those specified it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned Judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect.

Then his Lordships stated this:

In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions, therefore, to be considered are these: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? and 2. Is the reduction fair and equitable as between the different classes of shareholders?

It would appear from that passage in the judgment of Lord Macnaghten that the only serious question with which

1. *Poole v. National Bank of China, Ltd.*, (1907) A C 229=76 L J Ch 458=51 S J 513=23 T L R 567=14 Manson 218=96 L T 889.
2. *British and American Trustees and Finance Corporation v. Couper*, (1894) A C 399=63 L J Ch 425=1 Manson 256=42 W R 652=70 L T 882.
3. *In re Barrow Hamatite Steel Co.*, (1900) 2 Ch 846=69 L J Ch 869=83 L T 397=16 T L R 569.
4. *In re Anglo-French Exploration Co.*, (1902) 2 Ch 845=71 L J Ch 800=18 T L R 750=9 Manson 432=51 W R 8.

the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital should be reduced.

Since the decision in that case, however, there have been a number of other cases and upon one of them Mr. Chowdhury laid considerable stress as indicating that the Court ought to require proof that there has been in fact a loss of capital. The case to which I refer is the case of 1916 SC (H L) 120 (5) a resume of which appears in 1916 W N 70. The account of the case in the Weekly Notes is as follows:

Lord Parker of Waddington, after stating that the law in respect of reduction of capital, as stated in (1907) A C 229 (1), had not been altered by the Companies (Consolidation) Act, 1908, said that where the resolution was expressed to be founded upon loss of capital he understood that since the decision of the House of Lords the practice of the Courts in Scotland had been to dispense with proof of the facts referred to in the resolution, at any rate where there was no reason to suspect the bona fides of the parties. The practice of the High Court of Justice in England had not been uniform. His own practice had been to insist on prima facie evidence of the existence of the state of facts referred to in the resolution. If no such prima facie evidence were forthcoming it might well be that the special resolution had been passed under the influence of some mistake or misrepresentation as to the true facts, and it would be unfair to the minority, if not also to the majority of the shareholders, to confirm a reduction voted under such circumstances. Further inability to produce some such evidence might well suggest want of bona fides in the matter. If capital not really lost or unrepresented by available assets were cancelled, it might be possible thereafter, by some adjustment of the figures in the company's balance sheet, to carry the amount so cancelled to profit and loss account, and so indirectly return paid-up capital to shareholders, thus affecting the rights of creditors. He still thought therefore, that where the reduction of capital was based on the ground that capital had been lost or was unrepresented by available assets, it was, though not necessary, at any rate wise and prudent to insist on some evidence of the fact.

I have no doubt that the proposition that where a reduction of capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. In the present instance we are not, however, called on to lay down any general principle with regard to that particular point, because there is clear

evidence that in the case of Marwari Stores Ltd., there had in fact been a loss of capital. I have already mentioned the nature of that loss. The evidence with regard to it is the definite statement in para. 8 of the company's petition dated 7th February 1935 as verified by the solemn affirmation of Motilal. The averments contained in that paragraph are not disputed by Goenka. On the contrary in para. 3 of his own affidavit, dated 6th March 1935, he says:

With reference to para. 8 of the said petition I state that the amount of loss mentioned in the said paragraph would have been very considerably reduced had the Managing Director conducted the business of the company in a proper workmanlike manner.

It is clear, therefore, that Goenka was accepting the statements that there had been a loss as stated by the Managing Director, though he was saying that the loss was due to something done or something not done by the Managing Director Motilal. We are of opinion, therefore, that the learned Judge in the Court below ought to have acted upon the assumption that there was evidence of loss of capital. With regard to the other point, on which the objector sought to rely, viz. that the resolution was not properly passed, his complaint is set out in para. 6 of the affidavit at p. 13 of the paper book, where he says:

The following are the transfers alleged to have been made by the said Motilal Lath to the persons hereinafter named who are his relatives as is mentioned: (1) Bholaram Tibrewala, father-in-law of Motilal Lath; (2) Luxminarain Lath, cousin of Motilal Lath; (3) Nural Lath and (4) Hanumanbux Lath, nephews of Motilal Lath, employees of the company; (5) Hariram Khaitan, and (6) Jugalkishore Khaitan, cousins in law of Motilal Lath, and employees of the company.

That I state that on the respective dates the said Motilal Lath is alleged to have transferred the said shares, namely 25th and 27th October 1934, and on the date when he is alleged to have registered the said alleged transfers, namely 30th October 1934, the said Motilal Lath was not in Calcutta at all and could not have transferred the said shares in the manner alleged, nor could he have registered the said transfer in the books of the company on that date. The alleged deeds of transfer purporting to have been executed on 25th and 27th October 1934, by the said Motilal Lath and by the respective transferees at Calcutta are all false and fictitious and are in fraud of the company and its shareholders.

No answer to that paragraph, which of course contains a very serious allegation against Motilal, is given. The

5. Caldwell v. Caldwell & Co., Paper Makers Ltd., (1916) SC (H L) 120.

latter in his affidavit in reply dated 18th March 1935 in para. 2 (d) says this:

With regard to para. 4 of the said first affidavit I state that the extraordinary general meetings were properly convened, constituted and held. All the persons present as shareholders were in fact share-holders of the company and registered as such by the company. The person who acted as the Chairman was a shareholder duly and properly elected as Chairman and the mover of the resolution was also a shareholder entitled to move the resolution which he did.

and then in sub-para. (e) at p. 27 of the paper book he adds this:

The six persons named in para. 6 of the first affidavit duly became transferees of the shares which have been registered in their names after they were duly approved and they became members of the company, and their names were duly placed on the register of the company. Gourishanker Goenka inspected the register of members several times in December 1934 and early in January 1935 and he saw the said names on the register of the company and he did not then take any objection thereto. No application has yet been made for the removal of the names of the said persons or rectification of the said register of members either by Gourishanker Goenka or anybody else except that Gourishanker is not attacking the said transfers by criminal proceedings and not by appropriate civil proceedings, and by way of side-issue in this application nobody else has raised any objection regarding their becoming members.

Now it is obvious that the allegations that these six persons whose names appear in the register of shareholders were not shareholders, came entirely from Goenka. If he was to be successful in opposing the application which the company was making he was bound to show that the names of these persons were not properly entered in the register or that their names were not on the register for length of time sufficient to entitle them to vote at the meetings which were held on 20th January 1935 and 4th February 1935. In my opinion he has entirely failed to do so. We have examined the register for ourselves and as far as one can see on the face of it, it is perfectly regular and in order. It was open to Goenka to have taken appropriate proceedings under S. 38, Companies Act, to have had the Register corrected had he been so minded. That section is in the same terms as the corresponding section in English Act of 1929, viz. S. 100 and runs thus:

If (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person

aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

Section 40, Companies Act, provides that the register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. I think that we ought to take it, in the present instance, that as no steps were taken to have this register altered or rectified and the persons whose names appear therein were qualified shareholders and therefore entitled to take part in the meetings of 20th January and 4th February 1935. In that view of the case Goenka has wholly failed to show any cause whatsoever why the application put forward by the company for the reduction of capital should not be granted by the Court. The result is that this appeal is allowed, the order made by Cunliffe, J., is set aside, and the prayers Nos. 1 and 2 and the first part of prayer No. 3 contained in the petition of the company and affirmed by Motilal Lath on 7th February 1935 are granted. As regards costs of these proceedings, we are of opinion that as, in any event, it was necessary for the company to obtain the sanction of the Court for the reduction of the capital, the company should pay their own costs in the Court below. But we direct that the respondent must pay the costs of the appeal to the appellant company.

Panckridge, J.—I agree.

R.M./R.K.

Order accordingly.

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R. C. MITTER, J.

Sripati Charan De and others—Plaintiffs—Appellants.

v.

Kailash Chandra Jana—Defendant—Respondent.

Appeal No. 1750 of 1932, Decided on 10th July 1935, from appellate decree of Sub-Judge, First Court, Midnapore, D/- 21st April 1932.

(a) Interpretation of Statutes—Same word used in different parts of same statute should have same meaning.

The same word used in different parts of the same statute have the same meaning, unless something to the contrary appears from the context. [P 333 C 2]

(b) Bengal Tenancy Act (1885 as amended by Act 4 of 1928), Ss. 5 and 20 — Tenant holding undivided shares in parcels of land could be raiyat even before amendment of 1928 by reason of occupation for 12 years.

Under the Bengal Tenancy Act, even before the amendment of 1928, a tenant holding undivided shares in parcels of land would be a raiyat, and could be a settled raiyat of a village by reason of occupation of such lands for a period of 12 years, for S. 20 of the Act requires that the tenant should be a raiyat and must hold the "land" as such continuously for 12 years : 8 C W N 192 and 751, *Rel. on.*

[P 333 C 2]

(c) Bengal Tenancy Act (1885), S. 30—Tenancy consisting of undivided shares in parcels of land — Suit for enhancement of rent before amendment of 1928 is not maintainable.

A suit for enhancement of rent under S. 30 of the Act before the amendment of 1928 is not maintainable when the tenancy consists entirely of undivided shares in parcels of lands or partly of entire parcels of land, and partly of undivided shares in parcels of land : 8 C W N 751 and 192, *Disting. : Case law referred.*

[P 333 C 2]

(d) Bengal Tenancy Act (1885 as amended by Act 4 of 1928), Ss. 30 (b) and 3 (9)—Tenancy consisting of undivided shares in parcels of land created before 1928—Immunity from enhancement of rent given to such tenant is not taken away by amendment of 1928 as such amendment is not retrospective.

Where a tenancy created before 1928 consists of undivided shares in parcels of land, the tenant enjoyed immunity from action for enhancement of rent. This immunity has been taken away by the amendment of 1928. But the amendment cannot be given retrospective operation and the landlord has no right to sue for enhancement of rent in respect of such a tenancy created before Act 4 of 1928 : *In re Joseph Suche & Co. Ltd.*, 1 Ch D 48, *Applied* ; 1930 Cal 238, *Rel. on.* [P 333 C 2 ; P 334 C 1]

(e) Interpretation of Statutes — Statute creating new right of action — There is generally a corresponding obligation.

Where a statute confers a right of action which was non-existent before, it generally creates a right with a corresponding obligation. [P 334 C 1]

Sarat Chandra Jana and Saroj Kumar Maity—for Appellants.

S. N. Mukherji and Amiya Prosad Moitra—for Respondent.

Judgment.—The defendant is an occupancy raiyat. His tenancy has been in existence from certainly before 1928 and consists of thirteen complete parcels of land and undivided shares in three other parcels. It is held at an annual rental of Rs. 21-3-8. The plaintiffs sued him for recovery of the balance of the rent and cesses due for the year 1337 and claimed damages at 25 per cent. On this part of the claim the only controversy between the parties was in respect of the claim for damages. The first Court allowed damages at the rate of 6-1/4 per

cent and there is no further question relating thereto.

The plaintiffs however claimed enhancement of rent on the grounds mentioned in S. 30 (b), Ben. Ten. Act. They filed the suit on 18th June 1931, that is after the Bengal Tenancy Amendment Act (Act 4 of 1928 B. C.), had come into force. This claim of the plaintiffs was resisted by the defendant in the lower Courts and is resisted before me. The learned Munsiff held that the plaintiffs were entitled to enhancement of rent on the grounds mentioned in that section and enhanced the rent by one and half anna per rupee. The learned Subordinate Judge however on appeal has negatived the plaintiffs' claim. The plaintiffs accordingly have filed this appeal, and ask for the restoration of the decree of the learned Munsiff. The question raised in this appeal, as far as I am aware, is of first impression. The case of 33 C W N 1156 (1) approaches the case I have to decide very nearly, but is not exactly the same.

There cannot be any doubt that if the suit had been instituted and decided before the amendment of the definition of "holding" by Act 4 of 1928, the plaintiffs' claim for enhancement on the grounds mentioned in S. 30 would have failed, on the ground that the defendant's tenancy is not a holding as defined in the Bengal Tenancy Act before the amendment of the year 1928. The decisions of this Court on this point are uniform since 1898, when the case in 2 C W N 680 (2) was decided: 40 Cal 29 (3); 24 C W N 1022 (4). The cases of 25 Cal 917n (5), 8 C W N 192 (6) and 8 C W N 751 (7) cited by the learned Advocate for the appellant, have no bearing upon the point, and I may parenthetically observe that I do not see how in any event 25 Cal 917n (5) supports him. In that case on a difference between Petheram, C. J., and Ram-

1. *Bir Bikram Kishore v. Rajjab Ali*, 1930 Cal 238=126 I C 182=33 C W N 1156.
2. *Haribole Brahmo v. Tasimuddin Mondal*, (1898) 2 C W N 680.
3. *Parbati Debi v. Mathura Nath*, (1913) 40 Cal 29=15 I C 453.
4. *Binayak Das Achari v. Samiruddin*, 1920 Cal 701=59 I C 209=24 C W N 1022.
5. *Hari Charan Bose v. Ranjit Singh*, (1896) 25 Cal 917n.
6. *Uma Charan v. Moniram*, (1904) 8 C W N 192.
7. *Baidyanath Mondal v. Sudharam Mieri*, (1904) 8 C W N 751.

pini, J., the matter was referred to Banerjee, J., who in agreement with Rampini, J., held that a ryoti tenancy which comprised undivided shares in parcels of land was not a holding as defined in the Bengal Tenancy Act then in force and that rent would not be a first charge on such a ryoti tenancy as S. 65, Ben. Ten. Act, made rent a first charge on "a holding." The case of 8 C W N 751 (7), is a case of a different type altogether. There the ryoti tenancy which comprised undivided shares in parcels of land had been created before the Bengal Tenancy Act was passed and when Act 8 of 1869 (B. C.) was in force. The said Act did not define "holding" in terms of the Bengal Tenancy Act. The tenant had acquired occupancy rights under Act 8 of 1869. The right so acquired could not be taken away by the Bengal Tenancy Act. The estate or zamindari under which the said tenancy was held was purchased by the plaintiff at a revenue sale, and he brought the suit to get khas possession of the lands of the said tenancy. The defendant who owned the tenancy set up that his interest was protected by S. 37, Revenue Sales Act 9 of 1859, as he had occupancy right. It was held that he had occupancy right and was so protected from eviction. Even if such a tenancy had been created after the Bengal Tenancy Act came into force (but before Act 4 of 1928 B. C.) there would not have been any difference. A tenant who has been granted lease of land for the purpose of cultivation, would be a ryot even if the demised premises be undivided shares in parcels of land.

In S. 5, Ben. Ten. Act, which defines a ryot the condition is that he must hold 'land' and not a 'parcel' or 'parcels' of land for the purposes of cultivation. In S. 105, Ben. Ten. Act, the Settlement Officer is entitled to settle fair and equitable rent "in respect of the land" held by the tenant. It has been held that a Settlement Officer can settle fair and equitable rent which may be and in most cases is above the existing rent, even where the claim on the part of the landlord to get more rent is put forward on the ground of rise of the price of staple food crops or other grounds mentioned in S. 30, and the ryoti tenancy consists of undivided shares in parcels of land. In those cases the cases, where the enhancement of rent had been claimed by suit under the pro-

visions of S. 30 but refused on the ground that the tenancy comprised undivided shares in parcels of land, were distinguished on the ground that whereas S. 30 contemplates the case of enhancement of rent of "holdings," S. 105 contemplates the case of settlement of fair and equitable rent in respect of "land," the word "land" including "an undivided share in a parcel of land:" 21 C L J 592 (8); 48 C L J 590 (9). Adopting the well-established canon of construction that the same word used in different parts of the same statute must have the same meaning, unless something to the contrary appears from the context, it would not be unreasonable to hold that under the Bengal Tenancy Act, even before the amendment of 1928, a tenant holding undivided shares in parcels of land would be a ryot, and could be a settled ryot of a village by reason of occupation of such lands for a period of 12 years, for S. 20 of the Act requires that the tenant should be a ryot and must hold the "land" as such continuously for 12 years. The case of 8 C W N 192 (6) is of the same type as 8 C W N 751 (7). There also the suit was by a purchaser at a revenue sale to recover khas possession and the defendant put forward a claim for protection on the ground that he was an occupancy ryot. The two cases decide that occupancy rights can be acquired by a cultivator whose tenancy comprises undivided shares in parcels of land. The cases cited by the learned Advocate for the appellant have accordingly no bearing on the point, and do not certainly support his contention that a suit for enhancement of rent under S. 30, Ben. Ten. Act, before the amendment of 1928 would have been maintainable when the tenancy consists entirely of undivided shares in parcels of lands or partly of entire parcels of land and partly of undivided shares in parcels of land. The current of authority of this Court, so far as I am aware, is uniform.

The tenant in the position of the defendant in this case therefore enjoyed immunity from action for enhancement of rent on the grounds mentioned in S. 30. That immunity has been taken away by reason of the amendment of the

8. *Safaruddi v. A. K. Fazal Huq*, 1915 Cal 644 = 30 I C 414 = 21 C L J 592.

9. *Surendra Chandra v. Kedareswar*, 1929 Cal 156 = 115 I C 269 = 48 C L J 590.

definition of holding by Act 4 of 1928. Holding, as now defined, may include shares in parcels of land. The question therefore reduces itself to the simple proposition as to whether S. 30, Ben. Ten. Act can be combined with the definition of holding, as now amended, so as to give the landlord the right to sue for enhancement of rent in respect of a tenancy created before Act 4 of 1928 came into force. In my judgment the answer must be in the negative. The effect of the said amendment, is to take away the immunity from an action for enhancement enjoyed by such a tenant upto February 1929 when Act 4 of 1928 came into force, which should not for that reason be given retrospective operation. The following observations of Sir George Jessel in (1876) 1 Ch D 48 (10) at p. 50, are relevant:

I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action its enactments, unless in express terms, they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested that the alteration made by this section is within that exception.

A statute which takes away a right of action really takes away a right: *ubi jus ibi remedium*, and if the remedy is taken away what remains of the right! Where a statute confers a right of action which was non-existent before, it generally creates a right with a corresponding obligation. It is on this principle that Suhrawardy, J. when dealing with the effect of the amendment of S. 109, Ben. Ten. Act by Act 4 of 1928 on a pending action held that immunity from a civil suit is a substantive right and a statute which takes away such immunity cannot have any retrospective effect or govern proceedings pending at the time. In 33 C W N 1156 (1), a suit for enhancement on grounds mentioned in S. 30, Ben. Ten. Act had been instituted by the Maharaja in or before the year 1926. The tenancy of the ryot defendant comprised undivided shares of parcels of land. The suit was decided by the First Court on 7th December 1926 and the judgment of the appellate Court was pronounced on 30th June 1927. Both the lower Courts had dismissed the plaintiff's claim for enhancement. While the appeal was pend-

ing in this Court, Act 4 of 1928 (B. C.) came into force. The plaintiff contended that as the definition of holding, as amended by the said Act, would cover a case where undivided shares in parcels of land are held by a ryot, he was entitled to succeed on his claim for enhancement. Sir George Rankin held that this Court could not disturb a decision correctly arrived at according to law on the date of the decision, but in the course of his judgment he observed thus:

In my opinion there are no words in the amending Act which show or even tend to show that the amendment of the definition is to be applied with retrospective effect.

These observations were no doubt made in relation to the particular facts of the case and for the purpose of meeting the argument of the Advocate of the Maharajah that effect should be given to the amendment, as the suit, though instituted before the date of amendment, had not been finally disposed of at the date when it came into operation but they definitely point to the view of the learned Chief Justice that that amendment would not govern a pending action, which it would have done, if it was merely procedural and had not affected vested rights. I accordingly hold that as the tenancy had been created before Act 4 of 1928 (B. C.) came into force, the plaintiff's claim for enhancement of rent under S. 30 (b), Ben. Ten. Act has been rightly dismissed. The appeal is accordingly dismissed with costs. Leave to appeal under the Letters Patent asked for is granted.

K.S./R.K.

Appeal dismissed.

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MUKERJI AND S. K. GHOSE, JJ.

Brojendra Kumar Dutta Roy—Defendant—Appellant.

v.

Sushil Chandra Chakravarty—Plaintiff and others—Defendants—Respondents.

Appeal No. 83 of 1932, Decided on 26th June 1935, from original decree of Sub-Judge, 4th Court, Dacca, D/- 8th August 1931.

Bengal Money Lenders Act (7 of 1933), S. 4—S. 4 has no retrospective operation.

Section 4 has no retrospective operation. Where therefore the Act comes into force after the decision of the suit in the trial Court and during the pendency of an appeal, S. 4 cannot be applied at the hearing of the appeal: 6 C L J 74 and 102; 1915 Cal 103; 1928

10. In re Joseph Suche & Co., Ltd., (1876) 1 Ch D 48.

Cal 436 ; 36 *Mad* 439 (F B) ; 1918 *Mad* 1299 ;
Quilter v. Mapleson, (1882) 9 Q B D 673 and
Pardo v. Bingham, (1869) 4 Ch 735, *Disting.*
 [P 337 C 2]

Jotindra Nath Sanyal and Bhupendra Kishore Basu—for Appellant.

Atul Gupta and Hemendra Narayan Bhattacharjee—for Respondent.

Judgment.—This is an appeal by one of the defendants from a decree for sale which the plaintiff has obtained on a mortgage bond. The plaintiff's case was that the defendant and his three brothers and also their mother executed the bond on 7th Pous 1323 (22nd December 1916) and borrowed Rs. 5,500 at an interest of 14 as. per cent per month compound with six monthly rests in order to pay off two earlier mortgages on some of the properties covered by this bond ; that these two mortgages were one dated 17th Magh 1323 (31st January 1916) for Rs. 2,000 in favour of one Tara Nath Mitra bearing interest at 12 as. per cent per month and another dated 12th Falgun (24th February 1916) for Rs. 1,800 from one Kunja Chakravarty bearing interest at 10 annas per cent per month and also that he had received two sums, namely Rs. 613-2-0 and Rs. 1,365, on account of interest due, the former through one Jogendra Chakravarty, brother of Kunja Chakravarty, and the latter through one Mon Mohan Moulik, Mukhtear of the Bhowal Estate. The Bhowal Estate were the purchasers of one of the mortgaged properties which was sold to them by the mortgagors with the consent of the plaintiff. The claim was laid at the balance due at the date of the suit, namely Rs. 15,932-9-10.

The principal defendants in the suits, of whom the appellant is one, were the mortgagors or their heirs, and the others were subsequent transferees of portions of the mortgaged properties. The defence of the appellant and of the other contesting defendants introduced a long and complicated story. Shortly put, the story was as follows: The plaintiff at the time of the mortgage paid only Rs. 1,433 in cash out of the amount of consideration which was stated in the bonds : viz. Rs. 5,500 and retained the balance Rs. 4,067 to pay off the two earlier mortgages. In 1324 B. S. the appellant was given an appointment by the plaintiff's father as an officer in his employ. In November 1917 the mortgagors sold away their

moveables, including furniture, ornaments, cattle, etc., and out of the sale proceeds paid off Tara Nath's mortgage and, on 22nd December 1922 deposited in Court for paying off Kunja Chakravarty's mortgage a sum of Rs. 1923-12-0. Kunja Chakravarty did not accept the amount so deposited as it was short by a small amount, and eventually a creditor of his attached and realised Rs. 129-14-0. Out of this deposit, a balance of Rupees 1,793-14-0, was thus left. On 20th March 1923 a part of the mortgaged properties was sold with the plaintiff's consent, and this sale fetched Rs. 4,365, out of which Kunja Chakravarty was paid Rs. 3,000 leaving a balance of Rs. 1,365. These two amounts of Rs. 1,793-14-0 and Rupees 1,365, making a total of Rs. 3,158-14-0, was paid to the plaintiff on that date, of which Rs. 1,978-2-0 was credited to his dues on the mortgage, and the balance Rs. 1,180-12-0, was paid to him in satisfaction of his dues on certain pro-notes and for certain other charges. Taking the principal amount of the mortgage as Rs. 1,433 and giving credit for Rupees 1,978-2-0 then received, the dues on 20th March 1923 was found to be Rs. 481 12-6 which however the plaintiff's father promised to remit. The plaintiff's father eventually refused to grant the remission and so the appellant left his service. Other defences were also taken : want of legal execution and attestation ; penal and unconscionable rate of interest ; paramount title ; maintainability of the suit ; etc.

The Judge has overruled all the defences and accepting the plaintiff's case has made a decree. The first and most important question in the appeal is whether Rs. 5,500 was lent in cash or only Rupees 1,433 was paid in cash, the balance Rs. 4,067 being retained for clearing off the prior mortgages. On this question considerable reliance was placed upon the words of the bond which after reciting the two prior mortgages and saying that it was necessary to borrow Rs. 5,500 for paying them off and also for other needs of the mortgagors stated : "We, on keeping alive the rights under both the aforesaid mortgages * * * * borrow from your tehbil today the sum of Rs. 5,500." It has been argued that this stipulation shows that the dues on these earlier mortgages must have been retained and that no prudent mortgagee

would, if he intended to keep alive his rights under the previous mortgages, in such circumstances, have consented to allow the mortgagors to take the money for paying off the earlier mortgages. We are unable to see that the recital referred to above indicates any such thing. Nor are we able to hold that the story that the plaintiff trusted the mortgagors and left it to them to pay off the earlier mortgages is a story which is so improbable that it is intrinsically unacceptable. It is true that it would be to the interest of the mortgagees to see that the previous mortgages were paid off; but having regard to the fact that the appellant was soon after taken in the employ of the plaintiff's father, it was not an impossibility on the part of the plaintiff's father to be a bit indulgent to the mortgagors so that they might settle their own terms with the prior mortgagees as regards their satisfaction.

It has been next argued that there is no clear statement in the bond showing that the whole amount of Rs. 5,500 was received in cash, and so it should be presumed that a part of it must have been retained. This contention, in our opinion, is unfounded, because the recital is that the amount was being taken out of the tehbil. Such a statement can only mean a cash transaction. On arguments such as these, and so lightly, the question cannot be decided in favour of the appellant. It appears that in the appellant's written statement, in which his story is carefully and in every detail set out, he made a case that when on 20th March 1923 the two payments of Rs. 1,365 and Rs. 1,793-14-0 were made, it was agreed that both the sums would be credited against the principal of the debt and that this agreement was violated.

The learned Judge has rightly pointed out that a sum of Rs. 1,433, which according to the appellant was the principal amount of this mortgage, would not admit of a credit of Rs. 3,158-14-0, even if interest at the full rate in the bond is taken into account. If the plaintiff had withheld the amount due on the prior mortgages, it is extremely unlikely that he should have delayed so long in paying them off, for the debts were running against him and there is no suggestion that he was in want, the evidence, on the other hand, being that the plaintiff's father was a rich man and had a good

deal of money-lending. It is not explained why if so much as Rs. 4,067 was being withheld and only Rs. 1,433 was being paid, no mention whatever of that fact was made in the bond itself. The appellant's story is that when he had to sell the moveables, etc., as the plaintiff's father, contrary to the agreement, did not pay off the earlier mortgages, he complained to many persons including the plaintiff's father himself. This is palpably false; nobody has corroborated him and the fact that he continued in this service belies the statement. Is it conceivable that he and the other mortgagors should all remain quiet if they were being cheated in this way? Clearly, no. This strange conduct on their part has been sought to be explained before us by suggesting that the appellant was in the service of the plaintiff's father and so the mortgagors had to put up with the treatment they were receiving.

This explanation, to our mind, is unacceptable. It should be remembered that the appellant's story means that not only was the plaintiff's father playing them false, but that they had to sell their all and become paupers in order to pay off the earlier mortgages. It is not suggested that when the earlier mortgages were paid off any reference was made by those mortgagees to the plaintiff or his father, a fact which makes it exceedingly likely that the plaintiff and his father left it to the mortgagors to settle their own terms with those mortgagees. The probabilities, such as they are, are decidedly against the appellant's story. As regards the actual evidence in the case, a good deal of criticism has been levelled on behalf of the appellant against the direct testimony that there is as regards the passing of the consideration of Rs. 5,500. There may be a doubt as regards the presence of P. W. 6 Phanindra Chandra Chakravarty at the time when the payment was made, but we see no reason to distrust the other evidence that is there of it. A large body of evidence has been adduced on behalf of the defendants to show that the moveables, etc., were sold in order to raise money wherewith the earlier mortgages were eventually paid off. We do not regard this evidence as credible as regards the items that were sold and the prices they fetched. This evidence gives an account which to our mind seems

considerably exaggerated. The learned Judge has referred to this evidence in detail and we do not consider it necessary to deal with it here. On the whole we feel no difficulty in endorsing the conclusion which the learned Judge has come to and recorded in these words:

Conceding that all this evidence was true and that from this money Rs. 2,200 was paid to Tara Nath and Rs. 1,993 (should be Rupees 1,923-12-0) was deposited in the name of Kunja, still this does not disprove the plaintiff's case that the whole of Rs. 5,500 was paid to the defendants at the time of the bond. It is quite possible that the defendants spent the money if not all otherwise, and then raised more by sale of moveables. The great delay tends to show that some such thing must have happened.

Some comment has been made on behalf of the appellant on the ground that the plaintiff's father was not examined though he was alive for nearly eighteen months after the institution of the suit, that the jama kharach book has not been produced and some such other matters. We do not think it was necessary for the plaintiff to examine his father when the other evidence that he produced was not inadequate or unconvincing. As regards the non-production of the jama kharach the learned Judge has sufficiently dealt with it. Of the other defences taken, the question of paramount title has been left open and the other questions have all been decided against the defendants. The only other question amongst these that has been argued before us is the question of interest. This question has been raised before us in a different shape from that in which it was presented in the Court below. There it was alleged that the provision as regards compound interest was fraudulently inserted and that the rate was penal and unconscionable. The Court overruled these objections and held further that the bond being of a date prior to 1918, the Usurious Loans Act 10 (B. C.), 1918, did not apply. Here, reliance has been placed upon S. 4, Bengal Money Lenders Act 7 (B. C.) of 1933, and it has been contended that that section, by its retrospective operation, would disentitle the plaintiff to any interest beyond an amount equal to the principal of the loan. The decision of the Court below was passed on 8th August 1931. It is therefore undisputed that the decision was in accordance with the law as it then was. The appeal was filed on 23rd November 1931 and has since remained

pending. While it has been so pending, Act 7 (B. C.) of 1933 was passed and came into operation on 1st July 1934. If the appeal had been disposed of on any date prior to the date last mentioned the contention would have been out of the question. The argument of the appellant involves the position that because the appeal has, for congestion in the business of this Court, remained pending, the plaintiff respondent has to lose some five thousand rupees. The appellant says that this cannot be helped because the Act has made such change in the law as we are bound to take notice of and to apply to the case even at this stage.

Now, we do not find either in S. 4 itself or in any other section of the Act anything which would indicate that any retrospective operation to the section was intended. And, in our opinion, the argument is entirely misconceived when it speaks of 'retrospective operation.' The real question is whether at this stage, at the hearing of the appeal, the law which came into force during the pendency of the appeal on 1st July 1934, is to be applied to the case. One difficulty of answering this question in the affirmative is that according to the section the Court shall limit the amount "unless it is satisfied that the money lender had reasonable grounds for not enforcing his claim earlier." To deal with this proviso therefore, an issue of fact will have to be decided necessitating an investigation into facts. To hold in favour of the appellant would mean that in all cases as regards interest pending in first or second appeal or an appeal to the Judicial Committee, a remand or at least a further investigation would have to be made. It is hardly conceivable that such was ever the intention of the Legislature. A number of decisions have been cited before us on behalf of the appellant as supporting his contention that the law, such as it now is, should be applied to the case. Of these those that are said to have any bearing on the contention will now be noticed. 6 C L J 74 (1), 6 C L J 102 (2) and 20 C L J 107 (3) do not assist us because they merely say that facts and

1. Ram Ratan Sahu v. Mohant Sahu, (1907) 6 C L J 74=11 C W N 732.
2. Ramyad Sahu v. Bindeswar Kumar Upadhyay, (1907) 6 C L J 102.
3. Rai Charan Mandal v. Bishwa Nath Mandal, 1915 Cal 103=26 I C 410=2 C L J 107.

events subsequent to the filing of the appeal may, and sometimes should, be taken notice of where, by adopting that course litigation, may be shortened, ends of justice attained or rights of parties preserved. In 47 C L J 530 (4) this proposition was applied to a case in which in an action for ejectment the tenant was held by the trial Court protected by a temporary Act, namely the Calcutta Rent Act of 1920, but during the pendency of an appeal from that decision that Act expired and in the appeal ejectment was ordered which could be justified under the general law as between the landlord and tenant. It was held that:

If the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court, the Court is bound to take notice of it to give just and proper relief to the parties to the appeal before it.

It should be noted that if this view was not taken, and if the appeal was disposed of on the ground that the trial Court has applied the law as it then was the only result would have been that though the plaintiff failed to get ejectment on the ground that the temporary Act gave the tenant protection, he would be entitled to get the relief in a fresh suit which he would institute afterwards. To shorten the litigation and prevent an unnecessary suit the fact that the temporary Act had ceased to operate was taken notice of. In 36 Mad 439 (5), the real question was the meaning of the word 'final' used in connection with a decree under a certain Act; and it being held that it meant a decree which was not under appeal or was not liable to be set aside or modified on appeal certain rights provided for by the Act in such circumstances were allowed. In 40 Mad 818 (6), the relevant facts were that a suit had been dismissed by the trial Court, and after the plaintiff had taken an appeal from the trial Court's decision an Act was passed which was by nature a declaratory one and had retrospective effect; and relying on it the appellate Court held that the plaintiff had no right to sue and so dismissed this appeal. This

decision was upheld by the High Court holding that the Act was retrospective in its operation and the appellate Court was entitled to take cognizance of it at the appellate stage. This therefore was a case in which, if the contrary was held, a plaintiff who was unsuccessful in getting a decree from the trial Court would have got a decree from the appellate Court even though he had no right to such a decree at the date on which he was getting it. These cases, in our judgment, are all distinguishable from the present case and are of no assistance to us on the question we are now considering.

On behalf of the appellant considerable reliance has been placed upon the decision in (1882) 9 Q B D 672 (7). In that case it was held that the right given by the Conveyancing Act of 1881 to obtain relief against forfeiture could be claimed in a suit which had been instituted and tried at first instance before that Act came into operation. Jessel M. R. first of all referred to the general proposition that is applicable to such cases. He observed:

The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the legislature.

The expression "the provisions of the Act itself" should be understood in an enlarged and not a limited sense as had been explained by Lord Hatherby in an earlier decision, namely the case of (1869) 4 Ch 735 (8) thus:

Baron Parke did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was, whether the legislature had sufficiently expressed that intention. In fact we must look to the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated.

Then it was held that if the Act was not given a retrospective operation and if it was held that it did not apply to breaches committed before it came into operation, the effect would be to take away from the tenant a right of relief against forfeiture similar to what the Act itself gave him, and which he had under

4. Suresh Chandra Chatterji v. Kanti Chandra Bhattacharjya, 1928 Cal 436=110 I C 715=47 C L J 530.

5. Kanakaiya v. Janardhan Padhai, (1913) 36 Mad 439=8 I C 736 (F B).

6. Muthuswami Ayyar v. Kalyani Ammal, 1918 Mad 1299=38 I C 223=40 Mad 818.

7. Quilter v. Mapleson, (1882) 9 Q B D 672=52 L J Q B 44=47 L T 560=31 W R 75.

8. Pardo v. Bingham, (1869) 4 Ch 735=39 L J Ch 170=20 L T 464=17 W R 419.

a previous Act, namely the Common Law Procedure Act 1852, but which was now lost to him, as the earlier Act was abrogated by that Act. It was next held upon a certain consideration arising out of the wording of a particular section of the Act, and on comparing it with the earlier enactment, that the Act was intended to apply to pending proceedings. In other words, it was held that although the Act was not in existence at the date of commencement of the action, the provisions were to be applied to the action which was pending.

Lastly it was held that even though the trial at first instance was over, the appeal Court was entitled to apply the Act to the case. It will be noticed, if the judgments in the case are carefully perused, that considerable stress was laid, as regards this part of the decision, on the fact that although the judgment had already been given before the Act was passed, and the landlord might have obtained possession, he had not re-entered, but execution had been stayed to give the tenant time to appeal and no possession had been delivered. And putting the provisions of the Act together it was held that the tenant was entitled to the relief so long as the landlord had not taken possession.

There is nothing in the present case similar to the conditions in the case just discussed. The appellant's contention in our judgment is not well founded. We think the decree which the Court below has passed is right. The appeal is dismissed with costs. The days of grace will be extended by six months from to-day.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 339

CUNLIFFE AND HENDERSON, JJ.

Mrinalini Debi—Defendant—Appellant.

v.

Harlal Roy—Plaintiff and others—Respondents.

Appeal No. 1599 of 1934, Decided on 17th December 1935, from appellate decree of Addl. Dist. Judge, Third Court, 24-Parganas, D/- 18th April 1934.

(a) Bengal Money-lenders Act (7 of 1933), S. 4—S. 4 applies to transactions but not to suits prior to Act came into force.

Section 4 has no application to suits filed before the Money-lenders Act came into force,

but it applies to suits relating to money lent before the Act came into force : 1936 Cal 334, [P 341 C 2] *Foll.*

Per *Cunliffe, J.*—The scope of Ss. 4, 5 and 6 is retrospective. [P 340 C 2]

(b) Interpretation of Statutes—Intention of legislature—Ordinary meaning of language should be looked at—No words of limitation or qualification should be introduced to explain intention of drafters.

Per *Cunliffe, J.*—In interpreting a statute, the ordinary meaning of the language employed is to be looked at and it ought never to be necessary to introduce words of limitation or words of qualification to explain intention of the drafters of the Act. [P 340 C 2]

Rama Prosad Mukherjee and *Mohit Kumar Chatterjee*—for Appellant.

Abinash Chandra Ghose and *Sarat Chandra Janah*—for Respondents.

Ramendra Chandra Roy—for Deputy Registrar.

Cunliffe, J.—This appeal arises out of a suit which was commenced on 18th September 1931 in the Court of the Additional Subordinate Judge at Alipore. It was an action for the recovery of a sum of money which comprised both capital and interest upon a mortgage bond and it may be stated at once that of the amount claimed which was Rs. 3,238 odd the principal loan only amounted to Rs. 800. It was for an old debt going back as far as the year 1919, and the balance of the amount claimed was for compound interest at about 12 per cent. The learned Judge gave his judgment in the month of December 1933. Then it went up to the lower appellate Court where the judgment was delivered in April 1934. From that judgment an appeal to this Court was preferred. The question of the rate of interest was the real dispute between the parties, and the judgment of the Court of first instance shows, and also the judgment of the lower appellate Court, which is a very short one, demonstrates that this question of interest was pressed very hardly upon both Courts, the provisions of the Imperial Act known as the Usurious Loans Act being prayed in aid by the original defendant. Now after the appeal was preferred an interesting position was created, because during the pendency of the appeal before the matter reached this Court, there came into force a local Act known as the Bengal Money-lenders Act of 1933, which was ordered to become operative on 1st July 1934, and it was then that the defendants realised that they had another weapon in their hands

on this question of interest, because the provisions of this local Act in favour of the borrowers are even more advantageous than the Usurious Loans Act. Now what we have to decide here is whether the appellant is entitled to rely upon the provisions of this local Act having regard to the fact that when the respondents first launched the suit, the Act in question was not yet upon the Statute Book and was therefore not law operating in the borrowers' favour. It is argued that we ought to apply in favour of the appellant S. 4, Bengal Money-lenders' Act, which I think I ought to set out in full. It runs as follows :

Notwithstanding anything in any other Act, where in any suit in respect of any money lent by a money-lender before the commencement of this Act it is found that the arrears of interest amount to a sum greater than the principal of the loan, the Court, unless it is satisfied that the money-lender had reasonable grounds for not enforcing his claim earlier, shall limit the amount of such interest recoverable in the suit to an amount equal to the principal of the loan.

That section is a part apparently of the scheme of the Act to benefit the borrowers. Other sections in the favour of those who have got into the hands of the money-lenders with regard to the reduction on interest are Ss. 3, 5 and 6. I am also informed by the learned Advocate that there is a still greater advantage in favour of the borrowers under this local Act because in the Usurious Loans Act the onus of proving that the interest was harsh and unconscionable falls upon the borrowers. Here in this Act the reverse is the case, as the onus is upon the creditor to show that the interest which he has charged does not come into that category. It will thus be seen that it is extremely important from the borrower's point of view to ascertain whether in this particular class of case the operation of this S. 4 can be utilised to reduce the amount due to the lender. It is argued that it is however now settled law that in the peculiar circumstances of a case such as this, where the Act has come into force after a suit has already been launched and after the decision has already been given in the Court of first instance, the Act cannot possibly be applied. The authority for that proposition is reported in 39 C W N 1213 (1). It was

a decision of the Acting Chief Justice of this Court together with S. K. Ghose, J. Those learned Judges came to the conclusion that the Section was not applicable to a case such as we are considering now for various reasons. To quote from that judgment I may cite this passage.

Now we do not find either in S. 4 itself or in any other section of the Act, anything which would indicate that any retrospective operation to the section was intended. And, in our opinion, the argument (that is the argument to the contrary) is entirely misconceived when it speaks of 'retrospective operation'.

"The real question is" the learned Judges went on "whether at this stage, at the hearing of the appeal, the law which came into force during the pendency of the appeal on 1st July 1934 is to be applied to the case."

Now I may say at once that I have the misfortune to doubt whether, if I had been a member of this Bench, I should have been able to subscribe to this very specifically enunciated view. Reading the language of S. 4 and the language of Ss. 5 and 6 I am of opinion that the scope of these sections is undoubtedly retrospective. Moreover it seems to me that even S. 3 of the Act has, to a more limited extent, it is true, a reference to retrospective action. If it is held that the expression "any suit" must exclude any suit which has already been instituted and is under appeal, then I think the general principle of the interpretation of statutes and the rules which govern all interpretations of formal documents will be broken. That rule, as I understand it, is that the ordinary meaning of the language employed is to be looked at and it ought never to be necessary to introduce words of limitation or words of qualification to explain the intention of the drafters of the Act. Here if the section is to be read as only referring to suits which have not already been instituted, then it seems to me that it would have been quite easy for the framers of the Act to have given an indication of their intention by the addition of a few qualifying words. It would have been only necessary, e. g. to put in brackets after the word "suit," the words "not already instituted" or "not already under appeal". But that has not been done and it may be further interesting to note that in this Imperial Act, to which I have already referred, the Usurious

1. Brojendra Kumar Dutta Roy v. Sushil Chandra Chakrabarty, 1936 Cal 334=39 C W N 1213.

Loans Act, the class of suits to which the Act applies is specifically definite in Chapter II, Ss. 2 and 3 with three definitive sub-paragraphs so that, so far as the Usurious Loans Act is concerned, no person who wishes to consult it can be in any doubt as to what is meant by the word "suits" to which this Act applies when they are affected by this particular piece of law. It seems to me however that as in the peculiar circumstances of this appeal my learned brother is willing to accept the interpretation of the Bench of the Acting Chief Justice and S. K. Ghose, J., in 39 C W N 1213 (1) referred to above, in that he agreed with them that the words "any suit" in S. 4 must exclude those suits which have already been put on the file, and having regard also to the fact that the number of the persons and the number of the actions which are going to be affected by this particular section in these particular circumstances are a diminishing class, and more especially having regard to the necessity of preserving and supporting the rule which is so well known in our Courts as 'stare decisis' I am not prepared to press my opinion whilst reserving it upon this specific point in the way I have already indicated. I therefore propose, with deference to the views already expressed by the learned Chief Justice and S. K. Ghose, J., and the views which are about to be expressed by my learned brother, to agree that the appeal should be dismissed.

The appeal is accordingly dismissed with costs.

Henderson, J. — The short problem which has been propounded for our decision is whether S. 4, Bengal Money Lenders Act, applies to suits which were instituted before that Act came into force. My learned brother has already set out the terms of that section in full and it is unnecessary for me to do so. I do not think it can be seriously disputed that this section will not have such retrospective effect unless it is abundantly clear from the provisions of the Act itself that such was the intention of the legislature. The section really deals with two distinct matters; firstly, suits which are instituted before the Act comes into force and secondly money which was lent before the Act comes into force. Such being the case the legislature might deal with the matter in three ways. The

Section might have no retrospective effect at all. Secondly it might be completely retrospective or thirdly it might be retrospective in one respect and not in the other. I have read and re-read the section and the conclusion I have reached is that the intention of the legislature is that it should have no application to suits filed before the Act comes into force but that it should apply to suits relating to money lent before the Act came into force.

My reason for this view is that in my opinion the words "before the commencement of this Act" are intended to qualify only the words "money lent by a money lender." This appears to me to be the natural interpretation of the language used. If the intention of the legislature was that the section should apply to suits instituted before the Act came into force, the words to which I have referred would have no real meaning at all. It is quite clear that a suit which is instituted before the Act comes into force must be concerned with money which was lent before the Act came into force and all that it would have been necessary to say is that the Act is to apply to suits even though they were instituted before it came into force. If this view of mine is correct, the words "before the commencement of this Act" have entirely spent their force by the qualification which I have indicated. The result is that there is nothing left in the section to suggest that it is to apply to suits instituted before the Act comes into force. That being the case the ordinary rule of interpretation ought to apply and in the absence of any indication that the legislature intended it to be retrospective in this respect the contention of the appellant ought to be overruled. This opinion is supported by the decision of the Acting Chief Justice and S. K. Ghose, J. to which my learned brother has referred. There can be no doubt that if that case was rightly decided, the present appeal must be dismissed. We were strongly pressed by Mr. Mukherjee to dissent from that decision on the ground that the chief reason given in support of it appears to go too far. I allude to the sentence which has been set out by my learned brother. In my opinion what the learned Judges say should be interpreted with reference to the context. The only problem which they had to decide was whe-

ther the Section applies to suits instituted before the Act came into force. They were not concerned with the further question whether it applies to money lent before the Act comes into force. I am therefore of opinion that they were not intending to lay down the law on this latter point. If however that decision was intended to lay down that S. 4 has no retrospective effect of any kind I entirely agree with my learned brother that I could not interpret it in that way.

The conclusion which is reached by this decision at any rate avoids the absurdity that the question whether the appellant is to make a profit of several hundred rupees depends upon the entirely fortuitous circumstance that he made a delay of some weeks in filing this appeal. There is no room for doubt that had he filed his appeal before 1st July, it would have been summarily dismissed. Then again we should be compelled in second appeal to have an investigation made into facts in order to see whether the respondent has explained a delay which did not require explanation when the suit was brought.

The only other thing I desire to say is that I regret that I should have to differ from my learned brother. But had I agreed with him I should still have been pressed by his opinion that in a matter of this sort, which only affects suits that were instituted before 1st July 1934 and will have soon no practical importance, we ought to follow the decision of a Division Bench of this Court whatever our personal views about it might have been. I therefore agree that this appeal should be dismissed.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 342

JACK, J.

Ananda Prosad Ghose—Plaintiff—Appellant.

v.

Ronendra Lal Choudhury and another—Defendants—Respondents.

Appeal No. 1865 of 1934, Decided on 17th March 1936, from appellate decree of Sub-Judge, Third Court, Hooghly, D/- 30th June 1934.

(a) Bengal Tenancy Act (1885), S. 26-J—Suit for recovery of landlord's fees not barred.

The provisions of S. 26-J do not bar a suit by a landlord for recovery of "landlord's fees."

Where such a suit is filed the proper procedure is for the Court to treat the matter as an application under S. 26-J: 1933 Cal 784; 1933 Cal 283 and C. R. No. 768 of 1931, *Disting.* [P 343 C 1]

(b) Civil P. C. (1908), S. 151—Remedy of summary nature by application provided—Suit not barred—Suit can be treated as application.

Where legislature provides a procedure of a summary nature by an application without expressly barring any suit in that behalf, it is always within powers of Courts when instead of application the suit is filed to treat the suit as an application and proceed as an application. [P 343 C 1]

Apurbadhan Mukherjee—for Appellant.

Kshitish Chandra Ghatak and Rabin-dra Narayan Roy—for Respondents.

Judgment.—This appeal relates to a money suit for recovery of landlord's fees. The suit was dismissed in the trial Court as being not maintainable and this view was also taken in the Court of appeal below, the learned Subordinate Judge holding that since S. 26-J, Ben. Ten. Act, expressly provides for such a case and lays down that the landlord should come to Court and file an application under S. 26-J, a suit for recovery of fees is not maintainable. In support of this view he cited the case of 37 C W N 917 (1), where it was held that such a suit was not maintainable. In that case the earlier cases of 36 C W N 847 (2) and 36 C W N 924 (3) were referred to. But on referring to those cases and also to the unreported case of Civ. Revn. No. 768 of 1931 (4), which was referred to in 36 C W N 924 (3), I find that in those cases all that was decided was that the landlords were entitled under the law to recover the balance of the landlord's fee by means of an application. It was held that although S. 26-J does not expressly mention the procedure to be followed for the purpose of recovering landlord's fee and compensation, it is the intention of the legislature to provide a procedure of a summary nature. But under S. 9, Civil P. C., the Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either ex-

1. Md. Ismail v. Lal Mia, 1933 Cal 784=148 I C 14=37 C W N 917.

2. Srinath Bose v. Debendra Nath, 1933 Cal 24=141 I C 627=36 C W N 847.

3. Aghore Chandra Jalui v. Rajnandini Debi, 1933 Cal 283=141 I C 842=60 Cal 289=36 C W N 924.

4. Hari Mohan Sarkar v. Lokenath Mukherji, Civil Revision No. 768 of 1931.

pressly or impliedly barred, and I do not think that by the provisions of S. 26-J, Ben. Ten. Act, a suit can be said to be impliedly barred so as to be not maintainable. With all due deference to the learned Judge who decided the case of 37 C W N 917 (1), I think he misdirected himself as to the effect of the previous decisions. The proper procedure, to my mind, in a case like this is for the Court to treat the matter as an application under S. 26-J, Ben. Ten. Act, and that is what should have been done in the present case. The learned Subordinate Judge says that it would be a travesty of the procedure to permit this being done. But after all the Courts are there to enable justice to be done between the parties, and the landlord is simply asking for fees which, under the law, are due to him, and the mere fact that he applies in the wrong form is no reason why he should not recover the fees. The court-fees which he has paid for bringing a suit are more than those which he would have to pay on an application. Under S. 151 of the Code it is always within the powers of the Court to take action of this kind.

In these circumstances, the proper order to make will be to set aside the decision of the Court below, and to direct that the matter should go back to the trial Court to be treated as an application under S. 26-J and to be decided accordingly. The result is that the appeal is dismissed since the matter being one for the Small Cause Court, no appeal lies, but the application under S. 115, Civil P. C., is allowed. The parties will bear their costs both of this appeal and the application. The respondents will get their costs in the first two Courts.

V.B./R.K.

Appeal dismissed.

* A. I. R. 1936 Calcutta 343

R. C. MITTER, J.

Gadadhar Sarkhel — Pre-emptor —
Petitioner.

v.

Gopal Chandra Das and others—Opposite Parties.

Civil Rule No. 1078 of 1935, Decided on 17th February 1936, against order of Munsif, Second Court, Rampurhat, D/- 29th June 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 26-F (1)—Co-sharer not given notice of

transfer—Pre-emption application by another co-sharer — Notice issued on former co-sharer—He can apply to be added as co-applicant within reasonable time—Other co-sharers also can become co-applicants within a month of such co-sharer's application and not necessarily within a month of first pre-emption application.

On a transfer certain cosharer filed an application for pre-emption and notice was served on the other co-sharers of such application. One of the cosharers who had not been given notice of the transfer was served with notice; on getting notice of application he applied to be impleaded as a co-applicant and expressed his desire to pre-empt: within a month of his application, the other cosharers also wanted to be impleaded as co-applicants :

Held : that the cosharer's application should be treated not only as an application to become a co-applicant but also as an independent application for pre-emption.

[P 344 C 2; P 345 C 1]

Held also : that the other cosharers were also entitled to become co-applicants in his application even though they did not do so within a month of application by first co-sharer as they were not bound to exercise their right at the earliest opportunity, i. e., as soon as the first application for pre-emption was made.

[P 344 C 2; P 345 C 1, 2]

* (b) Practice—Injury caused to party by mistake and default of Court officers—Court should relieve party of injury caused thereby—For doing this, Court can consider even question of time—(Obiter.)

Obiter.—Where rights of third parties have not intervened it is not only in the power, but it is the duty of the Court, to relieve a party of the injury done to him by it, by reason of its mistakes and defaults and mistakes or defaults of its officers inadvertently committed. *Actus curiae neminem gravabit* : this principle ought to be applied even when for relieving a party from such injury the Court has to consider the question of time. Hence Court should grant extension of time on equitable grounds apart from S. 5, Lim. Act : 1927 Mad 597; 12 M L J 244 (P C) and 1926 Cal 65, Ref. [P 346 C 1]

Gopendra Nath Das—for Petitioner.

B. C. Mukherjee, Muktipada Chatterjee, Kshetra Mohan Chatterjee for Kshitindra Nath Mitter, A. C. Mukherjee and Narendra Nath Mitter—for Opposite Parties.

Order.—The petitioner and opposite parties 2 to 12 are the owners of a certain patni taluk. There is an occupancy holding under the said patni taluk held directly under the patnidars at a rent of Rs. 7-12-0. Opposite party 1 purchased 3/4th share of the same for Rs. 150. In the document of transfer opposite parties 2 to 11 and petitioner were named as the immediate superior landlords and the notice of the transfer was served on them on 16th December

1934. No such notice was served on opposite party 12.

On 11th February 1935 the petitioner, who had a very small share in the patni filed his application for pre-emption. To the said application he made opposite parties 2 to 12 parties on the footing that they were the remaining co-sharer landlords of the said holding. The said application which was accompanied by the requisite deposits was registered as a miscellaneous case on 25th February 1935. Process fees for the service of notice of the application on all the opposite parties to the application, that is, for service of the notice of the application on the purchaser and on the remaining co-sharer landlords, was filed along with the application, but the Court overlooked the said fact and was under the wrong impression that the said fees had not been deposited. Accordingly it did not direct the issue of the notices and recorded on 30th March 1935, the following order in the order-sheet.

It appears that process has not been filed. Petitioner to file the same at once failing which the petition will stand rejected; fix 6th April 1935 for orders.

On 6th April 1935, the following order was passed :

Process fee filed. Issue notice on the opposite party fixing 4th May 1935 for hearing.

The notices were issued on 10th April 1935 and served on opposite parties 2 to 12 on 27th April 1935. Opposite parties 2 to 6 and 12 applied for being made co-applicants for pre-emption on 4th May 1935, and opposite parties 7 to 11 made similar applications on 24th June 1935. In his application opposite party 12 stated that no notice of transfer under S. 26-C, Bengal Tenancy Act, had been served on him and that he came to know of the transfer for the first time when notice of the application for pre-emption made by the petitioner was served on him through Court. He stated that if the notice under S. 26-C had been served on him he would have applied for pre-emption under S. 26-F, sub-s. (1), and he wanted to pre-empt. This statement has been repeated in the counter-affidavit, filed before me on his behalf. As no evidence was recorded in the lower Court and parties chose to proceed on question of law only, I must accept his statements. He also asked the Court to intimate to him what money he should deposit under S. 26-F, sub-s. 4, Cl. (b), but the Court

not having passed any orders on his application he deposited Rs. 82-8-0 being half the amount which the petitioner had deposited with his application for pre-emption.

The purchaser did not oppose pre-emption and the contest was amongst the co-sharer landlords. The petitioner maintained and still maintains that he is entitled to pre-emption on the whole; opposite party 12 maintains that he and the petitioner are the only two persons entitled to preempt, and the other opposite parties, namely 2 to 11, maintain that an order for pre-emption should be made in favour of all the cosharer landlords. The learned Munsif has allowed all the patnidars to pre-empt.

Before me Mr. Das, who appears for the petitioner, has contended that the order of the learned Munsif is wrong and that his client alone should have been allowed to pre-empt. He says that the learned Munsif had exceeded his jurisdiction in entertaining the application of his co-sharers to become co-applicants as those applications had been filed beyond the time mentioned in S. 26-F, sub-s. 4, Cl. (a). This argument would have been unanswerable if opposite party 12, whose application must be considered not only as an application to become a co-applicant but an independent application for pre-emption under sub-s. (1), S. 26-F, had been served with the notice of transfer. The matter is further complicated by the fact that owing to a mistake committed by the Court the notice of the petitioner's application for pre-emption was not issued on opposite parties 2 to 12, the remaining cosharer landlords, within one month of the filing of the said application.

To repel the contentions urged by Mr. Dass, the opposite parties have raised two points, namely : (a) that the time for joining as co-applicants as provided for in S. 26-F, sub-s. 4, Cl. (a) ought to be extended in this case on account of the aforesaid mistake of the Court, and (b) that as opposite party 12's application regarded as an application for pre-emption under sub-s. (1), S. 26-F, is in order, he having come in within a reasonable time of acquiring knowledge of the transfer as no notice under S. 26-C had been served on him, the other opposite parties have the right to become co-applicants in his, opposite party 12's ap-

plication, within one month from the date of the said application and some of them having applied to become co-applicants on the date when that application was filed and the rest also within a month thereof, the order made by the learned Munsiff is correct.

I hold that both these contentions of opposite parties 2 to 12 are sound and the Rule ought to be discharged. So far as the second of the aforesaid contentions is concerned it is covered by authority. The point came up for consideration before my learned brother Lodge, J., in *Tara Sundar Banerjee v. Kishory Mohan Ray* (1). He held that under the circumstances present in this case the application of a co-sharer landlord (B), who had not been served with the notice of transfer, to become a co-applicant in the application for pre-emption made by another co-sharer landlord (A), who had been served with such a notice, is to be considered as an application for pre-emption under sub-s. (1), S. 26-F, and as soon as such an application is made the remaining co-sharer landlords C and D would have right to become co-applicants, if they make an application for being made so within one month of B's application for pre-emption, although they ask for pre-emption beyond a month of A's application. This decision is supported by the language of the statute. A simpler case can be conceived. Suppose there are three persons X, Y and Z who are the immediate landlords of the holding sold. The notice of transfer is served on the said three persons on three dates wide apart from each other. The notice of transfer is served on X on 2nd October 1935, and Y on 2nd November 1935, and on Z on 2nd December 1935. Y makes the application for pre-emption under sub-s. (1), S. 26-F on 2nd January 1936, i. e., on the very last date, and Z makes an application for pre-emption under the same sub-section on 2nd February 1936.

Although X cannot become a co-applicant in Y's application for pre-emption if, he makes his application on 4th February 1936, because it would be beyond two months of the date of service of the notice of transfer on him and also beyond one month of Y's application for pre-emption, he would be within time to be-

come a co-applicant to Z's application, for though his application is beyond two months of the service of the notice of transfer on him, he would be within one month of Z's application. A co-sharer landlord may not like to pre-empt the property from the purchaser, he may not have any personal objection to a particular co-sharer having the whole holding to himself by exercising the right of pre-emption, but he may have objection to another co-sharer of his having by pre-emption the whole of the holding transferred. It cannot therefore be held either on the words of the statute or on general principles, that a co-sharer landlord must exercise his right to acquire a share of the holding by becoming a co-applicant at the earliest opportunity, that is as soon as the first application for pre-emption is made by one of his co-sharers.

I accordingly uphold the second contention raised by the opposite parties. This is sufficient for the disposal of the Rule, but in deference to the arguments advanced before me on the first point raised by the opposite parties I express my views thereon. The said point has for its basis the fact that owing to a mistake of the Judge unwillingly, committed, the notice of the application for pre-emption made by the petitioner was not issued promptly but was issued after a month of the petitioner's application for pre-emption. The question is whether the Court should set right the injury caused to the rights of the co-sharer landlords opposite parties. On the facts of this case, it cannot be said that the petitioner's application for pre-emption was not in order. He had filed the said application within time and had made the remaining co-sharer landlords parties. He had put in process fees along with his application for pre-emption. It cannot be urged that he by his act had not given opportunity to his co-sharers to join as co-applicants, but if the Court had done what it was required to do, that is to issue the notice of the application for pre-emption immediately after the process fees were deposited, the notice of the petitioner's application for pre-emption would have been served within a month of the said application. The said notices were served late owing to the Court's mistake. The question is whether the Court has inherent power under these circumstances to do what justice requires.

1. Civil Revn. No. 130 of 1935, Decided on 31st May 1935.

It is true that the Court cannot invoke the aid of S. 5, Lim. Act, as that section has not been extended to applications for pre-emption made under S. 26-F. It is true that it has been laid down, though the decisions are not uniform in that respect, that questions of extensions of time or exclusion of time ought to be answered solely by reference to the provisions contained in the Limitation Act. I have in mind the cases where suspension of time had been pleaded apart from the statute, of which the cases of 12 M I A 244 (2) and 29 C W N 973 (3) are types. In the last mentioned case which has been followed by the Madras High Court in 50 Mad 417 (4) my learned brother Mukerjee, J., after an elaborate review of the case law, repelled the claim for exclusion of time based not on the provisions of the Limitation Act but on equitable principles. But I do not consider that these decisions can be invoked in the case before me. It is an established principle that where rights of third parties have not intervened it is not only in the power, but it is the duty, of the Court, to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes and defaults of its officers inadvertently committed. *Actus curiae neminem gravabit*. This principle, in my judgment, ought to be applied even when for relieving a party from such injury the Court has to consider the question of time. I accordingly discharge this Rule with costs. Hearing-fee one gold mohur to be divided between the appearing opposite parties in equal shares.

K.S./R.K.

Rule discharged.

2. Ranee Surna Moyee v. Shooshee Mukhee, (1867-69) 12 M I A 244=11 W R 5=2 Beng L R 10=2 Suther 173=2 Sar 424 (P C).
3. Sarat Kamini v. Nagendra Nath Pal, 1926 Cal 65=89 I C 1000=43 C L J 155=29 C W N 973.
4. M. Satya Narayan Brahman v. M. Seethaya, 1927 Mad 597=100 I C 776=50 Mad 417=52 M L J 396.

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GUHA AND BARTLEY, JJ.

Secy. of State—Appellant.

v.

Bhupati Nath Deb—Respondent.

Appeal No. 368 of 1933, Decided on 11th February 1936, from original decree of Calcutta Improvement Tribunal, Calcutta, D/ 6 September 1933.

Land Acquisition Act (1894), S. 23—Principle of valuation — Frontage to highway—If no frontage, propinquity and easy access to high road are powerful elements in value.

Where the value of the land in a populous locality, to be acquired under the Land Acquisition Act, is to be determined, frontage, i. e., immediate contiguity to highway and where there is no frontage, propinquity and easy access to high road are the powerful elements of the value to be taken into consideration: *Metropolitan Board of Works v. McCarthy*, 7 H L 243, Foll. [P 347 C 2]

S. C. Basak and Bijan K. Mukerji—for Appellant.

Surendra Madhav Mallik and Probodh Krishna Shome—for Respondent.

Judgment.—This is an appeal by the Secretary of State for India in Council, against a decision of the President, Calcutta Improvement Tribunal, enhancing an award of the Land Acquisition Collector, Calcutta, made in favour of the claimant, by Rs. 25,645, for reasons stated in the judgment of the learned President. It appears that the President granted certificate that the case was a fit one for appeal on the ground that the Tribunal had for the first time perhaps extended a principle of valuation which the Collector had adopted in regard to small plots of land, to the determination of the market value of a fairly large-sized land on a common passage. In this connection it has to be mentioned, that the acquired premises were described in the Collector's award as "premises No. 670, Beadon Street formed out of No. 67 Beadon Street, (portion)," comprising an area 1 B 12c. 2ch., 36sq. ft. of land, could be approached by a common passage varying from 12 to 16 feet in width and apart from that they were practically landlocked; and one of the material questions raised in the case before the Tribunal was whether, the land should be valued as having a frontage on a sewered ditch from Nilmoni Mitter Street, or having been in the third belt of an 80 feet belting from Beadon Street. As stated by the President of the Tribunal in his judgment, that was the real issue in the case.

The President expressed the definite opinion in his judgment, that the method of valuation adopted by two experts examined in the case,—one on the side of the claimant, and the other on the side of the Government, could not be accepted; and they had to be discarded for the reason that the experts represented

extreme views of valuing the property in question. The course followed by the President of the Tribunal mentioned as the sound course to follow in the matter of the valuation of the land, was "to apply a principle that has sometimes been followed by the Collector," and to give the land in question 75 per cent of the value given to a third belt of a property having frontage on Beadon Street. In the judgment of the President, there is no reference to the materials from which he came to the conclusion that the Collector followed the principle mentioned above, but there is reference to "the acquisition of 69-6 Beadon Street comprising an area of 10 chittaks of land" in his order granting leave to appeal to this Court, from which it appears the Collector held Rs. 2,400 per cotta, to be the reasonable value considering the size and situation of the land, and in consideration of the accepted award of premises No. 69-8 Beadon Street. It is impossible for us to deduce any principle from the Collector's award mentioned above, and we do not appreciate the reason for accepting the state of things shown in the same, as indicating any principle.

It may not be open to this Court in an appeal from the decision of the Calcutta Improvement Tribunal, to go into evidence in a case, for the purpose of ascertaining whether the valuation of the land in question, as made by the Tribunal, is proper or not; but on the judgment of the President of the Tribunal as it stands, there can be no doubt that the method of valuation followed in the case before us, was wholly unjustified. The President rejected the evidence of the valuers examined as experts by the parties concerned, and then adopted as basis of valuation, which we are unable to hold was based on any principle whatsoever; and there is absolutely no doubt that the method of valuation which the President has acted upon, is not supported by evidence on record. In the above view of the case, the decision of the President of the Calcutta Improvement Tribunal has to be set aside.

It is necessary to mention that in view of the real issue in the case, as stated by the President in his judgment, whether the land in question should be valued as the third belt of an 80 feet belting from Beadon Street the principle must be re-

cognised and kept in view, that the immediate contiguity to a highway commonly called a frontage, is a powerful element in the value of all lands in populous localities. When frontage to a high road does not exist, propinquity and easy access to a high road are equally undoubted, elements of value: see 7 H L 243 (1) at p. 263. On this principle, the question of valuation of land in the case before us, must in our judgment, be approached from this standpoint, as to whether or not the land acquired is one to which the basis of valuation by belts on lands having frontage on Beadon Street, could be applied, or whether the only basis that could reasonably be adopted in case of land of this nature, which was practically landlocked (as mentioned by the Collector in his award), was the one applicable to land where frontage to a highway does not exist, and propinquity and access to a high road are the matters to be taken into consideration, in determining the amount of compensation payable for acquisition of such land.

In view of the decision we have arrived at the judgment of the learned President of the Calcutta Improvement Tribunal cannot be supported on the ground stated by him. The decision and decree against which this appeal is directed, are set aside; and the case is remitted to the Tribunal for a fresh decision, in the light of the observations contained in the judgment, on the materials already on record, and on such further materials as the parties concerned may be advised to place before the Tribunal in support of their respective cases. The costs in this appeal will abide the decision after remand; the hearing fee in this Court is assessed at 5 gold mohurs.

M.D./R.K.

Appeal allowed.

1. Metropolitan Board of Works v. McCarthy, (1875) 7 H L 243=43 L J C P 385=23 W R 115=31 L T 182.

*** A. I. R. 1936 Calcutta 347**

D. N. MITTER AND NARASING RAU, JJ.
(In the matter of Refund of
Excess Court-fees.)

*Kumud Nath Das Saha and others —
Petitioners.*

v.

Government Pleader—Opposite Party.
Civil Rule No. 446-(F) of 1935, Decided
on 12th June 1935, from original decree
of Offg. Sub-Judge, Bogra.

* (a) Civil P. C. (1908), S. 151 — High Court can direct refund of excess court-fee where obvious injustice has been done and case does not fall within Ss. 13, 14 or 15, Court-fees Act.

In cases which are not governed by Ss. 13, 14 and 15, Court-fees Act, the High Court has inherent powers to direct a refund under S. 151, Civil P. C., in a case of excess court-fee where court-fee has been paid in excess of the amount payable, and obvious injustice has been done: 40 Cal 365; 14 W R 47; 1918 Pat 496; 1932 Mad 438 and 1933 Oudh 170, Foll.; 1928 Pat 35, Disting. [P 348 C 2]

(b) Civil P. C. (1908), S. 151— Suit for enhancement of rent under S. 7, Ben. Ten. Act — Payment of excess of court-fees was directed to be refunded to the plaintiff.

Where in a suit for enhancement of rent under S. 7, Ben. Ten. Act, the plaintiff paid court-fees on the basis of the enhanced rent both on the plaint and the memorandum of appeal, and the proper court-fee payable was the amount payable on the difference between the rate claimed and rate paid under Sch. 1, Art. 1, the High Court interfering under its inherent powers directed refund of the excess amount paid. [P 348 C 1, 2]

Bireswar Bagchi and Jyotindra Nath Das—for Petitioner.

Bijan K. Mukerji — for Opposite Party.

D. N. Mitter, J.—This Rule was issued on the learned Senior Government Pleader of this Court to show cause why the prayer of the petitioner asking for refund of the excess court-fees should not be granted to the petitioner or such other order or further orders made as to this Court may seem fit and proper. It appears that the petitioners who were the plaintiffs instituted a suit for enhancement of rent under the provisions of S. 7, Ben. Ten. Act, and they paid court-fees both in the Court below as in this Court on the amount which was claimed on the basis of enhancement of rent. They did not pay court-fees on the difference between the original rate of rent and the enhanced rent claimed. It now appears from a decision in 38 C W N 527 (1) that a suit for enhancement of the rent of a tenure, there being no prayer for recovery of rent for any period would be governed by Art. 1, Sch. 1, Court-fees Act, and the court-fee payable on the plaint would be on the difference between the rate claimed and the rate paid before and the fee payable on the memorandum of appeal would be on the difference between the rate

claimed and the rate allowed by the Court below.

Having regard to this decision it appears that the plaintiffs paid in the Court below as well as in the memorandum of appeal an aggregate sum of Rs. 585 in excess of the sum payable in view of the decision of Mukerji, J., just referred to. The appeal in connexion with which this Rule arises was disposed of by us on 11th April 1935 and on the same date Mr. Bagchi appearing for the petitioners made an application asking that his client should be allowed a refund of the excess sum paid. We accordingly asked the Senior Government Pleader to show cause why the prayer of the petitioners should not be granted. Dr. Mukerji, the Junior Government Pleader, has appeared to show cause. He does not dispute the position that according to this decision the plaintiffs petitioners have paid an excess sum of Rs. 585 in court-fees, but what he contends is that this is not a case in which we should exercise our powers of inherent jurisdiction under the provisions of S. 151, Civil P. C. A number of authorities have been referred to at the bar which would go to show that in cases which are not governed by any express provisions of the Act the Court can direct a refund under S. 151 if obvious injustice has been done.

We shall presently refer to those cases. The provisions which entitle a party to a refund of court-fees which are expressly mentioned in the Court-fees Act are those contained in Ss. 13, 14 and 15 of the Act. It is admitted that the present case falls outside the provisions of those sections. From the authorities of different High Courts it appears clear that High Courts should interfere under S. 151 in such a case as this where obvious injustice has been done. We may refer to the case of 40 Cal 365 (2) which again makes a reference to the very early case (1870) 14 W R 47 (3). We have next the decision of the Patna High Court in the case of 3 Pat L J 452 (4), which takes the same view. There is also a decision of the Madras High Court in the case of 55 Mad 641 (5),

2. Harihar Guru v. Anando Mahanty, (1913) 40 Cal 365=20 I C 498.

3. In the matter of Grant, (1870) 14 W R 47.

4. Chandradari Singh v. Tippon Prasad Singh, 1918 Pat 496=46 I C 271=3 Pat L J 452.

5. C. Thamayya Naidu v. C. Venkataramamma, 1932 Mad 438=139 I C 181=55 Mad 641.

1. Prosannadeb Roikat v. Purna Chandra Saha, 1934 Cal 674=152 I C 753=61 Cal 513=38 C W N 527.

to the same effect. Another decision which favours the exercise of inherent jurisdiction is to be found in the case of 7 Luck 588 (6). It is true that there is a subsequent decision of the Patna High Court in the case of 6 Pat 599 (7), where it was held that the inherent power of the High Court in such cases should be exercised with caution and not in every case.

We have however examined the facts of that case and the circumstances were very different there. In those circumstances Dawson-Miller, C. J., who laid down the principle in the earlier Patna case refused to exercise the inherent power. In the present case it appears clear that the applicants paid a large sum in excess of what is leviable from them. Having regard to the decision of Mukerji, J., which decision goes in their favour we direct that the taxing officer who is the Registrar on the Appellate Side of this Court may issue the necessary certificate to the petitioners so that they may get a refund of Rs. 585 which have been paid in excess by them in court-fees.

Rau, J.—I agree.

V.B./R.K. Application allowed.

6. Mohammad Sadiq Ali v. Ali Abbas, 1938 Oudh 170=146 I C 789=7 Luck 588.

7. Jagdish Chowdhury v. Radha Dubey, 1928 Pat 35=105 I C 740=6 Pat 599.

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PANCKRIDGE, J.

Kalooram Agarwalla—Plaintiff.

v.

Jonistha Lal Chakrabarty and another—Defendants.

Suit No. 1016 of 1934, Decided on 15th July 1935.

(a) Letters Patent (Cal), Cl. 12—Assignment of promissory note in favour of plaintiff—Plaintiff has cause of action even if defendants have no notice of transaction—Court can grant leave under Cl. 12 if case is in other respects fit one—Case held not fit for grant of leave.

An assignment of a promissory note in favour of a plaintiff must be regarded as part of the plaintiff's cause of action, even though it is a transaction of which the defendants had no notice and with which they had nothing to do. A Court has jurisdiction to grant leave under Cl. 12 to plaintiff if the case is in other respects a fit one. [P 350 C 1]

Where however the debtors reside outside the jurisdiction of the Calcutta High Court, Original Side, and the assignment was executed

on the last day before the expiry of the period of limitation, thus giving rise to a suspicion that the transaction was a collusive one in the sense that it was executed mainly for giving the Calcutta High Court jurisdiction, and there would be no hardship on the assignee, who sees fit to take the assignment, in being compelled to institute proceedings in the Courts which have jurisdiction apart from the assignment, the case is one in which leave under Cl. 12 should not be granted. The fact that in a moffusil Court there is no way of preventing unnecessary hardship in a case like this is no reason for allowing the discretionary jurisdiction of the Calcutta High Court to be used to inflict a similar hardship. [P 350 C 1, 2]

(b) Letters Patent (Cal), Cl. 12—It cannot be assumed that Judge granting leave has exercised his discretion—Court can in proper case re-call leave granted.

Having regard to the procedure which is followed in the matter of granting leave under Cl. 12, it cannot be assumed that the Judge granting leave has exercised his discretion in the matter and the Court can in proper case re-call the leave. [P 351 C 2]

(c) Letters Patent (Cal), Cl. 12—Defendants contending that discretion of Court in granting leave under Cl. 12 is wrongly exercised—He must bring fact to notice of Court as early as possible and not wait till hearing of suit—Failure to do so, if it prejudices plaintiff, might prevent success of his application.

Where the defendant maintains that the discretion of the Court in granting leave under Cl. 12 has been wrongly exercised, it is not proper for him to abstain from making any application to remove the suit from the file and to wait until the hearing to make his submissions. It is the duty of the defendant to bring this aspect of the matter to the notice of the Court at the first possible moment and his failure to do so, if it in any way prejudices the position of the plaintiff, is a matter which may prevent success of his application. This only applies to cases where the Court has admittedly jurisdiction to grant the leave. [P 351 C 2]

Where, however, the omission of the defendants to make the interlocutory application, has not in any way prejudiced the position of the plaintiff, and it is a case in which the Judge, if he had applied his mind to the point, would have refused leave, the Court can allow the application although made at the hearing of the suit: 1932 Cal 146 and 1934 Cal 175, *Disting.* [P 351 C 2]

S. M. Bose, J. N. Majumdar and H. N. Sanyal—for Plaintiff.

D. N. Sen and M. Bose—for Defendant (Rajendra Lal).

Judgment.—This is a suit by the assignee and endorsee of a certain promissory note. In the plaint it is stated that on 2nd June 1931 a sum of Rs. 1,729-13-3 was due and owing from the defendants to one Gazadhar Marwari and that the defendants agreed to pay interest on the sum at the rate of Rs. 1-8-0 per cent

per mensem. As security for payment of the sum they executed on that date a promissory note in Gazadar Marwari's favour. On 1st June 1934, Gazadar Marwari in Calcutta assigned the debt and endorsed the promissory note in favour of the plaintiff for valuable consideration. There is said to be due and owing at the time of suit a sum of Rs. 2,673-1-6. The note in question is signed by defendant 1 purporting to sign on his own behalf and on behalf of defendant 2 who is his brother. The suit was instituted on 1st June 1934. In the plaint the defendants are described as both residing at Anara in the district of Manbhum, and it is common ground that the promissory note was executed at that place. The defendants have both filed written statements in which they have put forward various defences on the merits. They say that the execution of the promissory note was obtained by fraud, by misrepresentation and by coercion, and defendant 2 also denies the authority of defendant 1 to execute the promissory note on his behalf. Paras. 4 and 5 of defendant 1's written statement are as follows:

Para. 4: This defendant states that this Court has no jurisdiction to try this suit, as no part of the cause of action as against him arose within the said jurisdiction.

Para. 5: In the alternative, this defendant states that in any event the assignment is mala fide and leave under Cl. 12, even if it has been granted, should be rescinded.

In defendant 2's written statement the assignment in favour of the plaintiff is described as being fraudulent and collusive, and defendant 2 also states that no part of the cause of action as against him arose within the jurisdiction. At the trial both defendants have raised the point that leave under Cl. 12 of the Charter should not have been granted and ought to be revoked. Now, it is well established that the assignment in favour of the plaintiff must be regarded as part of the plaintiff's cause of action, even although it is a transaction of which the defendants had no notice and with which they had nothing to do. It is therefore clear that the Court had jurisdiction to grant leave under Cl. 12 if the case was in other respects a fit one. In my opinion, on the facts as set out in the plaint, leave ought not to have been granted. The sum at stake is not a large one nor prima facie is there likely to be raised any issue which the tribunal with-

in whose local jurisdiction the defendants reside is not competent to try satisfactorily. The assignment was admittedly executed on the last day before the expiry of the period of limitation and one cannot help feeling a suspicion that it was collusive in the sense that it was executed mainly for the purpose of giving this Court jurisdiction which it would not otherwise possess. The defendants are described in the plaint as landholders residing in the district of Manbhum and in my opinion it is no hardship on a person who sees fit voluntarily to take such an assignment as the present to be compelled to institute any proceedings which may be necessary to realise his debt in the Courts which would have jurisdiction apart from the assignment. On the merits I think that the case is not one on which leave should have been granted. Various arguments have been advanced by the learned standing counsel on behalf of the plaintiff. He points out that under the Civil Procedure Code a suit can be instituted in any Court within whose jurisdiction any part of the cause of action arose, and that there is no question of the granting or refusal of leave. This is true, but I do not think that the fact that in a moffusil Court there is no way of preventing unnecessary hardship in a case like this is a reason for allowing the discretionary jurisdiction of this Court to be used to inflict a similar hardship.

Next it is said that the leave having in fact been granted it must be assumed that the learned Judge granting it has exercised his discretion, and that I cannot or ought not to interfere with such exercise. With regard to this the difficulty is that my mind refuses to make an assumption which I know is contrary to facts. I believe that the practice of all Judges dealing with interlocutory matters on the original side is the same. The Master examines the plaint, and if there is an allegation in it showing that part of the cause of action arises within the jurisdiction, the Master endorses the plaint "Leave granted under Cl. 12," and submits it to a Judge for his signature. The Judge then signs the plaint as a matter of course and leaves it to the defendant to take such steps as he may be advised. This system may not be wholly satisfactory, but it is not easy to think of a better one because at that

stage whatever is done must in the nature of things be done *ex parte*. I therefore feel no difficulty in reviewing (I use the term in its popular sense) the decision, if it can be called a decision, of Remfry, J., in signing the endorsement of the Master and granting leave.

What seems to me to be a matter of greater importance is the fact that the defendants have taken no steps to have the leave set aside until the hearing of the suit. This is a circumstance which might, I apprehend, in other cases operate in a manner unfair to the plaintiff, but the circumstances of the present case are such that this question does not arise. As I pointed out, the suit was filed on 1st June 1934, that is to say, on the very day of the assignment and one day before the expiry of the period of limitation. Presumably the writ would not in the ordinary course be served for at least a week. So no possible question of limitation can arise, because, even if the defendants had applied to revoke the leave at the earliest possible moment their application would have been made more than three years from the date of the note. I of course express no view as to the effect that the lapse of time between the filing of the suit and the hearing may have.

The defendants justify their delay by citing two decisions. The first is 59 Cal 150 (1) where Rankin, C. J., made certain observations in which he deprecated preliminary applications to take the suit off the file on the ground that leave under Cl. 12 had been improperly granted. That case, however, can readily be distinguished because there it was suggested not that the Court had wrongly exercised its discretion in granting leave, but that the Court had no discretion in the case because no part of the cause of action had in fact arisen within the jurisdiction. This contention gave rise to questions of law and fact of some complexity which in the opinion of the Court could not properly have been decided in an interlocutory application. A case which bears a closer resemblance to the one with which I am dealing is 37 C W N 1139 (2). There an application was made to revoke

the leave granted on the ground that the assignment of the debt to the plaintiff was not *bona fide* but made with the intention of creating jurisdiction. The application was dismissed, and in the course of his judgment Ameer Ali, J., observed that the question of *bona fides* was a matter which must be gone into in the suit, and that on an interlocutory application he was not in a position to investigate the allegations.

I do not think that either of these cases can be taken as an authority for the proposition that the proper course for the defendant to take in a case where he maintains that the discretion of the Court has been wrongly exercised is to abstain from making any application to remove the suit from the file and wait until the hearing to make his submissions. On the contrary, I think in many cases the defendant should bring this aspect of the matter to the notice of the Court at the first possible moment, and that his failure to do so, if it in any way prejudices the position of the plaintiff, is a matter which may prevent success of his application. I am speaking of those cases where the Court has admittedly the discretion to grant leave, and I say nothing about the other class of cases where the position is that no part of the cause of action in fact arises within the jurisdiction of the Court and the Court has therefore no power to grant leave. For reasons which I have already given, I do not think that the omission of the defendants in this case to make an interlocutory application has in any way prejudiced the position of the plaintiff, and on the facts I think the case is one in which, if the Judge had applied his mind to the point, he would have refused the leave. I therefore recall the leave and reject the plaint. I make no order as to costs of suit.

R.M./R.K.

Plaint rejected.

A. I. R. 1936 Calcutta 351

R. C. MITTER, J.

Hajee Golam Hossain Ostagar—Plaintiff—Appellant.

v.

Sheik Abu Bakkar—Defendant—Respondent.

Appeal No. 1419 of 1934, Decided on 26th February 1936, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 7th May 1934.

1. Secy. of State v. Golabrai Pallram, 1932 Cal 146=135 I C 873=59 Cal 150=35 C W N 980.

2. Haranathrai Binraj v. Churamanl Shah, 1934 Cal 175=148 I C 442=37 C W N 1139.

Landlord and Tenant—Ejectment—Landlord can eject tenant after notice to quit except where tenant holds in permanent right—Onus of proving permanency is on tenant.

A landlord is entitled to eject a tenant after notice to quit unless the tenant can prove that he has a right to remain on the land permanently and the onus is on the tenant to prove the permanency of his tenancy. [P 352 C 2]

S. C. Roy Chowdhury and Anilendra Nath Choudhury—for Appellant.

Diptendra Mohan Ghose—for Respondent.

Judgment.—This appeal is on behalf of the plaintiff, and it arises out of a suit instituted by him to eject the defendant by serving a notice to quit. In the plaint there are two other prayers, viz. for recovery of arrears of rent before the termination of the tenancy, and for mesne profits after the termination of the tenancy by the notice to quit. The plaintiff says that he served the notice on 16th September 1930 requiring the defendant to vacate the land with the expiry of the month of Chaitra 1337.

The plea of the defendant was that no notice had been served and that he could not be ejected as he was holding the land in permanent right. These defences were overruled by the Court of first instance. The defendant preferred an appeal to the lower appellate Court. Three points were raised in that appeal, viz. (1) whether the notice to quit had been served on the defendant; (2) whether the defendant if he could be ejected was entitled to any compensation for the improvements which he made on the land; and (3) whether he could at all be ejected on the ground that he was a permanent tenant. The learned Additional District Judge who heard the appeal did not record his finding on the first two points aforesaid; but he dismissed the suit on the ground that the plaintiff was precluded from saying that the defendant's tenancy was of a precarious nature by reason of a decision in a previous rent suit between the parties. The defendant came upon the land for the first time on the basis of a registered lease executed in the year 1909. By this lease he was given the right to remain on the land for three years at a rent of Rs. 15 a year, i. e. Re. 1-4-0 a month. This lease was granted by the plaintiff's predecessor in title, one Jitendra Nath Banerjee. Thereafter the landlord's interest in the land, vested in the plaintiff by reason of a conveyance exe-

cuted by Jitendra and a compromise by Jitendra's mother. After that the plaintiff instituted a suit for rent against the defendant, and he claimed rent at the rate of Rs. 1-4-0 per month, i. e. Rupees 15 a year. The defendant stated that the rent was altered to Rs. 6 a year by reason of an agreement arrived at between him and the mother of Jitendra, Kiron Sashi, after the term of the lease of 1909 had expired. The Court of first instance framed two issues: (1) whether there was a relationship of landlord and tenant between the plaintiff and the defendant; and (2) what was the rate of rent. The learned Munsif found that there was a relationship of landlord and tenant between the plaintiff and the defendant; and that the rate of rent was Rs. 12 a year. The said findings were affirmed by the learned Subordinate Judge in an appeal preferred by the defendant against the Munsif's decree. In this rent suit no question of status was raised or decided. The questions that were raised and decided were the relationship of landlord and tenant and the question as to what was rate of rent.

The learned Additional District Judge says that the decision, in this rent suit operates as *res judicata* on the question of status. I do not follow his judgment on that point. The question whether the tenancy was permanent or precarious was not the subject-matter of an issue in the rent suit, and there was no decision on the said point. I am therefore clearly of opinion that the point of *res judicata* has been decided quite wrongly by the learned Judge. He records a finding that the evidence led by the defendant to prove the grant of a permanent lease to him has not been substantiated. It is a well-established principle of law that a landlord is entitled to eject a tenant unless the tenant can prove that he has a right to remain on the land permanently. The onus is clearly on the defendant to prove the permanency of his tenancy. In this case he led evidence to prove that; but according to the finding of the learned Additional District Judge, he failed. I accordingly hold that the defendant is not a permanent tenant on the land and he is liable to ejectment, provided the plaintiff proved service of notice to quit, on him. On that point there has not been any finding by the learned Additional District Judge, nor has the

learned Additional District Judge considered the claim of the defendant to compensation. I accordingly set aside the decree passed by the learned Additional District Judge, hold that the question of permanency is not *res judicata* in the yearly suit, maintain his finding that the defendant has failed to prove that he is a permanent tenant, and remand the case to the lower appellate Court in order that two and two issues only may be decided by that Court namely, (1) whether the notice to quit has been served upon the defendant; and (2) whether the defendant can claim any compensation for the alleged improvement, in case the plaintiff gets a decree in ejectment. The question as to whether the plaintiff will be entitled to mesne profits as claimed in the suit, will be dependent on the first issue which I framed, viz. whether the notice to quit had been served on the defendant or not. So far as the plaintiff's claim for arrears of rent is concerned, that has not been considered also by the lower appellate Court. If the defendant challenges that part of the decree of the learned Munsif, it will be open to the lower appellate Court to go into that question. Costs of this appeal will abide the result.

V.B./R.K.

Case remanded.

A. I. R. 1936 Calcutta 353

M. C. GHOSE AND R. C. MITTER, JJ.

Bhadreswar Coal Supply Co.—Plaintiff—Appellant.

v.

Satis Chandra Nandi & Co. and others
—Defendants—Respondents.

Appeal No. 2395 of 1933, Decided on 18th March 1936, from appellate decree of Dist. Judge, Hooghly, D/- 26th June 1933.

Civil P. C. (1908), O. 30, R. 1—One partner can institute suit in name of firm, although other partners do not join—Name of firm only should be mentioned as plaintiff in cause title without addition of name of partner—Question of indemnity is matter between partners.

It is open to a partner of a firm consisting of several partners to institute a suit in the name of the firm although the other partners refuse to join in the suit. The partners refusing to join are not necessary parties in the sense that they should be named in the cause title and served with summons of the suit. In describing the cause title of such suit the name of the plaintiff should be the name of the firm only without addition of the name of the partner suing although addition of such name does not matter in the least. The question as to whether

the partner bringing the suit should have given an indemnity to the other partner, for bringing a suit in their name, is a matter between them: *Seal and Edgelow v. Kingston*, (1908) 2 K B 579, *Rel. on.* [P 355 C 1]

Manmatha Nath Roy (Sr.) and Suryya Kumar Aich—for Appellant.

Hira Lal Chakravarti and Nanda Gopal Banerjee—for Respondents.

R. C. Mitter, J.—In this case a suit was brought for the recovery of the price of coal supplied to the defendants who were partners of a firm carrying on business under the name and style of *Satis Chandra Nandy and Company*. The cause title of the plaint was as follows:

Bhadreswar Coal Supply Company through *Manik Lal Roy*, plaintiff v. *Satis Chandra Nandy and Company* represented by *Jnanendra Nath Nandy* and others, defendants.

At the date of the suit three persons namely *Manik Lal Roy*, *Sripati Charan Mukherjee* and *Bhujendra Nath Bhadra* were partners of a firm carrying on business under the name of *Bhadreswar Coal Supply Company*. They were also partners of the same firm carrying on business under the same firm name when the defendant Company bought the coal. The finding of the learned District Judge is that the said partnership of *Manik Lal Roy*, *Sripati Charan Mukherjee* and *Bhujendra Nath Bhadra* commenced under a deed of partnership and the partnership was still continuing at the date of the suit. To the suit as originally framed *Sripati Charan Mukherjee* and *Bhujendra Nath Bhadra* were added as pro forma defendants, but the notice of the suit was not served on them and ultimately they were dismissed from the suit on the ground of non-service of the summons. The suit thereafter continued as a suit by the '*Bhadreswar Coal Supply Company*' represented by *Manik Lal Roy* against *Satis Nandy and Company*. To the suit two substantial defences were taken. The first was that the suit was not maintainable and, secondly, that the claim of the *Bhadreswar Coal Supply Company* had been satisfied by payments. The learned Subordinate Judge overruled both these pleas and granted a decree in favour of the plaintiff firm for Rs. 1,577.8.6 less Rs. 275 admitted to have been paid, with interest at 12 per cent. The defendant firm filed an appeal before the learned District Judge. The learned District Judge did not enter into the plea of pay-

ment set up by the defendants but dismissed the suit on a preliminary point.

He held that a suit under the provisions of O. 30, Civil P. C., can be instituted in the name of the firm only if the suit is instituted by two or more partners of the firm. He came to the conclusion that inasmuch as the suit has been instituted by one partner, viz. Manik Lal Roy, in the name of the firm, the suit was not maintainable. The learned Advocate for the plaintiff firm urges before us that the view taken by the learned District Judge is erroneous. He says that a firm or a partnership must consist of two or more persons and O. 30, R. 1, enables a suit to be carried on in the name of the firm, and it does not matter whether the suit is filed at the instance of one or more of the partners. Mr. Chakravarti, who appears on behalf of the respondents, contends that O. 30, R. 1, can only apply when all the partners of a firm desire to institute a suit. He says that the said rule only provides for a convenient form of suing, and for the purpose of supporting his contentions he takes us through the history of the law. He says before 1908 all the partners of a firm had to be named in the plaint in order that the suit may be a good one. They had all to appear by name as plaintiffs, and such of them as were unwilling to join as plaintiffs had to be put down in the plaint as *pro forma* defendants. He accordingly argues that where all the partners of a firm do not agree to institute a suit, a suit cannot be instituted in the name of a firm; for a suit instituted in the name of a firm must be taken to be a suit instituted by all the partners of a firm, and in a case where some of them refuse to institute a suit, the dues of the firm can only be realised by following the same procedure which had to be followed before the introduction of O. 30 in the Code of 1908, that is to say in such a case the partner intending to sue must sue in his own individual name making the others who are unwilling to join him as defendants in the suit.

In our judgment the contention of Mr. Chakravarti is not sound. No doubt O. 30 has laid down a convenient procedure in this respect. A firm is not a legal entity but the legislature has provided for the partners of a firm to sue in respect of moneys due to a firm in the firm name. The provisions of O. 30, R. 1

have been taken from the provisions of O. 48-A of the Rules of the Supreme Court. The question which we have to decide was considered by the Court of appeal in England in (1908) 2 K B 579 (1). In that case two persons, Seal and Edgelow, constituted a firm of attorneys carrying on business under the name and style of Seal and Edgelow. Kingston was a client of theirs and the said firm had a claim against him. Edgelow did not desire that an action should be brought or proceeded with against Kingston, but Seal contended that the firm had a good case and thought that they ought to sue. Edgelow refused to join in the suit. On that Seal instituted the suit in the name of the firm, viz. Seal and Edgelow. The defendant made an application, which was granted by the Court by which he required the plaintiffs to make a further affidavit of documents in their possession within one month. Seal made the affidavit of documents and he served a copy of the order on Edgelow. Edgelow neglected to swear to an affidavit of documents whereupon Seal took out summons to commit Edgelow for contempt of Court in not obeying the order of the Court requiring a further affidavit of documents by the plaintiffs. Ridley, J. refused to make an order on this summons on the ground of want of jurisdiction whereupon Seal preferred an appeal to the Court of appeal. One of the questions raised in the Court of appeal was whether a suit could be instituted in the firm's name under the provisions of O. 48-A of the Rules of the Supreme Court by one of the two partners, the other partner refusing to sue. Sir Gorell Barnes decided that a suit could be so instituted. At p. 582 of the report he makes the following observations:

In my opinion the learned Judge had jurisdiction to make the order. It is clear upon the authority of 2 C & M 318 (2) that Seal had the right as one of the partners in the firm to use the name of the other partner for the purpose of bringing an action to recover a debt due to the firm, on giving his partner an indemnity against costs. As was said by Bayley B in the case referred to 'one of the several partners has a clear right to use the names of the other partners. If they object to their names being used, they may apply for an indemnity against costs

1. Seal & Edgelow v. Kingston, (1908) 2 K B 579=77 L J K B 965=99 L T 504=24 T L R 650=52 S J 582.
2. Whitehead v. Hughes, (1840) 2 C & M 318=4 Tyr 92.

to which they might be subjected by the use of their names.' In the present case an indemnity was given, and Seal was taking the proper steps to carry on the action, but Edgelow refused to assist him in the matter by making the further affidavit of documents which the plaintiff had been ordered to make.

In our judgment the suit which has been instituted in the present case by Manik Lal Roy in the name of the firm Bhadreswar Coal Supply Company is a good suit. To such a suit the other partners of Manik Lal Roy who have refused to join are not necessary parties in the sense that they ought to have been named in the cause title and served with summons of the suit. It would have been better if the cause title of the suit described the plaintiff as Bhadreswar Coal Supply Company simply without the addition of the words "through Manik Lal Roy," but in our judgment the addition of those words does not matter in the least. The question as to whether Manik Lal Roy ought to have given an indemnity to Sripati Charan Mukherjee and Bhujendra Nath Bhadra as partners for instituting the suit in their names is a matter as between Sripati Charan Mukherjee and Bhujendra Nath Bhadra on the one side and Manik Lal Roy on the other. If these two persons wanted an indemnity against costs from Manik Lal Roy it would have been for the Court to stay the suit till the indemnity is furnished, but they had not come forward and asked for such indemnity. The suit could proceed accordingly in the name of the firm with its carriage in the hands of Manik Lal Roy. We accordingly allow the appeal, set aside the judgment and decree of the Court of appeal below and remand the case to that Court so that the plea of the payment raised by the defendants may be considered. Costs to abide the result.

M. C. Ghose, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 355

JACK, J.

Hari Charan Banerjee and another—
Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 296 of 1936, Decided on 29th April 1936.

Calcutta Police Act (4 of 1866), Ss. 3 and 45—No evidence establishing place as gaming house—Accused having accepted marked five rupee note to put on certain horses—This by itself held insufficient for conviction under S. 45.

Accused was found to have accepted a marked five rupee note with instructions to put on certain horses. He was found with two others. There were no incriminating articles except a racing book :

Held : that the evidence was insufficient to show that the place was a common gaming house within the meaning of S. 3 and that the mere acceptance of the marked five rupee note was not sufficient to find the accused guilty under S. 45. [P 355 C 2 ; P 356 C 1]

*Monindra Nath Mukherjee and Mihir Mohan Mukerjee—*for Petitioners.

Order.—This Rule was issued on the Chief Presidency Magistrate to show cause why an order convicting the petitioners under S. 45, Act 4 of 1866 (Calcutta Police Act), and sentencing them to pay a fine of Rs. 100 each, should not be set aside on the ground that there was no evidence to show that gaming was taking place at the time the accused were prosecuted, and also on the ground that there was no evidence to show that the premises where the gaming is alleged to have been taking place was a common gaming house within the meaning of S. 3 of the Act. The evidence is that a Sub-Inspector of Police sent one Banku Behary Pal to 28, Chutarpara Lane, with a slip of paper containing the names of 16 horses and with an amount of betting to be placed on horses and also a marked Rs. 5 note asking him to go inside the house and to bet there.

Banku says that he handed over the money to accused 2 Brojo Mohan Saha and that when he went there a barber was giving five annas to the accused Brojo Mohan and that the other accused was also there, and that when Brojo Mohan went to bring change he called in the Sub-Inspector, prosecution witness 2, R. C. Chowdhury. The Sub-Inspector says that having sent in this man Banku with a marked note and a slip of paper they followed and found the accused Hari Charan Banerjee and Gonesh seated there and the accused Brojo Mohan standing in front of them. The latter dropped the five rupee note, the betting slip and also Re. 1 and one pice. No other incriminating articles were found in the premises except a racing-book Ex. 3. This is all the evidence on which the accused have been found

guilty under S. 45 of Act 5 of 1866 (Calcutta Police Act). This evidence appears to me to be totally insufficient to show that the accused were found gaming in a common gaming house or present during any gaming or playing therein or were found present in the gaming house for the purpose of gaming. A common gaming house as defined in S. 3 is a house in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying or using such house. There is no evidence that any instrument of gaming was kept or used in this house for the purpose of gaming. At the most what was found was that one of the accused accepted a five rupee note with instructions to put the money on certain horses. For all that we know it may have been intended to put this money on certain horses at the race course and in that case no offence has been committed. In any case, there was quite insufficient evidence to show that the place was a common gaming house.

The conviction and sentence are, therefore, set aside and the fine, if paid, will be refunded. The money found with the accused will be returned.

R.W./R.K. *Conviction set aside.*

**** A. I. R. 1936 Calcutta 356**

FULL BENCH

DERBYSHIRE, C. J., MUKERJI, PANCKRIDGE, M. C. GHOSE AND BARTLEY, JJ.

Harihar Sinha and others — Appellants.

v.

Emperor—Opposite Party.

Full Bench Ref. No. 1 of 1935, Decided on 9th April 1936 in Criminal Appeals Nos. 971 to 973 of 1934.

(a) Criminal Trial — Evidence — Right of cross-examination—Witness giving evidence against accused withdrawn from witness box and made accused — Conviction of accused should be set aside.

Where the witness who gave evidence against the appellants was withdrawn from the witness box and again made an accused, so that the appellants were thereby prevented from cross-examining him :

Held : that the appellants here were deprived of a fundamental right given them by law and that the conviction could not on that ground alone be upheld. [P 358 C 2]

(b) Criminal P. C. (1898), S. 494 (a)—Case withdrawn against accused—He cannot be tried again in same proceedings.

Where the case against an accused is withdrawn under S. 494 (a), he is discharged from those proceedings and cannot be put back into them. He may be tried again in other proceedings on the same charge, but not in those proceedings. [P 358 C 2]

* * (c) Criminal P. C. (1898), Ss. 494 (a) and 337 — Withdrawal of case by Public Prosecutor against accused with object of calling him as witness—Court can give consent — But if S. 337 is available, it is better for Court to use this section rather than S. 494 (a).

There is nothing in S. 494 which prevents a Public Prosecutor if he thinks it is in the interests of the administration of justice, from withdrawing the case as against one of the accused for the purpose of calling him as a witness against the others. It may well be in the interests of justice that the Public Prosecutor should so withdraw so that such evidence should be given to help to secure a conviction against the others. In the same way for the same reasons, it may well be that the Court ought to give its consent to such withdrawal. But in cases where S. 337 is available it is better that the accused should be dealt with under that section. Even where S. 337 can be applied, it is not contrary to law to discharge the approver under S. 494 (a). The approver dealt with under S. 337 gives his testimony with a contingent charge hanging over his head. The evidence of an accomplice whether dealt with under S. 337 or discharged under S. 494 (a) or acquitted under S. 494 (b) is the evidence of an approver and as such open to suspicion : 1929 Cal 319, *Appr.*

[P 358 C 2; P 359 C 1; P 360 C 2]

Per *Mukerji, J.*—The Court can give its consent on the ground of public policy but in so doing it has to enquire into the reasons which prompt the withdrawal. If the Court finds that S. 337 with its statutory safeguards is open to be availed of, it will be a sound exercise of its discretion to withhold consent : 1929 Cal 319, *Appr.* [P 367 C 1,2]

Per *Panckridge, J.*—The discretion under S. 494 is a judicial discretion. Where it is open to the prosecution to obtain the approver's evidence by applying for the tender of a conditional pardon under S. 337 (1), the Magistrate must keep the provisions of that section before him when he exercises his discretion. As a general rule the discretion will be wrongly exercised in such cases if the consent is given before the charge is framed : 1929 Cal 319, *Appr.* [P 369 C 2]

* (d) Bengal Suppression of Terrorist Outrages Act (12 of 1932), Ss. 24 and 25—Special Magistrate has power to tender pardon under S. 337, Criminal P. C.—Per *Full Bench—Mukerji, J.*, holding *contra*.

(Per *Full Bench*)—A Special Magistrate appointed under S. 24 of Bengal Suppression of Terrorist Outrages Act, 12 of 1932, has power to tender a pardon under S. 337, Criminal P. C., even though he has no power to commit the accused to the Court of Session or High Court. The Magistrate may, acting under S. 337 (1) tender a conditional pardon, and under S. 337 (2) examine the pardoned man as a witness in his Court, but must act under the Bengal

Suppression of Terrorist Outrages Act, 1932, try the accused himself instead of committing him for trial to the Court of Session or the High Court, as S. 337 (2-A) of the Code provides: 1933 Cal 537 and 1935 Cal 281, *Approved*.

[P 361 C 2; P 362 C 1]

(*Mukerji, J., contra*) — The special Magistrate has no power to tender pardon under S. 337, Criminal P. C., for the following reasons (1). The words used in the S. 25 are that "such person shall be tried." If a Magistrate proceeds to tender pardon to an accused person he stops his trial and does something which he has no jurisdiction to do. He thereby ceases to proceed with the trial of that particular accused person, the object of which is to determine his guilt or innocence and does something which is not covered by the direction under which he has jurisdiction to act. No doubt, in a case in which a prosecutor withdraws from the prosecution of an accused, the trial of that accused is also stopped; but such act is the act of the prosecutor. Hence tendering pardon is not trial of such person. (2) Section 337, Criminal P. C., cannot be taken in compartments, and it cannot be held that all the compartments, with the exception of that which ensures the right to have the case committed to the Court of Session, may be availed of by the Special Magistrate: 1933 Cal 537, *Disting.* [P 363 C 2; P 364 C 1; P 365 C 1,2]

(*Per Panckridge, J.*)—The various powers and directions given to Magistrates by S. 337 are so distinct and independent that each is a provision within the meaning of the Local Act. The argument that the Special Magistrate is only clothed with power to "try" the accused under S. 25 of the Local Act and not with the power to "pardon," construes "try" and "trial" in an artificial and unnecessarily narrow fashion. S. 337, Criminal P. C., is part of Ch. 24 which contains "General Provisions as to Inquiries and Trials," and the power to tender a pardon can be exercised "at any stage of the investigation or inquiry into, or the trial of the offence." The Special Magistrate authorized under S. 25 (1) has all the powers which the Code confers on Magistrates trying such cases, save such powers as are clearly inconsistent with the Local Act.

[P 370 C 2; P 371 C 1]

(e) Criminal P. C. (1898), S. 337—S. 337 applies only to trials concerning graver offences.

Section 337 is available for obtaining the evidence of approvers not in all trials but only as regards trials concerning some graver offences.

[P 366 C 1]

(f) Criminal P. C. (1898)—Interpretation—No presumption that principles of English Criminal Law were intended to be adhered to.

In construing the provisions of the Code in which the procedure to be followed has been detailed, it need not be assumed that the principles of English criminal law either substantive or procedural, were intended to be adhered to: *Riel v. Queen*, (1885) 10 A C 675, *Rel. on*.

[P 367 C 1]

(g) Criminal P. C. (1898), S. 494—Withdrawal under S. 494 is unconditioned and unconditional—What the public prosecutor will or will not do subsequently is no concern of Court.

(*Per Mukerji, J.*)—A withdrawal under S. 494 either under Cl. (a) or under Cl. (b) is a simple withdrawal—unconditioned and unconditional. The Court is concerned only with the question whether the ground for the proposed course is such as would justify it in giving its consent: If the Court finds that the object of withdrawing from the prosecution is to avail of the evidence of the particular accused and the circumstances of the case are such that it would further the ends of justice to have his evidence and that S. 337 is inapplicable, the Court will not be wrong in giving its consent. What the public prosecutor will or will not do thereafter, in a case in which the withdrawal has been under Cl. (a) with the effect of a discharge, is a matter which is no concern of the Court.

[P 367 C 2]

N. K. Basu, Hira Lal Ganguli, J. C. Gupta, Tapodhir Dastidar for Purnendu Choudhuri and Manmatha Nath Das—for Appellants.

Avocate General and Anil Chanra Roy Choudhuri—for the Crown.

Derbyshire, C. J.—The history of the proceedings in this matter is briefly this: that three appellants together with two others, Nalini and Gouranga were put on their trial before a Special Magistrate acting under the powers conferred on him by S. 25, Bengal Suppression of Terrorist Outrages Act, 1932. The procedure to be followed in such cases is that prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates.

The accused were eventually charged with conspiring to commit robbery and dacoity under Ss. 120-B/392, and 395, Penal Code. At the outset of the proceedings the Public Prosecutor applied to the Special Magistrate for the discharge of Nalini under S. 494, Criminal P. C., so that Nalini might give evidence in the case. As no charge had then been framed against the accused, Nalini was discharged under sub-s. (a), S. 494. Thereupon Nalini went into the box and gave evidence. The accused, who included the three appellants, as they were entitled, reserved their cross-examination until a charge had been framed. Nalini's evidence, although against the accused, amounted to very little.

Then the Public Prosecutor, evidently of the opinion that Nalini had not told all he knew and was hostile to the prosecution, applied to the District Magistrate to have Nalini re-committed to take his trial along with the accused.

Nalini was thereupon re-committed by the District Magistrate to take his trial

with the other accused against whom he had given evidence. Next the Special Magistrate tendered a conditional pardon to the accused Gouranga under S. 337, Criminal P. C., and Gouranga was taken out of the dock, put into the witness box, and he gave evidence in the trial.

Nalini thereupon moved a Bench of this Court to have the proceedings against him stayed, and a stay was ordered as against Nalini. The trial against the remaining accused, the three present appellants went on, the evidence against the appellants given by Nalini remained on the record for what it was worth, but the appellants never had the opportunity of cross-examining Nalini.

The Special Magistrate found the three appellants guilty and sentenced them each to five years' rigorous imprisonment. From those convictions and sentences the appellant appealed. The Bench of this Court which heard the appeals referred to a Full Bench of this Court a certain question of law for our consideration. This Full Bench acting upon R. 5, Ch. 7 of the Rules of this Court on the appellate side was unable to accept the partial reference, and thereupon the Bench concerned referred the whole case to us under the Rule above cited.

The questions of law referred by the Bench in question were: (1) Whether the Court may consent to the Public Prosecutor withdrawing from the prosecution of any person under the provisions of S. 494 (a), Criminal P. C., for the purpose of obtaining that person's evidence as a witness. (2) Whether the case of 56 Cal 1023 (1) was upon this point rightly decided. (3) Whether a Special Magistrate appointed under S. 24, Bengal Suppression of Terrorist Outrages Act, XII of 1932, has power to tender a pardon under the provisions of S. 337, Criminal P. C., or otherwise (4) Whether the cases of 60 Cal 652 (2), and 39 C W N 698 (3) and Appeals Nos. 844 and 845 of 1933 were upon this point rightly decided? The first feature which stands out in this case is that Nalini gave evi-

dence against the appellants and then was withdrawn from the witness box and again made an accused, so that the appellants were thereby prevented from cross-examining him. S. 256, Criminal P. C., and S. 136, Evidence Act, give the accused a right to cross-examine the witnesses who have given evidence against them. It is obvious that the appellants here were deprived of a fundamental right given them by law. The Advocate-General has admitted that the convictions cannot on that ground alone be upheld.

The second feature is that Nalini was re-committed to take his trial along with the three appellants in the same proceedings after having given evidence against them. S. 494 (a), Criminal P. C., enacts that after the Public Prosecutor, with the consent of the Court, has withdrawn from the prosecution of an accused, the accused "shall be discharged in respect of such offence or offences." It is obvious that if the accused is again charged in the same proceedings with the same offence, the provision that "he shall be discharged in respect of such offence or offences" has no real effect.

In my view the words in question mean shall be discharged from those proceedings and not put back into them. He may be tried again in other proceedings on the same charge, but not in those proceedings. The Advocate-General has stated that he cannot support the convictions on the evidence given, apart from the irregularities mentioned. These convictions clearly cannot stand. That would be sufficient to dispose of this appeal without going into the questions of law which have been formulated for our answer. However in view of the doubt that has been cast by the referring Judges on the cases of 56 Cal 1023 (1), 60 Cal 652 (2) and 39 C W N 698 (3), and the likelihood of that doubt giving rise to difficulty in other cases, we have thought fit to go into the questions raised. As regards questions (1) and (2), I see nothing in S. 494 which prevents a Public Prosecutor if he thinks it is in the interests of the administration of justice, from withdrawing the case as against one of the accused for the purpose of calling him as a witness against the others. It may well be in the interests of justice that the Public Prosecu-

1. Raman v. Emperor, 1929 Cal 319=121 I C 678=31 Cr L J 315=33 C W N 468=56 Cal 1023.

2. Abul Majid v. Emperor, 1933 Cal 537=1933 Cr C 893=145 I C 656=34 Cr L J 1023=60 Cal 652.

3. Mohammad Saleudin v. Emperor, 1935 Cal 281=1935 Cr C 391=156 I C 238=26 Cr L J 884=39 C W N 698.

tor should so withdraw so that such evidence should be given to help to secure a conviction against the others. In the same way for the same reasons it may well be that the Court ought to give its consent to such withdrawal.

The English case of (1866) 1 Q B 289 (4), which was discussed by the referring Bench, deals with this point. In that case two women—Harris and Winsor—were in the first instance charged together with murder. The jury disagreed and were discharged. When the retrial came on the accused Winsor was tried alone and Harris was called to give evidence against her without having been first acquitted, or convicted and sentenced, or without a *nolle prosequi* having been entered against her. Winsor was convicted, and on a writ of error the matter came before a Court of Judges of the Queen's Bench, where the Judges considered the matter. Cockburn, C. J., at p. 312, said:

I equally feel the force of the objection that the fellow prisoner was allowed to give evidence without having been first acquitted, or convicted and sentenced. I think it much to be lamented. In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him, or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence so that the witness may give his evidence with a mind free of all corrupt influence, which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce. This objection is not set forth on the record; in a civil case a question as to the reception of evidence may be raised upon a bill of exceptions, but in a criminal case it cannot be raised upon the record so as to constitute a ground of error; we cannot therefore take it into consideration. Whether this circumstance should have any influence elsewhere is a matter upon which it is not for us to pronounce an opinion. Under all the circumstances I am of the opinion that in this case the facts warranted the exercise of judicial discretion. Judgment must be for the Crown.

Blackburn, J., at p. 320, said:

I may however observe, although the matter does not come before us, I do not think Harris was an inadmissible witness, but being inadmissible she was completely within the category of accomplices. It would be right to tell the jury to look at her evidence with great caution. I do not doubt that the judge did carefully caution the

jury, nor do I doubt there was ample confirmatory evidence. I agree that it would be judicious as a general rule, where the accomplice is indicted that the indictment as to her should be disposed of before she is called as witness, so that the temptation to strain the truth should be as slight as possible. I do not think that this is an obstruction as to the legality of the evidence but is a matter which affects the degree of credit which ought to be given to her testimony.

Meller, J. at p. 324, said:

On an application made on the part of the Crown, the prisoner was tried by herself, and Harris, although she had not pleaded guilty, and although no verdict of acquittal was taken was called as a witness. She was, therefore liable herself to be tried. I think the temptation held out by this course, especially by an ignorant witness, to give false evidence, very great, a witness ought always to give evidence without fear of any consequences pending over him. I am however of opinion that the Judge on the second trial had no alternative but to receive the evidence, which I think was clearly admissible, although subject to strong observation as to its weight.

Lush, J. at p. 327, said:

The other objection relates to the admissibility of the evidence of Harris on the second trial. As to that, it is enough to say that in my judgment her testimony was admissible.

In Archbold's Criminal Pleading and Practice, Edn. 29 (1934), p. 463, under the heading "Competency of Witnesses" it is stated:

Where it is proposed to call an accomplice for the Crown, it is the practice, (a) not to include him in the indictment; or (b) to take his plea of guilty on arraignment; 1 Q B 289 (4), 1 Q B 390 (5), or during the trial he withdraws his plea of not guilty; 2 Cr App R 329 (6); or before calling him either (C) to offer no evidence and permit his acquittal, 9 C & P 83 (7); or (D) to enter a *nolle prosequi*, 4 St Tr N S 935 (8).

In the same edition of Archbold, at p. 112, it is stated:

A *nolle prosequi* puts an end to the prosecution, see 12 N S W Rep (Law) 184 (9) and English authorities there cited, but does not operate as a bar or discharge or an acquittal on the merits, 6 Mod 261 (10) and 10 Mod 152 (11), and the party remains liable to be re-indicted. It has been said that fresh process may be awarded on the same indictment, 6 Mod 261 (10), Com. Dig. Indict (K), but this dictum appears not to be law.

During the argument before us it was contended that the provisions of S. 343,

5. Winsor v. R. L. R., (1866) 1 Q B 390=7 B & S 490=35 L J M C 161=12 Jur (N S) 561=14 L T 567=14 W R 695.

6. R. v. Tomey, 2 Cr App R 329.

7. R. v. Owen, 9 C & P 83.

8. R. v. Feargus O'Connor, 4 St Tr (N S) 935.

9. Gilchrist v. Gardner, 12 N S W Rep (Law) 184.

10. Goddard v. Smith, 6 Mod 261=3 Salk 245.

11. R. v. Ridpath, 10 Mod 152.

4. Winsor v. The Queen, (1866) 1 Q B 289.

Criminal P. C., prevented the P. P. from applying for and the Court from consenting to, a withdrawal against one of the accused for the purposes of his giving evidence against his fellow accused. In 25 Bom 422 (12) the same argument was raised, and Candy, J., at p. 425, said:

Reference was also made by the learned counsel to S. 343; but that evidently refers to the examination of the accused under S. 342.

In that case Whitworth, J., differed from Candy, J., but Ranade, J., to whom the case was referred for final decision, agreed on the whole with Candy, J. That question does not arise because there is no evidence here that "influence by means of any promise or threat or otherwise" was used to the accused person "to induce him to disclose or withhold any matter within his knowledge." In 33 Cal 1353 (13), Mitra, and Holmwood, JJ., delivered a joint judgment in which at p. 1357 they said that:

Section 494 of the Code authorizes the Public Prosecutor as representing a Local Government in this country to withdraw a prosecution against anyone of a number of accused, and thus obtain a verdict of discharge or acquittal so far as such person is concerned. On such a discharge or acquittal he becomes a competent witness against other persons accused of the same offence. The disability to be examined as a witness on oath against the persons who are brought before the Court on the same indictment may thus cease on the withdrawal of the indictment against him.

In 45 All 226 (14) at p. 230 Mears, C. J., said:

There is no provision of Indian statute law nor is there any provision of natural justice, which makes an accomplice as such, an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. The prosecution is not evading the provisions of S. 337, Criminal P. C., when it puts into the witness box an accomplice in the commission of the offence to which that section does not apply.

The matter was also considered in 56 Cal 1023 (1). In that case the authorities, English as well as Indian, were considered by Dwarka Nath Mitter, J., who said at p. 1030:

My conclusions, therefore, are (1) that S. 337 of the Code does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon with all the safeguards mentioned in the said section; (2) that the language of S. 494 is very wide and gives a discretion to the Magis-

trate as to whether he would consent to withdrawal of a prosecution by the Public Prosecutor, such discretion to be exercised not arbitrarily, but must be based on correct legal principles, (3) that the Chief Presidency Magistrate has not, in the present case exercised the discretion wrongly in relying on the discretion of the Public Prosecutor in withdrawing the prosecution against Bijay in order that his evidence may be available after his discharge against the petitioner Raman who has been jointly tried with him on charges of conspiracy and cheating.

On principle and authority therefore, I am of the opinion that the answers to questions (1) and (2) must be "Yes". I wish however to add this: S. 337, Criminal P. C., which only applies to the offences of a more serious character therein specified, provides safeguards in the interests both of the Crown and the accused. I think in cases where S. 337 is available it is better that the accused should be dealt with under that section. I am however far from saying that even where S. 337 can be applied it is contrary to law to discharge the approver under S. 494 (a). It must be remembered that the approver dealt with under S. 337 gives his testimony with a contingent charge hanging over his head; also that the evidence of an accomplice whether dealt with under S. 337 or discharged under S. 494 (a), or acquitted under S. 494 (b), is the evidence of an approver and as such open to suspicion. I will now deal with questions Nos. 3 and 4. Under the Bengal Suppression of Terrorist Outrages Act, 1932, it is provided in S. 26 (1).

In the trial of any case under this Act, a Special Magistrate shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates: Provided that the Special Magistrate shall not be bound to adjourn any trial for any purpose unless such adjournment is, in his opinion, necessary in the interests of justice. (2) In matters not coming within the scope of sub-s. (1), the provisions of the Code, so far as they are not inconsistent with this Chapter, shall apply to the proceedings of a special Magistrate; and for the purposes of the said provisions the special Magistrate shall be deemed to be a Magistrate of the first class.

Section 34 reads as follows:

The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Chapter, shall apply to all matters connected with, arising from or consequent upon a trial by special Magistrates.

Section 337, Criminal P. C., gives power, in the case of certain offences of which the present is admittedly one, to

12. The Queen-Empress v. Hussein Haji, (1901) 25 Bom 422=2 Bom L R 1095.

13. Banu Singh v. Emperor, (1906) 33 Cal 1353 =10 C W N 962=4 Cr L J 145.

14. Emperor v. Har Prosad, 1923 All 91=77 I O 961=45 All 226=25 Cr L J 497.

certain tribunals including Magistrates of the first class of which the Special Magistrate is one, as stated above, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, to tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof: By S. 1-A the Magistrate shall record his reasons for tendering the pardon. By sub-s. (2) the person accepting the tender of pardon shall be examined "in the Court of the Magistrate taking cognisance of the offence and in the subsequent trial, if any." By sub-s. (2-A), in every case where a person has accepted a tender of pardon and has been examined under sub-s. (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be; (3) such person, unless he is already on bail, shall be detained in custody until the termination of the trial. S. 339 provides for the subsequent prosecution of the person who has been conditionally pardoned if the Public Prosecutor certifies that, in his opinion, such person has not complied with the condition on which the tender was made. It also provides that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at his trial that he has complied with the conditions upon which the tender was made, in which case the prosecution must prove that such conditions have not been complied with; sub-s. (2) provides:

The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

Sub-section (3) provides:

No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Sections 339-A and 340, 341 and 342 contain further provisions for the protection of the pardoned person on or in respect of his trial for giving false evi-

dence. In the present case after Nalini was put back into the dock, Gouranga was tendered a pardon by the Special Magistrate under the provisions of S. 337 and his evidence was received against the three appellants. It is said that the Special Magistrate had no power to tender a conditional pardon under S. 337 to Gouranga because the duty of the Special Magistrate was to try Gouranga and not to pardon him. I cannot accept that view. The Special Magistrate was charged with the duty of trying the appellants together with Nalini and Gouranga. It not infrequently happens in a trial that the only way in which justice can be done is through one of the accused giving evidence on behalf of the Crown, and if this evidence is given according to law, there is nothing wrong in it though as the evidence of an accomplice it is open to suspicion. S. 337 provides the terms on and the machinery by which the pardon, for the purpose of giving evidence, can be granted by the Magistrate, and in my view the Magistrate was acting within his powers in granting the conditional pardon.

It was next contended that the Special Magistrate having tendered a conditional pardon to Gouranga was bound, under S. 337 (2-A), to commit the other accused for trial to the Court of Session or the High Court, but that as he was directed to try the accused himself and therefore could not commit them to the Sessions or the High Court, the whole of the provisions of S. 337 are nugatory in this case, from which it follows that if he is to try the accused, he cannot pardon any one of them under S. 337. In my view this contention is not sound. Under S. 26 (2), Bengal Suppression of Terrorist Outrages Act, 1932, the provisions of the Code so far as they are not inconsistent with this Chapter (that is, Ch. 2), shall apply to the proceedings of a Special Magistrate;" and by S. 34 of the same Act

The provisions of the (Criminal Procedure) Code in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this chapter (that is Ch. 2), shall apply to all matters connected with, arising from or consequent upon a trial by Special Magistrates.

From that it follows in my view, that the Magistrate may, acting under S. 337 (1) tender a conditional pardon, and under S. 337 (2) examine the pardoned man as a witness in his Court, but must, acting

under the Bengal Suppression of Terrorist Outrages Act, 1932, try the accused himself instead of committing him for trial to the Court of Session or the High Court as S. 337 (2-A) of the Code provides. In the case of 60 Cal 652 (2) a Special Magistrate tried certain prisoners under the provisions of Ordinance 2 of 1932. The Ordinance provides in S. 37 (1):

In the trial of any case under this Ordinance a Special Magistrate shall follow the procedure laid down in sub-s. (1) of S. 32 for the trial of cases by a Special Judge.

Sub-section (2):

In matters not coming within the scope of sub-s. (1), the provisions of the Code in so far as they are not inconsistent with this Ordinance shall apply to the proceedings of a Special Magistrate; and for the purposes of the said provisions, the Special Magistrate shall be deemed to be a Magistrate of the first class.

Section 52:

The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this Ordinance.

It will be noticed that Ss. 37 and 52 of the Ordinance are respectively essentially the same as Ss. 26 and 34, Bengal Suppression of Terrorist Outrages Act, 1932. In 60 Cal 652 (2), one of the accused was granted a conditional pardon under S. 337 by the Special Magistrate and he then proceeded to give evidence against his co-accused before the Special Magistrate who dealt with the case and sentenced the prisoners. It was objected on appeal that the Special Magistrate had no power to tender a conditional pardon and afterwards dispose of the case himself, instead of sending it to the Sessions or the High Court. The appeal from the conviction was dismissed. Rankin, C. J., at p. 654 said:

It is right to notice the contention that was put forward to the effect that the proceedings before the Special Magistrate were bad. It is said that his having tendered pardon to the approver, sub-s. 2-A, S. 337, Criminal P. C., made it obligatory upon him to commit the accused for trial to the Court of Session. It is not disputed that, under the Ordinance (2 of 1932), he certainly could not commit the accused for trial to any Court of Session. When we look at the Ordinance, we find that there is an express provision that the provisions of the Code are to apply in the case of Special Magistrates so far as they are not inconsistent with the Ordinance, and similar phrasing is used more elaborately in S. 52 and also in connexion with Sessions Judges in S. 32. It makes no difference whatever, so far as I can see, whether

the Magistrate tendering the pardon had been the District Magistrate and not the Magistrate trying the case. The provisions of sub-s. (2-A) would apply equally, whoever had been the Magistrate tendering the pardon, and it is quite clear that the Special Magistrate is the Magistrate who, under the Ordinance, is to try the case. Unless therefore we were to hold that no approver could ever give evidence before a Special Magistrate, the appellants would not succeed in making the argument logical. But it is quite clear that, in so far as the Ordinance is inconsistent with sub-s. (2-A), the Ordinance prevails and there is no ground for supposing that it is impossible for the Special Magistrate to hear the evidence.

In my respectful view the judgment of Rankin, C. J., is correct and applies to the present case. 60 Cal 652 (2) was followed by S. K. Ghose and Henderson, JJ., in the case of 39 C W N 698 (3), and also by Guha and Nasim Ali, JJ., in two unreported cases—Appeals Nos. 844 and 845 of 1933. For the reasons I have given above, I am of opinion that the answer to Questions Nos. 3 and 4, in each case, is "Yes."

Mukerji, J.—I agree in the order that my lord the Chief Justice proposes to make in these appeals, setting aside the convictions and sentences of the three appellants concerned in them. Quite apart from any question of regularity or otherwise of the procedure adopted at the trial of the prisoners, the evidence of the approver Gouranga, which forms the backbone of the case against them, is, to my mind, utterly unconvincing. And if that evidence requires corroboration, as in my opinion it does, if the well-established rules as to the necessity for corroboration of the evidence of an approver are to be applied, the corroboration, such as there is in the other evidence and circumstances of the case, fails to reach the requisite standard, either in quality or in quantity. On the question of procedure, there was in the trial one irregularity far more serious than others, if any, to which my Lord has referred in his judgment, and which in its character is so fundamental that it is impossible to uphold the result in which the trial ended: I mean the illegality of putting Nalini back into the dock as a co-accused with the prisoners and so depriving them of the opportunity of cross-examining him after he had been examined as a witness for the prosecution. It did not matter in the least, so far as this part of the procedure is concerned, that

Nalini's evidence, as against the prisoners, amounted to very little; he had been examined as a witness against them and they had an undoubted right to get from him such evidence as they could, by questioning him by way of cross-examination. The adoption of a procedure which put it beyond the power of the prosecution to tender Nalini for such purpose and thus depriving the prisoners of a right which they never lose under the law except under certain specified conditions of which this certainly is not one, has vitiated the trial altogether. These are my views on the matters that have arisen on this reference, apart from the questions which have been specifically referred for our decision.

Turning now to the four questions which the referring Bench has formulated for our decision, they may be conveniently dealt with in two groups: Questions (1) and (2) in group 1, and questions (3) and (4) in group 2. The former raises the question whether the Court may consent to the Public Prosecutor withdrawing from the prosecution of any person, under the provisions of S. 494(a), Criminal P. C., for the purpose of obtaining that person's evidence as a witness. And the latter raises the question whether a special Magistrate appointed under S. 24, Bengal Suppression of Terrorist Outrages Act, 12 of 1932, has power to tender a pardon, under the provisions of Section 337, Criminal P. C., or otherwise. Upon the view that I take of the matters involved in these questions it would be more logical for me to deal with the second matter first. I may say at the outset that I have not been able to understand why the words "or otherwise" have been appended in Question (3), for I am not aware nor have I heard anything in the course of the arguments before us that there is any power in a Magistrate to tender a pardon under any law other than the provision contained in S. 337 of the Code. For reasons I shall presently give, I am unable to agree with my Lord in answering the question in the affirmative.

The jurisdiction of Special Magistrates to try offenders is conferred by S. 25 of the Act the words of which in my opinion are very important. The relevant words are:

(1) Where in the opinion of the Local Government etc. . . . there are reasonable

grounds for believing that any person has committed a scheduled offence etc. . . . the Local Government or the District Magistrate, as the case may be, may, by order in writing, direct that such person shall be tried by a Special Magistrate.

(2) Where in the opinion of the Local Government there are reasonable grounds for believing that any person has committed etc. . . . the Local Government, by order in writing, direct that such person shall be tried by a Special Magistrate.

There can be no question upon the plain words of the section that what the Special Magistrate may be directed to do by the Local Government or the District Magistrate, as the case may be, is that a person who comes within the purview of the section shall be tried by him. What is the meaning of the word 'trial' used in connexion with a proceeding in Court? The word is not defined in the Act or in the Code of Criminal Procedure, parts of which have been incorporated into the Act by the Act itself. The word therefore has to be understood in the ordinary lexicographical meaning. 'Trial' is; the hearing of a cause, civil or criminal, before a Judge according to the laws of the land. "Trial" is to find out by due examination the truth of the point in issue or question between the parties, whereupon judgment may be given: Wharton's Law Lexicon quoting Co. Litt. 1246.

In the Oxford Dictionary the meanings of the word given under the heading 'Law' are:

1. The examination and determination of a cause by a judicial tribunal; determination of the guilt or innocence of an accused person by a Court. 2. The determination of a person's guilt or innocence, or the righteousness of his cause by a combat between the accuser and the accused, etc.,

It is this idea of the determination of the guilt or innocence of the person who is tried that forms the fundamental conception of the trial that is held in respect of him. When therefore some competent authority directs that an accused person shall be tried, the trial that is to take place can end only in one or other of the recognised forms in which the trial can terminate: under the Code of Criminal Procedure such forms are,—conviction, acquittal, discharge, i. e. finding him guilty or not guilty or finding that there is no case against him or that the charge is groundless. In my opinion, it is a point of importance to note that the words used in the section are that "such person shall be tried." And I am further of opinion that if a Magistrate proceeds to tender pardon to an accused

person he stops his trial and does something which he has no jurisdiction to do. He thereby ceases to proceed with the trial of that particular accused person, the object of which is to determine his guilt or innocence and does something which is not covered by the direction under which he has jurisdiction to act. No doubt, in a case in which a prosecutor withdraws from the prosecution of an accused, the trial of that accused is also stopped; but such act is the act of the prosecutor.

But it may be said, as indeed it has been said, that there are two other sections of the Act which should not be overlooked—Ss. 26 and 34.

Section 26 says:

(1) In the trial of a case under this Act a Special Magistrate shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates: Provided that the Special Magistrate shall not be bound to adjourn any trial for any purpose unless such adjournment is, in his opinion, necessary in the interests of justice; (2) in matters not coming within the scope of sub-section (1) the provisions of the Code, so far as they are not inconsistent with this Chapter, shall apply to the proceedings of a Special Magistrate, and for the purposes of the said provisions the Special Magistrate shall be deemed to be a Magistrate of the First Class. 34. The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Chapter, shall apply to all matters connected with, arising from or consequent upon a trial by a Special Magistrate.

On a reference to these two sections of the Act and especially to the latter, it has been contended on behalf of the Crown that there is no reason why the provisions contained in S. 337, Criminal P. C., should not apply to a trial by a Special Magistrate to the extent that it is not inconsistent with the provisions of Chap. 2 of the Act, in which Ss. 24, 25, 26 and 34 occur. Now it is agreed on all hands that a Special Magistrate has no power to make an order of commitment to the Court of Session. But it will be seen that that is so, not because of any express provision contained in the Act but only because such Magistrate is only authorised by the provision which lays down his jurisdiction, namely S. 25 of the Act, to try the accused, and for no other reason. To deprive him of his jurisdiction to commit, which as a Magistrate of the First Class trying a warrant case he undoubtedly has under proper circumstances, it is the meaning of the

word 'trial' I have referred to above that is assumed. There it is his duty to try as distinguished from his power to commit for trial, that is relied upon. Why should not then the same meaning of the word "trial" be appealed to in order to hold that he is not competent to tender a pardon?

To explain the matter further I give an illustration. The procedure of the trial of warrant cases is detailed in Ch. 21 of the Code. Under S. 254 of the Code, when the Magistrate holding a trial under that procedure finds that a *prima facie* case has been made out against an accused person, he frames a charge; but he does so only if he finds that the offence *prima facie* disclosed is one which he is competent to try and which could be adequately punished by him. But if he finds that the offence disclosed is one which, though he is competent to try cannot be adequately punished by him, he adopts the procedure laid down in S. 208 of the Code, that is to say, being satisfied that there are sufficient grounds for committing the accused for trial frames a charge, and resorts to the procedure in the sections following which lead up to the commitment. Now a Special Magistrate is empowered by S. 27 of the Act to pass any sentence authorized by law, except a sentence of death or of transportation or imprisonment for a term exceeding seven years. If he finds a *prima facie* case made out and he is competent to try for the offence but cannot adequately punish the offender, he cannot commit the accused to the Court of Session but has got to try the accused all the same, and give him such sentence as he may. Why? Only because he has been asked to try the accused; that is to say determine the question of his guilt and bring the trial to a recognized form of termination. If this meaning of the word trial debars him from making an order of commitment, it is the same meaning which, in my opinion, debars him from tendering a pardon.

My second reason for holding that a Special Magistrate cannot avail of the provision as to tendering pardon is that I am not prepared to read S. 337 of the Code except as laying down one complete and indivisible procedure relating to an incident in the trial of the case, namely, as to tender a pardon to an accomplice. I use the expression 'trial of a case' ad-

visedly, because the scheme of the Code, as I understand it, is to deal with offences and cases relating to offences and not with offenders. Under the Code it is the offence of which cognizance is taken and trial is held, it is the cases relating to the offences which are committed to the Sessions and so on. The position is very different under the Act, for under the Act the direction is that it is the person who shall be tried. But be that as it may, an investigation into the history of S. 337 of the Code, tracing its origin to the Code of 1861, and noting the successive changes that it underwent in the Codes of 1872 and 1882 and then in the present Code, has convinced me that the provision first got into the Code as one particular incident in the trial, and that the mere fact that in the Code of 1872 that provision was divided into several paragraphs and later on in the Codes of 1882 and in the present Code the same provision was divided into several sub-sections would not justify us in reading that one provision as consisting of a group of provisions, separate and separable from one another. For over sixty years, since 1872, every Magistrate tendering a pardon has known that by doing so he is taking a step which, if it succeeds, will deprive him of jurisdiction to try the accused persons other than the accused person who is pardoned and it is only if the step fails that he would be able to proceed with the trial against all the accused persons including him. When he takes the step he expects to get rid of the trial, and it is, therefore, to my mind, a step which cannot be regarded as a legitimate step open to a Special Magistrate to take. Besides the right of the other accused persons to have the case committed, in case the tender of pardon is accepted and the pardoned accused is examined as a witness is a right which is so concomitant to a right to fair trial that in the absence of an express declaration by the legislature to that effect I should not be prepared to hold that the legislature has taken away that right, not openly but by a side wind as it were.

I am not prepared, therefore, to take S. 337 of the Code in compartments, and to hold that all the compartments, with the exception of that which ensures the right to have the case committed to the Court of Session, may be availed of by

the Special Magistrate. As regards the cases mentioned in Question (4), namely 60 Cal 652 (2), 39 C W N 698 (3) and Appeals Nos. 844 and 845 of 1933, I find that it is the first one on which the others depended. So far as the first one is concerned it is no doubt a case, not under the Act with which we are concerned but under Ordinance 2 of 1932, but its authority in my opinion is not to be discounted on that ground, for the two pieces of legislation are almost *pari materia*. On reading the decision with care, however, I have come to be of opinion that the contention that a Special Magistrate has no power to tender a pardon under S. 337 of the Code, which is the question before us, was not the contention urged in that case. What was contended in that case was that a Special Magistrate having tendered pardon to the approver was bound to commit the accused for trial to the Court of Session. This contention was overruled on the ground that unless the Court were to hold that no approver could ever give evidence before a Special Magistrate the appellants would not succeed in making the argument logical because it was quite clear that under the ordinance the Special Magistrate was to try the case. At the end of the decision there is an observation that "there is no ground for supposing that it is impossible for the Special Magistrate to hear the evidence."

But no reasons are given in support of this proposition, and it does not appear that any ground for that supposition was at all put forward for the consideration of the Court. So far therefore as the second group of questions is concerned, my answers are the following:

Question 3.—No.

Question 4.—The case of 60 Cal 652 (2), if it meant to decide to the contrary, and the other cases referred to in the question, in so far as they did so decide, were wrongly decided. I now take up the first group of questions. So far as this part of the reference is concerned, I cannot help thinking—and I say this with the utmost deference to the referring Judges—that it discloses some misconception as regards the law such as it undoubtedly is. The proposition contended for is that S. 494 of the Code is not intended to and may not be used for the purpose of obtaining the evidence of an accused. This proposition has been

sought to be supported by the following process of reasoning:

Firstly, there is S. 337 which makes special provisions for this purpose and contains proper precautions and safeguards under which tainted evidence of accomplices and approvers may be made available; and therefore, it is said—and here I quote the words used in the reference:

If, therefore, in such circumstances it was open to the prosecution with the consent of the Court to proceed by way of S. 494, instead of S. 337, the whole of the salutary safeguards provided in the latter section could be avoided and the section nullified.

Secondly, it has been pointed out in the reference that while S. 337 specifically lays down the procedure for taking such tainted evidence and finds place in Chap. XXIV headed 'General provisions as to inquiries and trials' in Part VI:

Proceedings in prosecutions, S. 494 comes under Chap. 38 headed "of the Public Prosecutor" in part 9, "Supplementary Provisions."

And thirdly, as observed by the referring Judges:

one of our main reasons for holding that S. 494 may not be used for the purpose of obtaining the evidence of an accused persons is that, under (9) thereof, he is merely discharged and not acquitted and thus must give his evidence under fear of further prosecution.

So far as the first of these reasons is concerned it seems to have been overlooked that S. 337 is available for obtaining the evidence of approvers not in all trials but only as regards trials concerning some graver offences. Curiously enough, the same misconception appears to pervade the arguments that were addressed to the Court in 56 Cal 1023 (1) in which the position taken up was that "if S. 494 could serve such a purpose, S. 337 would be redundant." To make these arguments logical, therefore, it will have to be maintained that the legislature never intended that in case of lesser offences, evidence of approvers and accomplices should be ever availed of. That argument would be too bold to deserve consideration; and indeed the referring Judges have nowhere suggested that that should be the position in law. Such a position would be utterly untenable and would find no support whatever in any decision of any Court in this country, so far; while on the other hand any amount of authority may be cited in support of the position that

so long as an accomplice is not jointly tried he is a competent witness at the trial of his confederates, whether such accomplice is not to be tried, or is awaiting trial or has been tried and convicted or acquitted or discharged. If S. 494 may not be used for withdrawing a prosecution as against an accused person who is being jointly tried with others, there would be no means left to examine him as a witness against the others in a case in which S. 337 is not applicable. And if it be permissible to examine an accomplice as such witness when he is not to be tried or has been already tried, whatever the result of such trial may have been, there is hardly any reason apparent why by simply putting him forward as a co-accused for a time the prosecution is precluded from using him as such witness. The existence of S. 337 therefore to my mind does not necessarily exclude the idea of S. 494 being used for a similar purpose.

As regards the second reason, it should not be overlooked that the Code only deals with such matters as have a direct bearing upon the procedure which obtains in it. S. 337, with its provision for tendering pardon, examining the pardoned accused as a witness if he accepts the pardon, and so on, lays down the procedure for these purposes; and such procedure appropriately finds mention in Ch. 24, headed "General Provisions as to enquiries and trials" in Part 6, "Proceedings in Prosecution." S. 494 concerns withdrawal of prosecutions which, except for the consent which the Court may or may not give for the purpose, is a matter falling within the authority and function of the Public Prosecutor and so not inaptly it has been placed in Ch. 38 headed, "Of the Public Prosecutor" in Part 9 "Supplementary Provisions." I am not of opinion that any assistance is derivable for our present purposes from the fact that the sections are placed as stated above. As regards the third reason all I desire to state is that the Indian Legislature has nowhere, except in S. 337 of the Code, shown any such anxiety as it has been credited with by the referring Judges, namely that it intended to exclude evidence given by an accused person under fear of further prosecution. However salutary the principle may be that a person who is under fear of further prosecution should not be trusted to give true evi-

dence, that principle finds no expression in any enactment. And even according to the procedure contained in S. 337 the pardoned approver is not totally free from the apprehension of a further prosecution. The referring Judges have expressed the view that Mitter, J., was under a misapprehension in his appreciation of the English law on the subject. My Lord has already dealt with this matter in his judgment. In construing the provisions of this Code in which the procedure to be followed has been detailed, we need not assume that the principles of English criminal law either substantive or procedural, were intended to be adhered to. On the contrary as pointed out by Lord Halsbury, L. C., in (1885) 10 App Cas 675 (15), that the words of the statute by virtue of which the Indian Legislature has enacted the Indian Acts, "are words under which the widest departure from criminal procedure as is known and practised in this country (meaning England) have been authorized in Her Majesty's Dominions." I have had occasion to consider the terms of S. 494 in 60 Cal 233 (16), and I then said:

The legislature not having defined the circumstances under which a withdrawal is permissible it would not be right to attempt to lay down any hard and fast rule circumscribing the limits within which the withdrawal may be made. . . . S. 494, in my opinion, contemplates action to be taken, more often than not upon circumstances extraneous to the record of the case: inexpediency of a prosecution for reasons of State, necessity to drop the case on the ground of public policy, credible information having reached the Government as to the falsity of the evidence by which the prosecution is supported and other matters of that description.

I adhere to the view that I thus expressed of the general scope of S. 494. If the prosecution, in order to avail of the evidence of an accused as against his co-accused, consider it necessary to withdraw from the prosecution as against him the section, in my opinion, would warrant such a course on the ground of public policy. But the withdrawal is dependent on the consent of the Court; and therefore the Court in order to see whether it should consent or not will have to enquire into the reasons which prompt the withdrawal. And

if the Court finds that S. 337 with its statutory safeguards is open to be availed of it will be a sound exercise of its discretion to withhold consent. So also I should think the Court would be justified in withholding consent if it finds that the expected evidence will not be relevant or material or necessary. Similarly perhaps would the Court be right in refusing to consent if it finds that the accused in whose favour the withdrawal is proposed was the principal offender and the purpose will be equally achieved if the case as against some other accused who took a lesser part in the offence is allowed to be withdrawn. But no hard and fast rule can possibly be laid down for the guidance of the Courts as regards a matter which is essentially a matter of discretion.

It will be noticed that question (1) of the Reference is confined to Cl. (a), S. 494. Apparently the referring Judges were of the view, and that obviously is the correct view, that none of the reasons upon which their view of Cl. (a) is based will support such view in respect of Cl. (b). It is clear, therefore, that if that view is to be accepted it will have to be held that one part of the section may be legitimately used for getting the evidence and the other cannot. The correct view to take of S. 494, in my opinion, is to hold that a withdrawal under that section either under Cl. (a) or under Cl. (b) is a simple withdrawal unconditioned and unconditional. The Court is concerned only with the question whether the ground for the proposed course is such as would justify it in giving its consent. If the Court finds that the object of withdrawing from the prosecution is to avail of the evidence of the particular accused and the circumstances of the case are such that it would further the ends of justice to have his evidence and that S. 337 is inapplicable, the Court will not be wrong in giving its consent. What the public prosecutor will or will not do thereafter, in a case in which the withdrawal has been under Cl. (a) with the effect of a discharge, is a matter which is no concern of the Court. But I think it is only fair that I should say that I have never in my experience come across any case, except this one, in which when the evidence of the discharged accused has failed to reach the required standard he has been again put on his trial for the

15. *Riel v. The Queen*, (1885) 10 A C 675=55 L J P C 28=54 L T 389=16 Cox C C 48.

16. *Giribala Das v. Madar Gazi*, 1932 Cal 699=1932 Or C 654=142 I C 891=34 Or L J 433=36 O W N 928=60 Cal 233.

same offence. If a public prosecutor who makes an application for withdrawing from prosecution against some accused person has some idea concealed in his mind that in case that accused does not give true and proper evidence he will again put him up for trial for the same offence, then he entertains in his mind a desire or a hope that is unknown to the law, which it is his duty to respect. And a course of that kind, though there is nothing expressly said against it anywhere in the law, would produce what in my view would be a most unseemly spectacle. Unfortunately such treatment was meted out to Nalini in the present case.

My answers to the first group of questions are the following :

Q. 1. Yes, but not in a case in which S. 337 of the Code may be availed of.

Q. 2. Yes, because 56 Cal 1023 (1), was a case in which S. 337 of the Code was not applicable.

It follows from the answer that I have given to the four questions referred that, if I were to decide these appeals upon the points raised in these questions, I would have held that it was illegal on the part of the Special Magistrate to examine Gouranga as a pardoned accomplice, and therefore his evidence could not be used against the appellants; and that Nalini was rightly allowed to be examined as a witness on his discharge under S. 494 of the Code. But in any case, as I have already said, Nalini not having been tendered for cross-examination, the whole trial was vitiated.

Panckridge, J.—Since the facts have been set out in full in the judgment of my Lord the Chief Justice I need not recapitulate them. The learned Advocate-General concedes that the evidence on the record does not justify him in asking the Court to affirm the conviction of the appellants. He also conceded that the course taken by the prosecution in reviving the proceedings against Nalini in such circumstances that the appellants were deprived of their right of cross-examination is an irregularity, which, apart from the merits of the case, makes it impossible for the Crown to succeed. The only course therefore open to us is to allow the appeals and acquit the appellants. I have no doubt that in these circumstances we should, strictly speak-

ing, be justified in declining to answer the questions propounded by the Division Bench. On the ground the appeals can be disposed of without answering them. I think however that it is not desirable to take this course, first because it was not until we had heard an elaborate argument on behalf of the appellants on the points raised by the Division Bench that the Advocate-General informed us of the position taken up by the Crown, and secondly, because I understand that the same points arise in appeals now pending, and it appears reasonably certain that sooner or later the decision of a Full Bench will be necessary.

In considering the first two questions we must of course leave out of account the irregularities which occurred subsequent to the consent given by the Special Magistrate to the application of the Public Prosecutor to withdraw from the prosecution of Nalini under S. 494, Civil P. C. In other words we must assume that Nalini never again became a co-accused with the present appellants, and that the present appellants had all the opportunities of cross-examining him that the Code provides in the trial of warrant cases by Magistrates. I turn now to the first question :

(1) Whether the Court may consent to the Public Prosecutor withdrawing from the prosecution of any person, under the provisions of S. 494 (a), Criminal P. C., for the purpose of obtaining that person's evidence as a witness. The question is framed in precise language and rightly so, we are only called upon to consider those cases, where the circumstances are such that, if the Court in its discretion permits the Public Prosecutor to withdraw, the result of such permission will be that the accused is discharged under S. 494 (a). I wish to emphasize this because the appellants have sought to establish a proposition much wider than is necessary for a negative answer to the question. It is plain that what impressed the Division Bench was that, in their opinion, no reliance can be placed upon the evidence of a witness who, being discharged and not acquitted, is still in jeopardy of again being accused and ultimately convicted of the offence in respect of which he was originally an accused. They say (pp. 117, 126):

The witness would give his evidence well-knowing that under S. 494 (a) he had only been discharged, and that he remained liable to be harassed with another trial unless his evidence were considered by the prosecution to be satisfactory and favourable to their case. This was what happened to Nalini in the present case. Evidence given under such an apprehension would not be likely often to be reliable.

The appellants however argue that at no stage of a trial before a Magistrate should the Public Prosecutor be permitted to withdraw from the prosecution of one of a group of accused for the purpose of obtaining his evidence against the others. They base their contention not so much on the quality of the evidence so obtained, as on the apprehensions, which, it is suggested, the consent of the Magistrate will cause in the minds of the remaining accused. It is pointed out that where a Magistrate tenders a pardon under S. 337 (1), Criminal P. C., the Magistrate, if he thinks that there are reasonable grounds for believing that the accused is guilty of an offence, must under sub-s. 2-A commit him for trial to the Court of Session or High Court even although the case is one triable by himself. It is suggested that the reason for this is that in giving his consent to the withdrawal the Magistrate is "helping the prosecution", and that thereafter the remaining accused persons will suspect, possibly quite unjustifiably, that the Magistrate has made up his mind as to their guilt.

Reference was made to 10 C W N 848 (17), where it was held that a Magistrate, specially empowered under S. 30, Criminal P. C., to try cases exclusively triable by a Court of Session, could not after tendering a pardon under S. 337 (1) try the case himself, and that he was subject to the restrictions imposed by S. 337 sub-s. 4, as it then stood. This case does not appear to me to throw any light on the matter. I asked counsel for the appellants whether, if the proposition for which he was arguing was correct, it did not follow as a result, that it would be impossible in a trial before a Magistrate for the prosecution to tender the evidence of an approver except in those cases covered by S. 337 (1). In reply to my question counsel stated that it would always be open to the prosecution to have the ac-

cused tried separately, in which case each accused person would be a competent witness against or on behalf of such of his fellow accused as were being tried in different proceedings but for the same offence: 23 Bom 213 (18), 45 Cal 720 (19). I can only say that if such a course is legal, as it apparently is, the objections to it are fully as strong as any that can be urged against permitting withdrawal from the prosecution under S. 494. With regard to the narrower question propounded by the Division Bench, there is nothing in the Code to suggest that the legislature has intended to fetter the discretion of a Court in giving its consent to withdrawal under S. 494 where the circumstances are such that the accused will be discharged and not acquitted. The discretion however is a judicial discretion, and it appears to me that in cases, where it is open to the prosecution to obtain the approver's evidence by applying for the tender of a conditional pardon under S. 337 (1), the Magistrate must keep the provisions of that section before him when he exercises his discretion. I am disposed to go further, and to say that as a general rule the discretion will be wrongly exercised in such cases if the consent is given before the charge is framed. For reasons that I shall give shortly I am of opinion that the Magistrate in this case had power to tender a conditional pardon under S. 337 (1). No grounds have been suggested why the Magistrate should not have tendered a conditional pardon to Nalini, and I am therefore of opinion that he exercised his discretion wrongly.

Subject to the observations I have made I would answer questions 1 and 2 in the affirmative. I would remark that the case of 56 Cal 1023 (1) was one to which S. 337, Criminal P. C., had no application. I would also draw attention to and express my agreement with the observations of Meares, C. J. and Pig-gott, J., in 45 All 226, 230 (14):

There is no provision in Indian Statute Law, nor is there any principle of natural justice, which makes an accomplice, as such, an incompetent witness in respect of the offence in the commission of which he was an accomplice. The prosecution is not evading the provisions of S. 337, Criminal P. O., where it puts into

18. *Empress v. Durant*, (1899) 23 Bom 213.

19. *Akhoy Kumar Mookerjee v. Emperor*, 1919 Cal 1021=45 I O 999=22 C W N 405=19 Cr L J 663=45 Cal 720.

17. *Paban Singh v. Emperor*, (1906) 10 O W N 847=4 Cr L J 44.

the box an accomplice in the commission of an offence to which that section does not apply.

I have now to consider Questions Nos. 3 and 4. (3) Whether a Special Magistrate appointed under S. 24, Bengal Suppression of Terrorist Outrages Act 12 of 1932, has power to tender pardon, under the provisions of S. 337, Criminal P. C., or otherwise. (4) Whether the cases of 60 Cal 652 (2) and 39 C W N 698 (3), and Appeals Nos. 844 and 845 of 1933 were upon this point rightly decided. The relevant provisions of the Bengal Suppression of Terrorist Outrages Act, 1932 are the following: Under S. 24, the Local Government has power to invest any Presidency Magistrate and certain Magistrates of the First Class with the powers of a Special Magistrate. Under S. 25 the Local Government has power by order in writing to direct that a person suspected of committing certain offences (including the offences with which these appellants were charged) or offences under the Arms Act, 1878 be tried by a Special Magistrate. Under S. 26, sub-s. 1 in the trial of any case under the Act such Special Magistrate is to follow the procedure prescribed by the Criminal Procedure Code for the trial of warrant cases by Magistrates. Sub-section 2, S. 26, is as follows:

In matters not coming within the scope of sub-section (1) the provisions of the Code, so far as they are not inconsistent with this Chapter, shall apply to the proceedings of a Special Magistrate and for the purposes of the said provisions the Special Magistrate shall be deemed to be a Magistrate of the First Class.

The only other relevant section is S. 34:

The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable, shall apply to all matters connected with, arising from or consequent upon a trial by Special Magistrates.

What we have to decide is whether the provisions of S. 337 (1), Criminal P. C., giving a Magistrate power to tender a pardon on condition that the person to whom the pardon is tendered do make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence, and the provisions of S. 337 (2) directing that every person accepting such a tender shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence, are inconsistent with the Bengal Suppression of Terrorist Outrages Act: for if they are not inconsistent they will apply to trials by Special

Magistrates by reason of Ss. 26 (2) and 34 of the Act. The appellants submit that a broad interpretation is to be given to the word "provisions" in Ss. 26 (2) and 34. S. 337, Criminal P. C., provides a definite machinery, whereby in certain cases the prosecution may obtain the evidence of an approver against his co-accused in cases tried by a Magistrate.

First there is the tender of the pardon, then, if it is accepted, examination by the Magistrate, then, if a prima facie case against the accused is made out, committed to the Court of Sessions or the High Court. It is argued that if S. 337 cannot be applied in its entirety then its provisions are "inconsistent" with the Bengal Suppression of Terrorist Outrages Act within the meaning of Ss. 26 (2) and 34 of the Act. I agree with the contention that it makes no difference whether the section is subdivided into numbered sub-sections, as it is now, or not so sub-divided, as was the case before 1923. In my opinion however the various powers and directions given to Magistrates by S. 337 are so distinct and independent that each is a provision within the meaning of the Local Act. The position would be different if under the Code as soon as the conditional pardon were accepted the Magistrate at once lost seizin of the case, and was bound to transfer it or commit the accused to another Court. This however is not so, for under sub-s. 2 the Magistrate has then to examine the person who has accepted the pardon, and his evidence becomes evidence in the case. Neither the power to tender the pardon, nor the obligation to examine the recipient of the pardon, can reasonably be said to be inconsistent with the Local Act, though the obligation to commit the accused to another Court is admittedly so. Two other arguments must be noticed. It has been suggested that the Special Magistrate is only clothed with power to "try" the accused under S. 25 Local Act and not with the power to "pardon." This argument seems to me to construe "try" and "trial" in an artificial and unnecessarily narrow fashion. S. 337, Criminal P. C., is part of Ch. 24 which contains "General Provisions as to Inquiries and Trials," and the power to tender a pardon can be exercised "at any stage of the investigation or inquiry

into, or the trial of the offence." In this case four persons were being tried together, and in my opinion the Special Magistrate authorized under S. 25 (1) had all the powers which the Code confers on Magistrates trying such cases, save such powers as are clearly inconsistent with the Local Act. Finally the appellants base an argument on a comparison of the Bengal Suppression of Terrorist Outrages Act, 1932, with the Bengal Criminal Law Amendment Act 1925. It is pointed out that by S. 7 of the earlier Act, the provisions of the Code, so far only as they are not inconsistent with the provisions of, or the special procedure prescribed by, or under the Act shall apply to the proceedings of Commissioners appointed under the Act, and such Commissioners shall have all the powers conferred by the Code on a Court of Sessions exercising original jurisdiction. Under S. 5 (1) the Commissioners have power to take cognizances of offences without the accused being committed to them for trial, and in trying accused persons they are to follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates. By S. 8 (1) Commissioners are given power to tender pardon. By sub-s. (2) where the pardon has been tendered and accepted before the order for trial by Commissioners has been made, the provisions of S. 337 (2) and (3) are to apply as if the accused person had been committed for trial to the Commissioners.

It is argued that sub-s. 1, S. 8 shows that in the opinion of the Legislature S. 7 did not confer upon Commissioners the power to tender pardon given by S. 338, Criminal P. C. to the Court of Sessions and the High Court. I do not think any guidance can be obtained from the former Act, as the construction of the Act with which we are dealing seems reasonably clear. It may be the words "after commitment" and "the Court to which commitment is made" in S. 338, Criminal P. C. seemed to the legislature likely to create a difficulty and that for greater caution S. 8 was inserted in the Act of 1925. I have therefore arrived at the conclusion that questions 3 and 4 must be answered in the affirmative.

The case 60 Cal 652 (2), which is referred to in question 4 and which has been followed in the subsequent cases, was a case tried under Ordinance 2 of

1932, the relevant provisions of which correspond to Ss. 26 and 34, Bengal Suppression of Terrorist Outrages Act 1932. The argument is not reported, and it was suggested that the point now raised by the Division Bench was not decided in that case. It was sought to be inferred from certain observations of Rankin, C. J., that the case only decides that a Special Magistrate, who has tendered a pardon, has no power to commit for trial under sub-s. 2-A of S. 337, Criminal P. C. This view is perhaps confirmed by what is, in my opinion, an inaccurate and unsatisfactory head-note. Reading the whole of the learned Chief Justice's judgment I have no doubt at all that so ridiculous a submission as that the Magistrate had such a power was never made to him, and that the point decided by that Division Bench was substantially the same as the point formulated by the Division Bench making this reference.

M. C. Ghose, J.—I agree with my Lord the Chief Justice.

Bartley, J.—I agree that these appeals must be allowed on the merits, but that we should not therefore decline to answer the questions propounded by the Division Bench, though we are strictly speaking entitled to do so. I am of opinion that all the questions so propounded must be answered in the affirmative. On the first question: S. 494, Criminal P. C., contains no reference to the object of withdrawing from a prosecution. It simply empowers the Public Prosecutor, with the consent of the Court, to withdraw proceedings, and defines the effect of this procedure. In the case which we are called on to consider, that effect is the discharge of the accused. The section does not deal with what may happen after that discharge or lay down any considerations which apply to the exercise of the Court's discretion to grant or refuse consent.

In view of the provisions of S. 337, the evidence of an accomplice is available to the prosecution, and the Court cannot be said to make an improper use of its discretion in consenting to the discharge of an accused on the ground that it is proposed to examine him as a witness. Nothing in the Code expressly limits the discretion given by S. 494 and the position that a discharge for the purpose of obtaining the evidence of an accused is

contrary to the spirit of the Legislature does not appear to me to be in the least degree a sound position. It has been said that such a procedure is by way of bargain and should not be allowed; secondly that it must tend to affect the confidence of the accused on trial in the impartiality of the Court. Now the law provides for a conditional pardon in specific cases. I do not therefore think that there is anything contrary to its spirit if the Court consents to the withdrawal of a charge in order that the accused may be put into the witness box. Further, the Court, in the exercise of its discretion, cannot refuse to consider the interests of all the parties who are before it. I agree however that in cases to which the provisions of S. 337 apply, it is a better exercise of discretion on the part of the Magistrate to use that section instead of S. 494. With regard to the third question referred by the Division Bench, the answer depends on the interpretation of a statute which modified the previous law governing the conduct of criminal trials. I agree with the interpretation placed on the relevant sections of that statute in the judgment of Panckridge, J., and cannot usefully amplify what has there been said.

Final Judgment.

The result is that the appeals are allowed, the convictions quashed and the accused are acquitted. The appellants, as they are on bail, will be discharged from their bail bonds. This order however does not entitle the appellant Saroj Bhusan Roy alias Topa Roy to be released if he is undergoing imprisonment in respect of some other offence.

K.S./R.K.

Appeals allowed.

A. I. R. 1936 Calcutta 372

NASIM ALI AND EDGLEY, JJ.

In the matter of P, a Pleader, Rangpur.

Civil Rule No. 163 of 1936, Decided on 18th March 1936.

Legal Practitioners Act (1879), S. 13 (f)—Certificate under R. 6 of Rules framed under S. 6 containing false statement regarding probationer—Case falls under S. 13 (f).

Where a legal practitioner intentionally gives a certificate under R. 6 of the rules framed under S. 6, which contains false statements or statements which are misleading, he brings himself under S. 13 (f). [P 373 C 2]

Bijan Kumar Mukerji—for the Crown.

Atul Chandra Gupta and *Jitendra Kumar Sen Gupta*—for Pleader.

Order.—This is a rule upon Babu Probhat Chandra Bhattacharya, a pleader of Rangpur to show cause why he should not be suspended or dismissed under S. 13 (f), Legal Practitioners Act. The facts on which the rule was issued by this Court are these: Babu Probhat Chandra took Moulvi Md. Shafiuzzaman as a probationer for one year from March 1933 to 1934. The said probationer accepted the whole time appointment of a teacher in the Kailash Ranjan High English School in Rangpur from 1st August 1933. On 10th December 1934, the pleader granted the following certificate to the probationer: I Probhat Chandra Bhattacharya, a pleader practising in the District Courts of Rangpur certify that M. Shafiuzzaman has duly and faithfully served me as a probationer for the period required by the rules and in my opinion he is a fit and proper person to be admitted as a pleader in the District Courts of Rangpur subordinate to the High Court. The rules referred to in the certificate are the revised rules for the training of legal practitioners in the subordinate Courts framed by this Court under S. 6, Legal Practitioners Act. These rules came into force on 1st January 1930. R. 6 of these rules lays down that during the period of probation the probationer shall work with the pleader in and outside Court and such work shall be that of assisting the pleader in his professional work as a pleader. By R. 10 the pleader who takes a probationer is permitted to charge a fee of Rs. 50 for his remuneration for the training he gives to the probationer. By R. 12 the probationer has got to file with the District Judge a certificate in the prescribed form on the completion of the period of probation. The certificate which was given by the Pleader Probhat Babu to M. Shafiuzzaman on 10th December 1934 was given in pursuance of the rule in the prescribed form.

The question is whether the statements in this certificate bring him under S. 13 (f), Legal Practitioners Act. The pleader does not deny that the probationer accepted the whole-time appointment of a teacher in the High School mentioned above from 1st August 1933, and that he granted the certificate. He however says that he had no knowledge during the period of probation that the probationer was acting as a teacher since

August 1933. He admits that the probationer is his neighbour and lives in the Rangpur town which is about 2 to 3 minutes' walk from his home. He also admits that the probationer used to come to his house almost every morning and that he used to call him to his house whenever he required his assistance. If he required the assistance of the probationer in his house in connexion with his professional work why did he not ask him to assist him in Court? His explanation is that he did not require the assistance of the probationer as his practice was confined to ex parte cases, Small Cause Court suits, rent suits and execution matters. But if for such a practice assistance was required in his house I cannot imagine why similar assistance would not have been availed of by him while he was conducting Small Cause Court suits and rent suits in Court if such assistance was in fact available to him. I am of opinion that the probationer was not assisting the pleader in Court not because the pleader did not require his assistance but because his assistance was not available during Court hours, as he was working somewhere else during this period. I cannot believe that the probationer who is a neighbour of the pleader and who used to come to him almost every morning to his house never told him that he was working somewhere else and that the pleader was ignorant of the fact that the probationer was employed elsewhere.

Again in the certificate it is stated that the probationer duly served him as a probationer. By R. 6 the probationer is to work with him in and outside Court. Admittedly he did not serve him in Court. Why did he then state that the probationer duly served him. The word "duly" means in accordance with the rules framed by this Court. The pleader does not say and it is not open to him to say that he did not know the rules. He however says that the rules framed by this Court regarding qualifications of pleader, etc., not having duly defined the duty of a pleader in relation to a probationer, he could not realize how he failed in this connection. But he took him as a probationer under the rules framed for the training of legal practitioners in Subordinate Courts and he was entitled to get remuneration for the training given. It was his duty to give him training in

Court also. In his explanation he says that he did not consider it necessary for the probationer to work with him in Court as he had already acted as a pleader for two years at Muzzfarpur. He was not entitled to take this view of his duty as in spite of the practice of the probationer as a pleader in a different province he was required to enrol himself as a probationer for the purpose of being trained as a legal practitioner in this province. His certificate unmistakably shows that he certified that the probationer served him duly under the rules, i. e., in and outside Court. This statement is highly misleading if not false. From the facts and circumstances of the case it is clear that the pleader knew full well that the probationer was acting as a whole-time teacher in the local High School during the major part of the period of probation and in spite of this knowledge he intentionally gave the probationer a false or at any rate a misleading certificate about the training of the probationer in order to enable the latter to get permission to practise as a pleader. It must be remembered that the certificate of the pleader who takes a probationer for training is taken as a proof that the probationer has been trained as required by this Court.

If therefore a pleader intentionally gives a certificate which contains false statements or statements which are misleading he brings himself under S. 13 (f), Legal Practitioners Act. The next question is how the pleader is to be dealt with. Although we take a serious view of the matter, nevertheless having regard to the fact that the rules relating to the training of probationers have been recently introduced, we think that the ends of justice will be sufficiently met if he be suspended for a week. The pleader is accordingly suspended for a week from the date on which this order is communicated to him by the District Judge.

V.B./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 373

JACK, J.

Aditendra Nath Mitter and others—
Accused—Petitioners.

v.

*Bhupati Bhushan Sen Gupta—*Complainant—Opposite Party.

Criminal Revn. No. 1015 of 1935, Decided on 17th March 1936.

(a) Calcutta Improvement Act (5 of 1911), S. 171—Word "re-erect" should have its ordinary meaning.

The word "re-erect" in S. 171 has not the same meaning as defined in S. 3, Cl. 39, Calcutta Municipal Act, and should be interpreted in its ordinary meaning. [P 374 C 2]

(b) Calcutta Improvement Act (5 of 1911), S. 171—If more than one person joined, each can be fined Rs. 500.

Where more than one person join in erection of a building, they are each liable to fine extending to Rs. 500 and there is no illegality if the fine imposed on all amounts in all to an amount exceeding Rs. 500. [P 375 C 1]

N. K. Basu and Satyendra Nath Ghose—for Petitioners.

D. N. Bhattacharji—for the Crown.

Satindra Nath Mukherji—for Opposite Party.

Order.—This rule was issued calling upon the Chief Presidency Magistrate of Calcutta as well as upon the Chairman of the Calcutta Improvement Trust to show cause why the convictions and sentences under S. 171, Calcutta Improvement Act, passed upon the petitioners should not be set aside. The offence complained of was that the accused had put up structures in premises Nos. 14 to 23, Jackson Lane, Calcutta, without the permission of the Improvement Trust and without an agreement as required by S. 63 (8), Improvement Trust Act. The question is whether the accused have infringed the provisions of S. 171, which lays down that:

If any person, without the permission of the chairman required by S. 63, sub-s. (8) erects, re-erects, or adds to any wall (exceeding ten feet in height) or building which falls within the street alignment or building line of a projected public street shown in any plan sanctioned by the Local Government under the said section shall be punishable.

The grounds on which this rule is supported are (1) that there has been no re-erection of any building within the street alignment and (2) that in any case there has been no reconstruction or re-erection according to the plan Ex. 15, which the accused submitted. After the previous plan had not been accepted, this was the plan which was submitted by the accused as one according to which he proposed to construct a new building. As regards the first point it turns on the meaning of the word "re-erect." It is claimed by the petitioner that the word "re-erect" is to be interpreted according to the meaning of that word in the Calcutta Municipal Act of 1899. In S. 3, Cl. (39)

of that Act it is laid down that the expression "re-erect" when used with reference to a building includes the reconstruction of a building after more than one-half of its cubical extent has been taken down or burnt down or has fallen down. It is argued that as the Calcutta Improvement Act of 1911 is a subsequent Act, and since the Improvement Trust and the Calcutta Corporation were working hand in hand, the same meaning should be attributed to the word by the Improvement Act as that put upon it in the Municipal Act. On the other hand, it is pointed out that there is no definition of the word "re-erect" in the Improvement Act, but in S. 2 it is stated that certain expressions, namely, drain, public street and street alignment, have the same meaning as in certain clauses of S. 3, Calcutta Municipal Act, the inference being that had the intention been to give any special meaning to the word "re-erect," it would have been mentioned amongst the definitions in S. 2, Improvement Act, and that otherwise the meaning should be the ordinary meaning of the word, and that it was for the Court to decide whether in fact what had been done amounted to re-erection. I think there is considerable force in this argument.

In the absence of any definition of the word "re-erect," I think it should have its ordinary meaning. Otherwise there was no reason, if it was intended that "re-erect" should be used in any other meaning than its ordinary meaning, why it should not have been defined in the Act itself. If then, it is used in its ordinary meaning, the finding of the Presidency Magistrate is that there has been re-erection in this case and the judgment shows that there has in fact been a considerable amount of re-erection, though it is admitted by the opposite party that if the meaning of re-erection in the present case coincided with the definition of the word as given in the Municipal Act, the work done would not amount to re-erection. In this view of the matter, the first contention of the petitioners fails. Then as regards the second contention, the charge is constructing structures in premises Nos. 14 to 23, Jackson Lane, without the permission of the Improvement Trust. It was not construction according to one plan or the other, and if it is found that the accused actually con-

structed structures on the premises in question, they come under the Act since it appears that no sanction was given to the erection of any structure on the premises whether according to one plan or the other. The petitioner has pointed out that according to the evidence, no construction has been made according to the plan, Ex. 15. But it cannot be said, in view of the findings, that there has been no re-erection. It was open to the petitioner to contend before the Presidency Magistrate that what had been actually done did not amount to re-erection. But in view of the findings that in fact there was re-erection of the building, this contention must also fail.

Another ground that the petitioners urge is that the sentence is much too severe. In this connection it is argued that under S. 171 the fine may extend to Rs. 500, whereas in this case the fines imposed on the five petitioners will amount in all to Rs. 750 and that therefore it is illegal. Under S. 171 any person who erects a building without sanction is liable to a fine of Rs. 500. So that where more than one person joined in erecting a building, they are clearly each liable to a fine extending to Rs. 500. There is therefore nothing illegal in the amount of the fine. On the other hand, it has been pointed out that these proceedings have been pending for about a year and in view of the conduct of the petitioners, the fine is not too severe. Considering the fact that the petitioners have no doubt been able to utilize these buildings erected without sanction for the period of a year, I see no reason to interfere with the decision of the Presidency Magistrate who is in a better position to assess the amount of the fine than this Court sitting in revision. The Rule is, accordingly, discharged.

V.B./R.K.

*Rule discharged.***A. I. R. 1936 Calcutta 375**

NASIM ALI AND EDGLEY, JJ.

Gopal Chandra Chanda and others—
Defendants—Appellants.

v.

C. K. Nag & Co., Ltd. and others—
Plaintiffs—Respondents.

Appeals Nos. 2054 to 2074 of 1933,
Decided on 12th March 1936, from ap-
pellate decrees of Dist. Judge, Khulna,
D/- 30th June 1933.

(a) Bengal Tenancy Act (8 of 1885), Ss. 52—
What determines liability of tenants to pay
additional rent stated.

The words "area for which rent has been previously paid" mean the area with reference to which rent was assessed or adjusted. In order therefore to prove the area for which rent was being previously paid it is not necessary for the plaintiff to prove the area of the tenancy at its inception, and in order to determine whether the landlord is entitled to additional rent the question which has to be solved is whether the tenant is in occupation of the land for which no rent has been assessed and for which he is bound to pay rent. If since the date of the last assessment he has encroached on adjoining waste of the landlord he is liable for rent for the land encroached. If he has not encroached upon the adjoining waste and is in occupation of the same area which he possessed when the rent was last assessed he may be liable to pay the additional rent if it is proved that rent was not assessed at a consolidated sum upon the entire area found in his possession but upon an assumed area or upon an area determined by measurement as the area in his possession : 1928 Cal 553 and 1921 Cal 345, *Rel. on.* [P 376 C 2]

(b) Bengal Tenancy Act (8 of 1885), Ss. 105 and 109—Proceedings under S. 105—Claim for additional rent for unassessed land of tenancies not pressed—Suit for enhancement of rent is not barred.

Under S. 109 the withdrawal or failure to press the claim for additional rent for unassessed lands of the tenancies under S. 105 proceedings does not preclude the landlord from suing the tenant in civil Court for increasing the rent of tenancies : 1932 Cal 207 and 1936 Cal 307, *Rel. on.* [P 377 C 2]

*Bireswar Bagchi and Prem Ranjan Ray Chaudhury—*for Appellants.

*Atul Chandra Gupta, Rajendra Nath Das and Ganga Prosad Bose—*for Respondents.

Judgment.—These 21 appeals arise out of as many suits for recovery of arrears of rent. Plaintiffs' case briefly stated is as follows : Plaintiffs are the proprietors of 4 mouzahs in Touzi No. 98 appertaining to Pergana Salimabad. These 4 Mouzahs constitute Bandabasti Taluk Bisweswar Ray Chaudhury. Under the said Taluk there are tenancies of different grades held by the defendants in these suits. By a Robakari of the Commissioner of Sunderbans dated 1st July 1850, the rates of rent per standard bigha of 80 cubits payable by the tenants of different grades in respect of all the tenancies under this taluk are fixed. During the last settlement survey the lands of the tenancies in all the suits except suits Nos. 46 and 51 have been found on measurement by the same standard to be in excess of the area

which were assessed at the rates fixed in the year 1850. Plaintiffs therefore are entitled to get additional rent for the unassessed lands of their tenancies according to the rates mentioned in the Robakari. In Suit No. 62 rent for the years 1335 to 1337 B. S. has been claimed. In the other suits the claim is for the years 1334 to 1337 B. S. Plaintiffs also claim cesses at a certain rate for 1334 and 1335 B. S. and at a different rate for the subsequent period. In Suit No. 64 plaintiffs prayed for enhancement under S. 30 (b), Bengal Tenancy Act. The defences common to all the suits are :

(1) That S. 109, Bengal Tenancy Act, is a bar to the plaintiffs' claim for additional rent. (2) That the rent for each of the tenancies in suit is a consolidated rent fixed for the entire land of each of these tenancies. (3) That the entire amount of rent for the period in suit has been paid. (4) That the plaintiffs are not entitled to claim cesses at the rate mentioned in their plaints.

The learned trial Judge decreed the suits in part on the following findings :

(a) That S. 109, Bengal Tenancy Act, as it stood before the Bengal Tenancy Amending Act of 1928, is a bar to the plaintiffs' claim for additional rent in Suits Nos. 14, 47, 49, 50, 56, 59, 62 and 63.

(b) That the plaintiffs are entitled to get additional rent for increase in areas in Suits Nos. 13, 52, 53, 54, 55, 57, 58 and 61 at 8 annas per bigha of excess land.

(c) That the plaintiffs are entitled to get cesses at the rate of 6 pies per rupee for the period previous to the last quarter of 1336 B. S. and at the rate mentioned in the Valuation Roll, Ex. 5, for the subsequent period.

(d) That the plaintiffs are entitled to get enhancement of rent at the rate of 8 annas per rupee under S. 30 (b), Bengal Tenancy Act, in Suit No. 64.

(e) That the pleas of payment taken by the defendants have been substantiated in part.

The plaintiffs and the defendants both appealed to the lower appellate Court. The learned District Judge has dismissed all the appeals excepting the appeal by plaintiffs in Suit No. 64 which was allowed by him. Hence these second appeals by the defendants ; plaintiffs have also filed cross-objections. The first point

urged by the learned Advocate for the tenants is that the facts found by the lower appellate Court are not sufficient to establish the liability of the tenants to pay additional rent for the excess lands of their tenancies. By S. 52, Ben. Ten. Act, a tenant is liable to pay additional rent for all lands proved by measurement to be in excess of area for which the rent had been previously paid by him. Now the words "area for which rent has been previously paid" mean the area with reference to which rent was assessed or adjusted. [See the case of 55 Cal 680 (1)]. In order to prove the area for which rent was being previously paid it is not necessary for the plaintiff to prove the area of the tenancy at its inception. In order to determine whether the landlord is entitled to additional rent the question which has to be solved is whether the tenant is in occupation of the land for which no rent has been assessed and for which he is bound to pay rent. If since the date of the last assessment he has encroached on adjoining waste of the landlord he is liable for rent for the land encroached. If he has not encroached upon the adjoining waste and is in occupation of the same area which he possessed when the rent was last assessed he may be liable to pay the additional rent if it is proved that rent was not assessed at a consolidated sum upon the entire area found in his possession but upon an assumed area or upon an area determined by measurement as the area in his possession. [See the case of 25 C W N 204 (2)]. From Ex. 1, dated 1st July 1850, and Ex. 6, dated 24th July 1850, the two Robakaris of the Commissioner of the Sunderbans, the following facts appear :

(1) That the Bandobasti Taluk in question was a part of the Sunderbans in Pergana Salimabad in the District of Bakargunj. (2) That the Mouzahs included in that Taluk were resumed. (3) That in 1850 the Mouzahs were permanently settled with certain Zemindars of Pergana Salimabad. (4) That at the time of this permanent settlement the Board of Revenue fixed 8 annas as revenue payable by the permanent settlement holders to Government for each

1. Gocool Chunder Law v. Jamal Biswas, 1928 Cal 553=111 I C 107=55 Cal 680.
2. Durga Priya Chaudhury v. Nazra Gain, 1921 Cal 345=62 I C 453=25 C W N 204.

standard bigha of 80 cubits. (5) That in the course of this settlement on the application of certain Sikmi tenure-holders the rates of rents payable by the subordinate tenants of different grades to their immediate superior landlords per standard bigha of 80 cubits were settled by the Sunderbans Commissioner and were accepted by all the subordinate tenants. (6) That these rates give the Sikmi tenure-holders, that is the middlemen, a certain amount as profit per bigha of 80 cubits. (7) That a Jamabandi was directed to be prepared in accordance with the rates settled and accepted by the subordinate tenants.

The Jamabandi has not been produced. It appears however that at the time of settling the mehal permanently the revenue for the mehal was settled at 8 annas per bigha. Ex. 6 shows the total amount of revenue payable to Government for the mehal in question. There cannot be any doubt therefore that the area of the mehal in question was ascertained by measurement before the total amount of revenue payable for the mehal was fixed. The dakhilas granted to the tenants after 1850 show the areas of the different tenancies as so many bighas, cottas and chataks, and the amounts of rent payable for those areas were worked out by applying the rates settled and accepted by the tenants in 1850; there is no evidence in these cases to show that in 1850 the tenants were in possession of these excess lands which have now been found to be in their possession. We are therefore of opinion that the lands in the possession of the tenants in 1850 were measured in 1850, and areas for which the rent was assessed in 1850 are the areas shown in the dakhilas and that the excess areas which have now been found to be in the possession of the tenants were not assessed in 1850 and are therefore unassessed lands. The Courts below were therefore right in assessing these excess lands. The second point urged on behalf of the tenant is that in determining the present areas of each of these tenancies at least 5 p. c., should be deducted for closeness of survey from the area found by measurement in the course of the District Settlement operation. The learned Advocate for the landlord does not seriously dispute this point. This contention is therefore accepted. The third point urged by the learned

Advocate for the appellants is that the Courts below were wrong in not enquiring into the legality and correctness of the appropriation of payment on account of rent and cesses by the landlords in respect of all the 42 jamas held by the defendants under the plaintiffs. This contention has no substance because the tenants did not produce any materials which could enable the Courts below to make such investigation.

The last point taken by the learned advocate for the appellants is that in suit No. 64 the Courts below were wrong in enhancing the rent under S. 30 (b), Ben. Ten. Act. This contention is well founded and the position is not seriously contested by Mr. Gupta appearing on behalf of the respondents. Plaintiffs' claim for enhancement of rent under S. 30 (b), Ben. Ten. Act, in this suit is therefore disallowed. As regards the cross-objections the first point urged by the learned Advocate for the plaintiffs is that the Courts below were wrong in dismissing the plaintiffs' claim for additional rent in suits Nos. 14, 47, 49, 50, 56, 59, 62 and 63. It appears that the plaintiffs instituted proceedings under S. 105, Ben. Ten. Act, before the Revenue Officer for additional rent for unassessed lands of the tenancies which are the subject-matter of these suits. The claims for additional rent however were not pressed before him with the result that S. 109, Ben. Ten. Act, precluded the plaintiffs from suing the tenants in the civil Court for increasing the rent of these tenancies. In view of the decision in 35 C W N 1147 (3) and our decision in Second Appeal No. 563 of 1934 (4) we overrule this contention.

The next point urged on behalf of the plaintiffs is that the Courts below are wrong in holding that the plaintiffs are not entitled to get cesses at the rate of more than six pies per rupee before the first quarter of 1336 B. S. It appears however that the plaintiffs did not produce the Valuation Roll before the trial Judge. On appeal they asked the learned District Judge to take a certified copy of the Valuation Roll as additional evidence. The learned Judge refused the prayer of

3. Gosta Behary Pramanik v. Nawab Bahadur of Murshidabad, 1932 Cal 207=136 I C 606=35 C W N 1147.

4. Suprabat Chandra v. Bhupati Bhusan, 1936 Cal 307.

the plaintiffs. The same prayer has been repeated before us. The learned Judge did not accept the explanation given by the plaintiffs for not filing the Valuation Roll in the trial Court. We see no reason to differ from the learned Judge in this matter. There are no materials therefore on which we are in a position to say that the rate of cesses which is payable by the tenants is higher than what has been decreed by the Courts below. The last point urged by the learned Advocate for the plaintiffs concerns the plea of payment. The onus of substantiating this plea is upon the tenants. It is true that they made certain payments from time to time. But they did not declare the year or the years and the instalment to which they wanted the payments to be credited. The plaintiffs therefore were justified in crediting these payments to the account of the years previous to the period in suit under S. 55 (2), Ben. Ten. Act. There are no materials on the record to show that this appropriation is wrong. The plea of payment therefore in all these suits fails.

The result therefore is: Plaintiff's claim for enhancement of rent under S. 30 (b), Ben. Ten. Act, in Suit No. 64 and for additional rent for excess area in suits Nos 14, 47, 49, 50, 56, 59, 62 and 63 is dismissed. Plaintiffs are entitled to get additional rent for each bigha of unassessed area that is 19/20th of the present area as stated in the plaint minus the area shown in the plaint as already assessed at the rate of 8 annas in the tenancies which are the subject-matter of suits Nos. 13, 52, 53, 54, 55, 57, 58 and 61 and at the rate of one rupee one anna in the tenancy which is the subject matter of suit No. 64. The plea of payment in all the twenty-one suits is disallowed. The appeals and the cross-objections are therefore allowed in part. The decrees of the lower appellate Court are varied in the manner indicated above. Parties will bear their own costs in these appeals and the cross-objections. The prayer of the learned Advocates for the parties for a direction upon the trial Court to prepare decrees in accordance with our decision in these cases is allowed.

V.B./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 378

GUHA AND BARTLEY, JJ.

Suresh Chandra Dam—Plaintiff—Appellant.

v.

Sm. Marani Dassi—Defendant and another—Respondents.

Appeal No. 79 of 1933, Decided on 11th February 1936, from original decree of Sub-Judge, First Court, Dacca, D/- 12th December 1932.

(a) **Burden of Proof**—Special plea—Pardanashin lady taking special plea that she did not understand nature of transaction entered into by her—She must establish case founded on special plea.

Where in a suit on a mortgage executed by husband and wife the wife, who is a pardanashin lady alleged, that she did not understand what she was doing and that she signed the document on being asked by her husband to do so, the pleas raised by the wife are in the nature of special pleas resting on facts within the knowledge of the party raising them and the burden is on the wife to establish her case founded on the special pleas. [P 380 C 2]

(b) **Pardanashin Lady**—Mere declaration by lady that she did not understand nature of transaction is not conclusive—Person enforcing transaction establishing that document evidencing transaction was free and intelligent act of lady—Transaction is binding on lady.

Although a pardanashin lady is entitled to receive at the hands of the Court the same protection which the Court extends to the weak and infirm and to those who for any other reason are specially likely to be imposed upon by exertion of undue influence over them, still independent legal advice is not essential and is not necessary in every case and the mere declaration by the lady subsequently made that she had not understood what she was doing is not in itself conclusive. It is sufficient if the person enforcing a transaction establishes that the document evidencing the same was the free and intelligent act of the lady. [P 381 C 1]

Where, therefore, in a suit on mortgage executed by husband and wife, the wife who is a pardanashin lady alleges that she did not understand what she was doing and it appears from the evidence that the lady was not a person, who required any special protection and in regard to whom it could not be presumed that any undue influence was exercised on her by her husband or by the mortgagee; but on the other hand the evidence coming from the mortgagees establishes the facts necessary to make the mortgage binding on the lady, namely that the transaction was fair and the lady fully understood the acts to which she was subscribing, the mortgage is binding on her. [P 381 C 2]

S. C. Basak, Rajendra Ch. Guha and Sachindra K. Roy—for Appellant.

Bankim Ch. Banerjee—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for enforcement of two mortgages purported to have been executed by defendants 1 and 2. One of these mortgage bonds in suit was dated 19th July 1926, and it was in favour of the father of the plaintiff; the other mortgage bond dated 15th August 1927, was in favour of the plaintiff himself; and the plaintiff prayed for a mortgage decree on the footing of the two aforesaid mortgages. The claim in suit was resisted by defendant 2, the wife of defendant 1, on the ground that she had no knowledge of the contents of the two documents in suit, and that she had not executed them. On the pleadings of parties, the question for decision in the case was whether defendant 2 executed the mortgage bonds with full knowledge of the terms of the bonds and with full knowledge of the transactions. The decision on that question arrived at by the learned Subordinate Judge in the trial Court was against the plaintiff and the plaintiff's suit was dismissed, so far as defendant 2 was concerned, on the ground that defendant 2 did not willingly or knowingly execute the bonds, and that defendant 2 was not liable for the loans on the bonds. There was a decree passed by the trial Court against defendant 1 alone for the money lent under the bonds in suit.

The plaintiff appealed to this Court; and it was urged in support of the appeal that on the evidence on record the Court below should have held that the plaintiff-appellant was entitled to a mortgage decree against both defendants 1 and 2, the mortgagors. The materials on the record have received our careful consideration. Before however dealing with the evidence in the case, we consider it necessary to refer to the proceedings before the Court below, leading up to the filing of the written statement by defendant 2 in the suit, which call for special notice in view of the position that the mortgage bonds in suit were executed jointly by the husband, defendant 1, who was Gharjamai and the wife, defendant 2, to whom the properties mortgaged belonged. The plaint in the suit was filed on 24th June 1932; there was appearance in the suit by both the defendants by one and the same vakalatnama on 21st July 1932, the same pleaders representing them both. On the same date

an application was filed on behalf of the two defendants, by one of the pleaders who accepted the joint vakalatnama, praying for time for filing written-statement after drafting the same on procuring necessary papers. Application for time for filing written-statement was again made by the two defendants jointly on 28th July 1932, on stating that necessary papers had not been procured till then. The third application for time for filing written-statement and after procuring papers was made on behalf of the defendants "owing to the physical indisposition of the defendant who looks after the case," and the written-statement that was ultimately filed on 23rd August 1932, was one by defendant 2. The material averments of fact made in that written-statement were those contained in Paras. 10 and 11 of the same, which are set out below:

10. About six years before, defendant 1 informed this defendant, who has no knowledge of the affairs of the world, is inexperienced and is a Pardanashin woman, that she would have to execute a document as he was in need of some money and if necessary defendant 1 would also have to put signature to the said document. A few days after that defendant 1 again came and informed her that this defendant would have to go to Court and put her signature there to a document. This defendant accordingly went to the Registration Office in a carriage drawn by horses and sitting in that carriage she put several signatures on two occasions. This defendant never went to the house of the plaintiff and never signed any document there. This defendant does not know to read and write at all. She can only sign her name with great difficulty. No document was read over to this defendant by any one nor did this defendant put her signature after knowing and understanding the contents of the document. The plaintiff or his father did not pay any money to this defendant. This defendant did not obtain any money on the basis of that document.

11. One year after the above, defendant 1 told this defendant that she would have to go to the Registration Office again as she did last year and to sign her name there. Accordingly this defendant went to the Registration Office in a carriage drawn by horses and put several signatures sitting in that carriage on two occasions. This defendant never signed any document at the house of the plaintiff. Nobody read over any document to this defendant, nor did she put her signature after knowing the contents of any document. The plaintiff did not pay any money to this defendant nor did she receive any money on the basis of any document. The bonds in suit are not bona fide documents so far as this defendant is concerned.

It was with reference to the aforesaid statements that the points for decision

in the suit, relating to knowledge of the mortgage transaction question, the execution of the same by defendant 2 were raised. The filing of a written statement by defendant 2 alone repudiating liability under the mortgages in suit in the circumstances cast a doubt as to the bona fides of the defence to the plaintiff's suit, and the circumstances to which reference have been made above, go to indicate community of interest so far as the plaintiff's claim under the mortgages was concerned, and in our judgment throws a great deal of light on the defence ultimately taken up by one of the defendants, resting upon grave aspersions on the other defendant, the husband.

The case before us is not one in which there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, and where the burden of proving good faith of the transaction is on the party who is in a position of active confidence. The case before us was one in which the usual defence open to a pardanashin woman in this country was taken, and in which evidence was adduced by both the parties and the relevant facts are before the Court, and the question of burden of proof was immaterial, and no importance was to be attached to the question on whom the initial onus lay. The entire evidence had to be considered, and on the consideration of the same, decision had to be arrived at.

The parties to the mortgage transactions in question were strangers, and in dealing with them it had to be considered whether one of the parties, a pardanashin woman, was or was not of such intellectual attainment as to be able to comprehend and understand the nature of the transaction, or had the full knowledge of the nature and effect of the transaction into which she is said to have entered. The mortgages in question purported to have been executed by defendant 2 on two different dates are couched in plain and simple language. They were signed by her on all the pages in which they were written. One of the mortgage bonds contains an endorsement that it was read over to the executant, defendant 2 and both of them contain the endorsements by the registering officers that the execution was admitted by defendant 2. The second mortgage bond dated 15th August

1927, appears to have been presented for registration by Marani Dassi alias Hari Dassi Saha, defendant 2.

The execution of the mortgage bonds by defendant 2's attestation of the same, as also the reading over of the documents to her at the house of the creditor, the payment of the mortgage money after execution and deposit of title deeds by the mortgagors, have been proved by witnesses whom we find it impossible to disbelieve. There were discrepancies in matters of detail as between the witnesses speaking to events, after a long interval of time; but we are unable to hold on the evidence before us, that defendant 2 had no knowledge of the contents of the mortgage bonds, or that she did not fully understand the effect of the transaction evidenced by them. On the evidence coming from the plaintiff's side, the special defence raised by defendant 2 had not been established in any way. The part taken by the husband, defendant 1, as mentioned in the written statement of defendant 2, was undoubtedly in the nature of special pleas, resting on facts within the special knowledge of the party raising those pleas; and it was, therefore, incumbent upon that party to establish her case founded on special pleas. Defendant 2 did not make a beginning of a case by leading evidence in support of the case stated by her in her written statement, and repeated in her evidence. The evidence of defendant 2, when examined in the light of the mortgage documents in question, and taken along with the evidence on the side of the plaintiff, which we see no reason to disbelieve in material particulars, appears to us to be altogether unreliable. On the question of defendant 2 being a pardanashin lady, who was inexperienced and who had no knowledge of the affairs of the world, arising on her statements in the written statement, we have arrived at the definite conclusion that her deposition in the case goes against her. She starts with the statement in her examination-in-chief that she was aware of the rate of interest on Rs. 100 or Rs. 150 four or five years back. She asked her husband about the necessity for raising money on loan, but was snubbed by him; but the enquiry about the transaction was there. There was knowledge on her part of deposit of papers, when the loan was raised; and

certain documents relating to title to property were left in the custody of the plaintiff. The documents were not brought back and they were with the plaintiff. She had money-lending business previously, although it was her father who used to look after the business. It could not be suggested that a woman of the defendant's position was competent to look after a business, unaided by her male relation.

The evidence of defendant 2 does not enable us to hold, on the facts and circumstances appearing from evidence, that she was a person in whose case, it was necessary for a creditor suing upon a mortgage to establish that she had independent and disinterested advice when entering into the mortgage transactions in question. Defendant 2 was, regard being had to her intellectual capacity and experience of the world, fully able to comprehend the nature of the mortgage transaction, and the application in the case before us, of the general principles and formulae applicable to a case of a pardanashin woman would undoubtedly lead to denial of justice to an honest creditor, who on the evidence, took all necessary precautions in the matter of transactions to which defendant 2 was a party.

The facts and circumstances of the case before us lead to the definite conclusion that the mortgages sought to be enforced by the plaintiff in the suit, were binding against defendant 2 and that the defence of that defendant denying her liability under the mortgages was not a bona fide one. As it has been indicated already, independent legal advice is not essential, and is not necessary in every case; and the mere declaration by the lady subsequently made, that she had not understood what she was doing, was not, obviously in itself, conclusive; it is sufficient if the person enforcing a transaction establishes that the document evidencing the same was the free intelligent act of the lady; the evidence in this case satisfied that test. It is now settled that a pardanashin woman is entitled to receive, in the Courts in this country, that protection which the Court of Chancery in England extends to the weak and infirm and to those who for any other reason are specially likely to be imposed upon by the exertion of undue influence over them.

That is not however the case now before us. Defendant 2 in the case before us was not upon her own evidence, a person who required any special protection, and in regard to whom it could be presumed that any sort of undue influence was exercised by her husband, defendant 1, or by the creditor, who was a stranger, and the evidence coming from the plaintiffs establishes the facts necessary to make the transactions of mortgage binding on her namely that the transactions were fair and that defendant 2 fully understood the acts to which she was subscribing. The result of the conclusions we have arrived at, as mentioned above, is that we are unable to express agreement with the decision of the Court below that Defendant 2 did not willingly or knowingly execute the two mortgage bonds in suit, and that she was not liable for the loans of the bonds. The appeal is allowed; the judgment and decree of the Court below, so far as they relate to defendant 2 in the suit are set aside and the plaintiffs suit is decreed against both defendants 1 and 2 with costs throughout, including the costs in this appeal. An usual mortgage decree in favour of the plaintiff appellant and against defendants 1 and 2, respondents in this appeal, will be drawn up in this Court, in supersession of the decree passed by the Court below.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 381

GUHA AND BARTLEY, JJ.

Annada Prosad Chatterji—Plaintiff—Appellant.

v.

Phanindra Bhushan Ghatak and others—Defendants—Respondents.

Letters Patent Appeal No. 43 of 1935, Decided on 20th March 1936, against judgment of R. C. Mitter, J., D/- 9th August 1935.

Bengal Tenancy Act (8 of 1885), Ss. 159 and 167—Suit for possession of property by purchaser at rent sale—Claim resisted by mortgagee-purchasers purchasing property in execution of their mortgage decree—Mortgage subsisting at date of rent sale—Right of mortgagee is not annulled—Property purchased by mortgagees within one year of rent sale—Purchaser at rent sale is not entitled to possession unless he redeems mortgage.

Where, a claim in a suit for possession of property by a purchaser at rent sale, is resisted by certain persons claiming to be mortgagees

purchasers of the property at a sale in execution of their mortgage decree and it is found that the mortgage was subsisting at the date of rent sale, that the property was purchased by the mortgagees within a year of the rent sale in execution of their decree, and that the rights of the mortgagee under the mortgage were not annulled, the sale under the mortgage does not for all purposes extinguish the mortgage, and the mortgagee who purchases at the mortgage sale can fall back upon the mortgage and use it as a shield against the purchaser at the rent sale and the purchaser is not entitled to possession of the property unless he redeems the mortgage: 1922 P C 11 and 1922 Cal 32, *Rel. on.*

[P 382 C 1, 2]

B. C. Mukherjee and Mukti Pada Chatterjee—for Appellant.

Panchanan Ghose and Sailendra Nath Banerjee—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for possession on declaration of title, and is directed against the decision of our learned brother R. C. Mitter, J., affirming that by the Subordinate Judge, Bankura. The plaintiff prayed relief in the suit instituted by him on the basis of rent sale at which he was the purchaser of the property in litigation, on 22nd November 1923. The defendants who resisted the claim of the plaintiff in the suit, were the mortgagee purchasers at a sale in execution of their mortgage decree; the purchase of the defendants was on 20th May 1924. The case of the defendants was that the plaintiffs not having annulled the mortgage were not entitled to get possession as prayed by them in the suit without redeeming the mortgage. The learned Subordinate Judge in the Court of appeal below gave effect to the defence of the defendants, and the decree passed by him directed payment of the decretal amount of the defendants' mortgage, before he could get khas possession of the lands in suit. The decree so passed by the lower appellate Court was affirmed by Mitter, J., in Second Appeal. In the case before us, the defendants were mortgagees at the date of the rent sale at which the plaintiff was the purchaser; the rent sale was prior in point of time and the defendants purchased the property within a year of the rent sale in execution of their mortgage decree. The right of the defendants under the mortgage was not annulled.

On the facts of the case, about which there is no dispute, the legal position would be the one indicated by our learned brother Mitter, J., in his judgment,

that the sale under the mortgage would not for all purposes extinguish the mortgage; the purchaser at the mortgage sale could fall back on the mortgage, and use it as a shield against the purchaser at a rent sale. This is in consonance with the principle underlying the decision of the Judicial Committee in 48 I A 465 (1), and is in accordance with the decision of this Court in 35 C L J 1 (2), in which it was held, in line with the decision in previous cases, that the mortgagee purchasing property in execution of a decree obtained by him in the suit instituted in the mortgage in which the purchaser at a rent sale was not made a party, does not lose his right to be redeemed by the purchaser at rent sale; and the relative rights of the purchaser at the rent sale and the mortgagee should be determined with reference to this position at the time of the sale. As indicated above, we are in entire agreement with the decision of our learned brother Mitter, J., and this appeal must accordingly be dismissed. The appeal is dismissed with costs.

R.M./R.K.

Appeal dismissed.

1. Sukhi v. Golam Safdar, 1922 P C 11=65 I C 151=48 I A 465=43 All 469.
2. Sital Chandra Majhi v. Parbati Charan, 1922 Cal 32=69 I C 841=35 C L J 1.

A. I. R. 1936 Calcutta 382

D. N. MITTER AND PATTERSON, JJ.

Bejoy Kumar Bhattacharjee and another—Appellants.

v.

(Firm) Satish Chandra Nandi, Jnanendra Nath Nandi, Dharendra Nath Nandi—Plaintiffs and *others*—Respondents.

Appeal No. 264 of 1932, Decided on 7th February 1936, from original decree of Sub-Judge, Second Court, Hooghly, D/- 4th August 1932.

(a) Pleadings — Construction — Variance between plaintiff's pleadings and case alleged at trial—Court must look to plaint, issues and manner in which case was fought to determine if there is variance.

Pleadings should not be construed too narrowly and therefore in dealing with the question whether there has been a variance between a plaintiff's pleadings and the case alleged at the trial, the Court must look not to the mere wording of the plaint, but to the issues which were settled for trial and to the manner in which the case was deliberately fought out by both the parties in the trial Court: 1930 P C 205, *Foll.* [P 384 C 1]

(b) Limitation Act (1908), Art. 85 — Mutual, open and current account involves tran-

sactions on each side creating independent obligations.

In order that a transaction should disclose a case of mutual, open and current account within the meaning of Art. 85, there must be reciprocal demands involving transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations: 1931 Cal 359, *Foll.* [P 385 C 2]

(c) Limitation Act (1908), S. 3—Materials to sustain defence not put before Court—Court can reject plea of limitation in appellate stage.

No doubt the plea of limitation can be urged at any stage having regard to S. 3, but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence, it is difficult for the Court sitting in appeal to give effect to the defence contention and the Court is justified in rejecting it. [P 385 C 2]

Amarendra Nath Basu and Lalit Mohan Sanyal—for Appellant.

Sarat Chandra Roy Choudhury, Panna Lal Chatterji for Nando Gopal Banerji—for Respondents.

D. N. Mitter, J.—This is an appeal by defendants 1, 5 and 6 from the decision of the Subordinate Judge, Hooghly, dated 4th August 1932, by which he decreed the suit of the plaintiff for recovery of a certain sum of money. Defendant 1 died during the pendency of the appeal and his five sons, who are defendants 2 to 6 to the suit, have been substituted in his place as the heirs and legal representatives under the law. The case stated in the plaint is that the defendants purchased from the plaintiff bricks and other materials for the construction of cooly lines of the Brahmanberia Jute Mills. It is alleged in the plaint that the defendant took material of the value of Rs. 12,674-7-0 from the plaintiff between 24th February 1925 and 27th October 1928. The defendants made payments from time to time of the sum of Rs. 8,725-9-9 between 9th April 1925 and 27th February 1929. The plaintiff accordingly sued for the balance of Rs. 3,948-13-3 and to their claim they added the sum of Rs. 1,777-8-0 for interest at the rate of 18 per cent per annum. The total claim was laid at Rs. 5,726-5-3. On 17th August 1928 defendant 1 wrote a letter in favour of the plaintiff in which he agreed to be bound as a surety for the debt of the partnership.

The suit was contested by defendant 1 and his two sons, defendants 5 and 6 who

by their written defence denied liability on the ground that they are not partners of the firm which took the materials and were not liable. They also pleaded limitation of a portion of the claim. They further contended in their written defence that the interest at the rate of 18 per cent per annum was excessive and unconscionable. Several issues were joined in the suit. The Subordinate Judge after taking evidence came to the conclusion that all the defendants were partners and were liable as such. On the question of limitation he reached the conclusion that as the suit which was instituted on 5th May 1931 was within three years of the last payment it was within time and he decreed the plaintiff's claim in full. Against this decision defendants 1, 5 and 6 have taken this appeal to this Court and defendant 1 having died during the pendency of the appeal the appeal is being continued by his heirs. Several points have been argued before us in support of the appeal. It is argued in the first place that in finding that defendants 1, 5 and 6 were partners the Subordinate Judge has gone against the pleadings as the case in the plaint is that defendant 1 was the sole partner and that all these defendants have been made liable because the articles were taken through them and there is absolutely no evidence on the record to show that defendants 5 and 6 were partners. As against defendant 1, it is next contended, the claim on the basis of suretyship cannot stand for the case of the suretyship was not pleaded and even assuming that the case of suretyship is made out, the plaintiff cannot get a decree against defendant 1 on that footing as the plaintiff did not get payment from the principal debtor and the suretyship was consequently discharged. It is argued by the appellant that the claim includes the price of the material after the letter of suretyship was given; and it is argued further that a good portion of the claim was barred by limitation; and lastly it is argued that the question of interest was not properly dealt with by the Subordinate Judge.

We will take the grounds in the order in which we have stated them. In so far as ground 1 is concerned which really rests on the argument that there is a variance between the pleadings and

on the question as to who are really the partners, our attention has been drawn by Mr. Bose, who appears for the appellant, to para. 1 of the plaint, where it is stated that the defendants are a firm of contractors and their firm is known under the name and style of Pelley Brothers. It is also stated then that defendant 1 is the father of defendants 2 to 6 and they live jointly as members of a joint family and the real owner of the firm of Pelley Brothers is defendant 1, and the sons being capable manage the business. It is argued that the Subordinate Judge's finding that all the six defendants were partners of the firm of Pelley Brothers is clearly inconsistent with the statement made in para. 1 where the allegation is that the real owner of the firm is defendant 1. It appears, however, that when the matter came before the Subordinate Judge several issues were framed of which issue 4 was to the following effect :

Who are the proprietors of firm of Pelley Brothers? Have defendants 1, 5 and 6 any interest in it? If not, are they liable for debts due to the plaintiff?

Upon this issue evidence was directed and the issue was deliberately fought out in the Court below. In such circumstances it would not be right for us to hold that the Subordinate Judge was wrong in arriving at the conclusion that all the defendants were partners of the firm even in view of the case as laid in para. 1 of the plaint. In cases of this kind one has to bear in mind certain observations of their Lordships of the Judicial Committee of the Privy Council bearing on the question in 52 C L J 1 (1). In that case it was pointed out by their Lordships that pleadings should not be construed too narrowly and therefore in dealing with the question whether there has been a variance between a plaintiff's pleadings and the case alleged at the trial the Court must look not to the mere wording of the plaint, but to the issues which were settled for trial and to the manner in which the case was deliberately fought out by both the parties in the trial Court. Whatever the statement be in para. 1 of the plaint it appears clear that the parties understood that the real issue was whether all the defendants, including the appealing defendants, were partners or not. In the case before the Judicial Com-

mittee Lord Tomlin pointed out this :

Their Lordships so far as the first suit is concerned, see no reason to differ from the main findings of facts of the trial Judge and are of opinion that the High Court founded themselves upon too narrow a ground in dismissing the suit for variance. Their Lordships are satisfied that notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined.

We do not think therefore that there is any substance in the ground which is raised as to the variance of the pleadings and proof having regard to the course which the trial took after the issues were framed. We do not think that there has been any prejudice in so far as defendants 1 to 6 are concerned. The next point taken is that there is absolutely no evidence to show that defendants 5 and 6 are partners. We do not think that this ground is sustainable seeing that there are a few outstanding facts which leave no doubt in our mind that the partnership consists of the father defendant 1 and his five sons. One of such outstanding facts is that it is admitted by defendant 1, the father, when he deposed before the Commissioner that he gave a sum of about 2½ lacs of rupees in order to enable the sons including the appealing defendants to start this business. We are asked having regard to the evidence given before the Commissioner that he was giving the sum to the other defendants, namely defendants 2, 3 and 4 for starting this business. But as has been pointed out by the Subordinate Judge that the right construction to be put upon the evidence of defendant 1 given before the Commissioner is to hold that he was giving it to all his sons, for it is not likely that he should invest a sum of 2½ lacs of rupees depriving his two younger sons from the benefit of the partnerships. This also appears to be the case from certain correspondence which has been referred to by the Subordinate Judge—certain letters and postcards Ex. 5 and 5 (a). There defendant 1 was writing to the other plaintiff Satis Nundy for taking time to adjust the accounts.

This is only consistent with the circumstance that defendant 1 was a partner. An attempt was made therefore both in this Court as also in the Court below, to show that neither Ex. 5 nor Ex. 5 (a) contains the genuine signature of defendant 1 and this attempt failed before the

Subordinate Judge who had no hesitation in rejecting this contention. He held that the signatures on these two letters were genuine. The two letters Ex. 5 and Ex. 5 (a) are to be found printed at pp. 32 and 33 of the second part of the paper book. It is true that defendant 1 has given a denial to these signatures but the Subordinate Judge is of opinion that the evidence of defendant 1 is of a shifting and prevaricating kind, and that he was unable to place any reliance on it after a careful perusal of it, and it seems to us that the whole object of defendant 1 was to shield defendants 2, 3 and 4 and to make it difficult for the plaintiff to realize his money. We are in entire agreement with the Subordinate Judge after having gone into the entire evidence on this point. With regard to the ground about the liability on the basis of suretyship it is not necessary to come to any conclusion in view of our finding that defendant 1's liability as partner has been established to our satisfaction. The real question on which we have heard the respondent and thought that the case calls for a reply was the plea of limitation. It appears from the finding of the Subordinate Judge on this question of limitation that the issue of limitation was not urged or made out by evidence.

It appears that the Subordinate Judge negatived the plea of limitation on the ground, as he puts it, that the suit was instituted on the 22nd Baishakh 1338 B. S. corresponding to 5th May 1931 and that the claim was within time because the date of the last transaction was Kartick 1335 B. S. This finding of the Subordinate Judge would undoubtedly be justified if the case was treated as one of mutual open and running accounts within the meaning of Art. 85 of the Schedules to the Limitation Act. Having regard to the evidence which has been given in this case it cannot be said that the transaction in this case disclosed the case of mutual open and current account where there has been reciprocal demands. The present case appears to be one in which goods were purchased and payments made in discharge of the price of the said goods. The true test in cases of open and mutual accounts has been discussed in a very elaborate judgment of Sir George Rankin C. J., (as he then was) in the case of 52

C L J 314 (2). After an exhaustive review of the authorities Sir George Rankin summarizes his conclusion as follows:

There can I think be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Holloway, Ag. C. J. transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side. Those on the other being merely complete or partial discharges of such obligations.

The present case is really a case where there are obligations on one side, those on the other side being merely partial discharges of the obligation. The goods were purchased and were paid for. In this view it appears that Mr. Sarat Chandra Roy Choudhury who appears for the respondent does not contest the argument of the appellants that Art. 85 does not apply to this case but concedes that the real article applicable to the present case is Art. 52 for the price of the goods, and that the suit is to be instituted within three years from when the goods were delivered. It appears from the evidence that some of the goods the prices for which were sued for were delivered beyond three years of the date of the institution of the present suit, that is beyond three years of 5th May 1931, and we are told that it will be possible from an examination of the accounts to arrive at a figure which will show the amount that is barred by limitation. But it was not possible, having regard to the state of account books the only material available to the Court, for the learned Advocates on either side to arrive at a very definite figure. In these circumstances we have no other alternative but to hold that this ground cannot be sustained and this contention cannot be given effect to, having regard to the paucity of material on the record of this case. The defendants-appellants are to blame in this matter and to some extent. It is true that the plea of limitation can be urged at any stage having regard to S. 3, Limitation Act, but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence it becomes difficult for the Court sitting in appeal to

2. The Tea Financing Syndicate Ltd. v. Chandra Kamal Bez Barua, 1931 Cal 359=133 I C 801=58 Cal 649=34 C W N 1175=52 C L J 314.

give effect to the defence contention. Before the Sub-Judge the point of limitation was faintly urged, for the learned Judge remarks: "Issues 2 and 3 were not urged or made out by evidence." It seems to us that the trial Judge must have felt the same difficulty which we have felt, viz., paucity of materials to sustain the defence. On these grounds we must regret the contention of the appellant on the question of limitation. In this view the ground which is based on the plea of limitation must also fail.

Having regard to the circumstance that the Subordinate Judge seems from his very brief finding on limitation to have applied a wrong article of the schedules to the Indian Limitation Act to the present case we are of opinion that that circumstance really bears on the question of costs. The defendants had fair reasons for preferring this appeal. In these circumstances we dismiss this appeal, but we do not allow any costs to the plaintiffs-respondents either in this Court or in the Court below. We affirm the decree of the Subordinate Judge except with regard to costs.

Patterson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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GUHA AND BARTLEY, JJ.

Sripati Chandra De and others—Plaintiffs—Appellants.

v.

Kailash Chandra Jana—Defendant—Respondent.

Letters Patent Appeal No. 39 of 1935, Decided on 19th March 1936, against judgment of R. C. Mitter, J., D/- 10th July 1935, reported as 1936 Cal 331.

(a) Bengal Tenancy Act (1885), S. 30 and Amending Act 4 of 1928—Amending Act is not retrospective in operation—Tenancy created before amendment and not holding—S. 30 and Amending Act cannot be combined so as to give landlord right to sue for enhancement of rent.

In the case of tenancy consisting entirely of undivided shares in parcels of lands or partly of entire parcels of lands and partly of undivided share in parcels of lands, S. 30 cannot be combined with the definition of holding as now amended so as to give the landlord the right to sue for enhancement of rent in respect of the tenancy created before Act 4 of 1928 came into force. The Amending Act cannot be given retrospective effect. [P 386 C 2; P 387 C 1]

(b) Interpretation of Statutes—Retrospective effect—Statute taking away or imposing

vested rights under existing law cannot have retrospective effect.

Every statute which takes away or imposes vested rights acquired under existing laws creates new obligation or imposes new duties or attaches new disabilities must be presumed, out of respect for the legislature not to have retrospective operation. [P 387 C 1]

Sarat Chandra Jana and Saroj Kumar Maiti—for Appellants.

Satindra Nath Mukherjee and Amiya Prosad Moitra—for Respondent.

Judgment.—The plaintiffs in the suit in which this appeal under S. 15, Letters Patent, directed against a decision of our learned brother R. C. Mitter, J., has arisen, claimed enhancement of rent under S. 30 (b), Ben. Ten. Act, in addition to the claim for rent with cesses, and the question for consideration now before us relates to the right of the plaintiffs to claim enhancement in the manner mentioned in their plaint. The tenancy in question comprised 13 parcels of land and fraction of three other parcels; and it was not therefore a holding under the Bengal Tenancy Act, before the definition of holding was amended by the Bengal Tenancy Amendment Act 4 of 1928. The defence of the tenant defendant in the suit was that the definition of holding as amended in the year 1928 had no retrospective effect, and as such the plaintiffs as landlords had no right to apply for enhancement of rent under S. 30 (b), Ben. Ten. Act.

The Court of first instance came to the conclusion that no vested right of the defendant was affected by the amendment of the definition of holding; the defendant was an occupancy raiyat under the old law, and he was so now. According to the Munsif, there was a technical flaw to the enhancement of his rent under S. 30, because of something in the nature of a defect or otherwise in the definition of the word holding under the old law, and that has now been removed. On appeal, the Court of appeal below differed from the view taken by the Munsif as mentioned above; and the Subordinate Judge in the lower appellate Court, held that the holding in question was not a holding within the meaning of the old Bengal Tenancy Act, and as such S. 30 (b) had no application. The change in the definition of holding could not legally take away a vested right in the absence of any clear provision in the statute. It was accordingly held by the lower appel-

late Court, that the rent of the holding in question could not be enhanced under S. 30 (b), Ben. Ten. Act. On second appeal to this Court Mitter, J. affirmed the view taken by the Subordinate Judge in the Court of appeal below.

As it has been pointed by the learned Judge Mitter, J. in his judgment, there can be no doubt that if the suit had been decided before the amendment of the definition of holding by Act 4 of 1928, the plaintiff's claim for enhancement on the grounds mentioned in S. 30 (b) would have failed, on the ground that the tenancy in question is not a holding as defined in the Bengal Tenancy Act. The learned Judge has rightly observed, and the position cannot be controverted, that the decisions of this Court on the point are uniform since the year 1898, that a tenancy of the description with which we are concerned in the case before us, could not be treated as a holding, so as to attract the provisions contained in S. 30, Ben. Ten. Act, before the amendment of the year 1928. The tenant in the position of the defendant in the case before us, enjoyed immunity from action for enhancement of rent till the amendment of the definition of holding in the year 1928, and as mentioned by Mitter, J. the question for consideration in the case reduced itself to the simple proposition as to whether S. 30, Ben. Ten. Act could be combined with the definition of holding as now amended, so as to give the landlord the right to sue for enhancement of rent in respect of a tenancy created before Act 4 of 1928 came into force. The question has, in our judgment, to be answered in the negative, for the reason given by the learned Judge, namely that the effect of the amendment was to take away an immunity from enhancement enjoyed by the tenant up to February 1929, when Act 4 of 1928 came into operation, and the provision of the amending Act of 1928 dealing with vested rights could not be given retrospective effect. There can be no controversy as regards the position that every statute which takes away or imposes vested rights acquired under existing laws, creates new obligation or imposes new duties or attaches new disabilities, must be presumed, out of respect for the Legislature, not to have retrospective operation. The creation of a new right in one class of persons is generally atten-

ded with imposition of new obligations on, or the interference with vested rights of other classes. A law therefore creating a new right was generally subject to the rule against retrospective operation. The addition made to the definition of holding by the amending Act of 1928 indicates clearly that the immunity from enhancement under S. 30, Ben. Ten. Act, enjoyed by tenants in respect of tenancies comprising undivided shares of parcels of land was taken away, thus interfering with vested rights of tenants and creating new rights in the landlord so far as the operation of S. 30, Ben. Ten. Act, was concerned, in the matter of enhancement of rent, under certain circumstances, and the amendment could not have retrospective effect.

The contention raised in support of the appeal before us, that the definition of the word holding in the amending Act of 1928 was merely explanatory, does not bear serious examination, seeing that the decisions of this Court are uniform on the question that a prayer for enhancement of rent under S. 30, Ben. Ten. Act, was not maintainable in the case of a tenancy consisting entirely of undivided shares in parcels of land or partly of entire parcels of land and partly of undivided shares in parcels of land, as in the case before us. The previous law as explained by this Court was changed by the amendment made in the amending Act of 1928, by adding words to the definition of the word holding. There can also be no question that the amendment of the definition of holding affected vested rights of tenants, and conferred rights on the landlords, which did not exist before the amending Act of 1928 came into operation, and as such was a substantive provision removing a disability so far as landlords were concerned, and removing immunity so far as tenants were concerned, in the matter of enhancement of rent as contemplated by S. 30, Ben. Ten. Act; and in no way could the amendment introduced in the year 1928 be said to be a part of the law of procedure having retrospective effect. There was nothing contained in the amending Act of 1928 which gave the definition of holding a retrospective operation. In the above view of the case before us the appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 388

R. C. MITTER, J.

Gajendra Nath Mandal—Petitioner.

v.

Kunja Behari Mistri and others—
Opposite Parties.

Civil Rule No. 780 of 1935, Decided on 10th January 1936, from order of Munsif, 3rd Court, Tamaluk, D/- 4th May 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 26-F—S. 5, Limitation Act, does not apply to application under S. 26-F.

Section 5, Limitation Act, has not been extended to applications made under S. 26-F.

[P 388 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 26-F—Application must be made within two months of notice—Where some co-sharer landlord not served with notice, he can apply within reasonable time.

An application for pre-emption based on S. 26-F must be made within two months, but where all the co-sharer landlords have not been served with notice under Ss. 26-C or 26-E, there is no time limit prescribed so far as the landlord not served with the notices and they can file the application within a reasonable time of the transfer: 1932 Cal 289 and 1934 Cal 662, Ref.

[P 389 C 1, 2]

(c) Bengal Tenancy Act (8 of 1885), Ss. 4 (a), 26-F and 188—Application for addition of co-sharer landlord left out must be made within period prescribed by Ss. 4 (a) and 26-F—S. 22, Limitation Act, does not apply.

Where some of the co-sharers landlords file the application for pre-emption, an application for addition of some of their co-sharers landlords as opposite parties must be made within two periods prescribed by S. 4 (a); and S. 22, Limitation Act does not apply to such an application: 1936 Cal 231, Foll.; 1934 Cal 187, Disting.

[P 390 C 1, 2]

Saroj Kumar Maity—for Petitioner.*Narendra Krishna Bose, Durgadas Roy and Bishnupada Mukherjee*—for Opposite Parties.**Order.**—This Rule is directed against the order of the learned Munsiff of Tamaluk, Third Court, by which the application for pre-emption made by the petitioner before me, Gajendra Nath Mandal, under S. 26-F, Ben. Ten. Act, has been dismissed. Opposite Party 14, Promotha Nath Dass, who is the tenant of an occupancy holding, sold 8 acres of land out of his holding to opposite party 1, Kunja Behary Mistry, by a registered conveyance dated 10th October 1933. Gajendra Nath Mandal is the patnidar under one Lilabati Debi, who has 6 annas odd share in the zemindari, and her co-sharers are the opposite parties 1 to 5, 6 (a) to 6 (f), 7 (a) to 7 (c), 8 (a) to 8 (e) and 9 to 13. Promotha Nath Dass held

the occupancy holding under the patnidar and under opposite parties 1 to 5, 9 to 13 and under Bankubehary Chatterjee, Sankhu Behary Chatterjee and Natbar Chatterjee, the predecessors in interest of opposite parties 6 (a) to 6 (f), 7 (a) to 7 (c) and 8 (a) to 8 (e) respectively. Natabar had died on 31st August 1933, i. e. before the transfer, and Bankubehary and Sankha Behary, on 28th March 1934 and 27th July 1934, respectively, i. e. after the transfer. In the notice of the transfer the names of the landlords were stated to be the petitioners, the opposite parties 1 to 5, 9 to 13 and Natbar, Benkubehary and Sankhabehary. Natbar was dead some time before the transfer but still he and not his heirs, the opposite parties 8 (a) to 8 (e), were named as one of the landlords in the notice of transfer.

The notice of transfer was served on the petitioners on 26th December 1934 and he made the application for pre-emption on 21st January 1935. In his application he mentioned the names of opposite parties 1 to 5, 9 to 13, Bankubehary, Sankha Behary and Natbar, as his co-sharer landlords. The heirs of the last mentioned three persons were not made parties, the petitioners apparently proceeding on the assumption that they were still alive. In fact he has made a statement on oath, that he being a patnidar under one of their co-sharers, he did not know of their death at the time when he filed his application for pre-emption, but was for the first time put on enquiry by the objection raised by the opposite party 1 on 23rd March 1935. He states that being put on enquiry he came hurriedly to Calcutta, went to the residence of the said three persons and came to know by proper verification early in April 1934 that the said three persons had died on the dates mentioned above and that their heirs were the opposite parties 6 (a) to 6 (f), 7 (a) to 7 (c) and 8 (a) to 8 (e). These statements of his remain practically uncontradicted, but I do not consider them material as S. 5, Limitation Act, has not been extended to applications made under S. 26-F. He first filed two applications for substitution and later on, being advised that as the said three persons had died before he filed his application for pre-emption, he made an application for adding the heirs of the said three persons as parties

to his application for pre-emption. This application for addition of parties was made on 27th April 1935. It has been rejected by the learned Munsiff, who after rejecting it has held that the application for pre-emption is defectively constituted as all the landlords are not parties and he has dismissed it.

The question therefore is whether the Munsiff was right in throwing away the petitioner's application for addition of parties, for if that action of the Munsiff is right, his order dismissing the application for pre-emption is manifestly right. Before I deal with the said question, I should point out that on the state of the record it may be held that Bankubehary and Sankha Behary had died before the service of the notice of transfer. The position then is this that no notice of transfer was served on Bankubehary Sankhabehary and Natabar, the persons named in the notice of transfer as some of the cosharer landlords, nor on their legal representatives.

In my judgment the rule ought to be discharged, though I do not agree with the extreme contention of the opposite party No. 1 which I will notice hereafter. An application for pre-emption based on S. 26-F must be made within two months of the service of notice issued under S. 26-C or S. 26-E. The service spoken of here must necessarily mean the service on the persons filing the application for pre-emption. The case where there is one immediate landlord of the holding does not present any difficulty. But there may, as there usually are, be many such landlords. In those classes, of cases if the notice issued under S. 26-C or S. 26-E has been served on all and all file the application for pre-emption, the case also does not present any difficulty. Both these cases are governed by the terms of the statute. The third type is where all the cosharer landlords have not been served with such a notice. All the cosharer landlords may file the application for pre-emption, i. e., some who have been served with the said notice and the rest not served. In this case there is a hiatus in S. 26-F and it has been held that there is no time limit prescribed in the statute so far as the landlords not served with such notice are concerned. They can file the application within a reasonable time of the

transfer : 35 C W N 688 (1), 38 C W N 634 (2). The fourth case is where all the landlords have been served with such a notice and some of them only file the application for pre-emption, and the fifth case is where only some of the cosharer landlords have been served with such notice, and the rest have not been served, and the cosharer landlords filing the application for pre-emption are those on whom such notice has been served. The case before me is that of the fifth class.

These are the typical cases, but other cases may be contemplated, but they would really be a combination of the fifth type with the third type which I have mentioned above; that is where some of the cosharers, some served with such a notice and some not so served, and not all the cosharers landlords file the application for pre-emption. To provide for these cases where some of the cosharer landlords file the application for pre-emption the legislature has enacted S. 188 and S. 26-F, sub-s. 4 Ols. (a) and (b). These cases would be of the fourth and the fifth types, or a combination of the fifth type with the third type as indicated above. The first requisite is that the remaining cosharer landlords must be made opposite parties in the application for pre-emption filed by some of the cosharer landlords in the manner provided in sub-ss. 1 and 2, S. 148-A; that is to say all the remaining cosharer landlords must be made opposite parties, and on the application being admitted a summons or notice in the prescribed form calling upon the said cosharer opposite parties to join as co-applicants must be issued and served. The second requisite is that the co-sharer landlords who file the application for pre-emption are to give an opportunity to the cosharer landlords opposite parties of joining in the application for pre-emption, that is, of becoming co-applicants.

In S. 188 the legislature uses the word and "and are given, etc." Sub-s. 4 (a) S. 26-F prescribes the time limit within which a cosharer landlord opposite party has to make the application for being transferred as co-applicant. In all the

1. *Suryya Kumar Mitra v. Munshi Noabali*, 1932 Cal 289 = 136 I O 871 = 35 C W N 688 = 59 Cal 15.

2. *Baikantha Chandra v. Samsul Huq*, 1934 Cal 662 = 152 I O 279 = 38 C W N 634 = 61 Cal 870.

aforesaid three cases, which I have mentioned above, where some of the cosharer landlords file the application for pre-emption, it would seem to follow that the application of the co-sharer landlords, who have filed the application for pre-emption, for addition of his co-sharer landlords as opposite parties must be made within the two periods of time mentioned in sub-s. 4 (a), S. 26-F. The question whether a co-sharer landlord opposite party can apply for pre-emption as a co-applicant, when he gets through Court notice of the application for pre-emption after a month of its filing, whether he is made a party in the original application for pre-emption or added as a party within a month from the date when it is filed need not be considered in this case, as on the dates given above the application for addition of parties, as also the application for substitution in the case before me, were filed much later than one month of the filing of the application for pre-emption. That question will have to be considered when a proper case arises and it may be that the question as to whether a Court will or can relieve a party whose rights have been prejudiced by an act of the Court itself will have to be carefully considered in such a case.

The view which I have taken in this case, that the application of the petitioner for addition of some of his cosharers as opposite parties was not entertainable at the time it was made, accords with the view of my learned brother Lodge, J., in the case of 39 C W N 1178 (3), which decision I follow. It now remains for me to notice the extreme contention of the opposite party No. 1. The learned Advocate appearing for him contends that all landlords are necessary parties to an application for pre-emption. There I agree with him. He further says that if some of the cosharer landlords are left out in the original application for pre-emption the application for pre-emption becomes a good application only when the co-sharer landlords so left out are added as parties. There also I agree with him. His third point is that S. 22, Lim. Act, applies to the addition of necessary parties and as landlords necessary parties to an application for pre-emption that section furnishes the answer as to when

a cosharer landlord originally left and can be added as a party. To substantiate it he cites before me the case of 38 C W N 409 (4). That case lays down the proposition that S. 22, Lim. Act, does not apply to the addition as defendants of proper parties, who are not necessary parties. Having regard to the provisions of S. 22, Lim. Act, and the facts of that case, and observations of my learned brother Mitter, J., at p. 413, left hand column, the words "necessary parties" have been used in the judgment to mean parties against whom relief has been claimed by the plaintiff. Inasmuch as in an application for pre-emption filed by a cosharer landlord no relief can be claimed against his cosharer landlord, I hold that the contention of the opposite party No. 1, that the defect of parties occurring by reason of the cosharer landlords being left out in the application for pre-emption must be cured within two months of the date of the service of the notice issued under S. 26-C or S. 26-E on the cosharer landlord who had filed the application for pre-emption, is not sound and I overrule it. The result is that for the reasons given above I discharge this rule with costs; hearing-fee one gold mohur, in favour of opposite party No. 1.

V.B./R.K.

Rule discharged.

4. Secy. of State v. Dharendra Nath Roy, 1934 Cal 187=151 I C 1076=38 C W N 409=59 C L J 295.

A. I. R. 1936 Calcutta 390

R. C. MITTER, J.

Kusum Kumari Devi—Decree-holder—Petitioner.

v.

Gayanath Pramanik — Judgment-debtor and others—Opposite Parties.

Civil Rule No. 369 of 1935, Decided on 28th August 1935, from order of Munsif, 1st Court, Manikganj, D/- 25th February 1935.

Execution—Rateable distribution—Case not falling under S. 73, Civil P. C.—Court can distribute pro rata.

Where the parties are not entitled to claim rateable distribution under S. 73, Civil P. C., by reason of the fact that none has applied for execution before the date of receipt of assets, to the Court having the custody of the assets, but all the same have made attachments, the attachment does not create any lien in favour of any of them, and the Court holding the assets can divide the same amongst all of them pro rata: 1917 Cal 13, *Rel. on.* [P 391 C 2]

3. Mahammad Garib Hossein v. Sm. Halimannessa Bibi, 1936 Cal 231 = 63 Cal 102 = 39 C W N 1178.

Bankim Ch. Mukerjee, Jitendra Mohan Banerjee and Nirmal Kumar Sen—for Petitioner.

Order.—This Rule is on behalf of one of the creditors of opposite party No. 1. The other creditors of the said opposite party No. 1 are opposite parties Nos. 2, 3 and 4. The opposite party No. 2 is however a secured creditor and the rule is not against her. The question raised in this rule is a question relating to rateable distribution not under the provisions of S. 73, Civil P. C., but on general principles of the surplus sale proceeds of a holding, which belonged to opposite party No. 1, but has been sold in execution of a rent decree obtained by the landlord against him. The holding was sold by the Munsif, 1st Court, Manikganj, on 24th September 1934, for a sum of Rs. 350. The whole of the purchase money was in Court on or before 14th November 1934. The claim under the rent decree was only Rs. 48 odd and after the satisfaction of that decree there remained a balance of Rs. 302 odd. Opposite party No. 2 had obtained a mortgage decree against the opposite party No. 1 for Rs. 202-13-2, the subject of the mortgage being the holding which was sold on 24th September 1934. She laid a claim to the surplus sale-proceeds, and by order No. 15 the learned Munsif, First Court, Manikganj, has allowed opposite party No. 2 to withdraw the sum of Rs. 202 odd out of the surplus sale-proceeds. That order has not been challenged in this rule and cannot be challenged. After the claim of opposite party No. 2 to the surplus sale-proceeds had been allowed by order No. 15, a sum of about Rs. 100 was still left and the scramble to get this surplus was between the petitioner, opposite party No. 3 and the opposite party No. 4. On 19th November 1934 the opposite party No. 3 applied to attach this surplus sale-proceeds. The application was made in the 1st Munsif's Court at Manikganj. The claim under his decree is Rs. 52-12-6. On the same day opposite party No. 4 who had a decree against opposite party No. 1 for the sum of Rs. 43 odd had the surplus sale-proceeds attached through the Munsif, 2nd Court, Manikganj. On 24th November 1934 the petitioner who had obtained a decree against opposite party No. 1 for a large amount caused the attachment of the surplus sale-proceeds

to be effected through the Munsif, 2nd Court, Manikganj. From the dates which I have mentioned above, the petitioner and the opposite party No. 4 did not make any application for execution to the Court which held the money. Besides, all the attachments were issued after the date of the receipt of the assets by the first Court of the Munsif at Manikganj. Opposite party No. 3 however made the application for execution there. But his application was also after the date of receipt of the assets. On these facts, there cannot be doubt that none of the parties, namely petitioner and opposite parties Nos. 3 and 4 are entitled to claim rateable distribution on the basis of S. 73, Civil P. C. The position, therefore, is this that the surplus sale-proceeds which amounted to about Rs. 100 was in the custody of 1st Munsif of Manikganj. The attachments had been made at the instance of three sets of creditors. These attachments did not create any lien in favour of any of them and therefore their rights cannot be detained by priority of attachment. Having regard to this fact according to the principle laid down in the case of 44 Cal 1072 (1), I hold that each of these three sets of creditors namely petitioner and opposite parties Nos. 3 and 4, must get the surplus sale proceeds divided amongst them pro rata, that is in proportion to their decrees.

The proper form of the order for the Munsif, 1st Court, Manikganj, to pass would have been to retain the portion which fell to the share of opposite party No. 3 pro rata for payment to him, and to send the Munsif, 2nd Court, Manikganj, the amounts which would fall due to the share of the petitioner and the opposite party No. 4 pro rata, i. e., according to the principle which I have indicated above. But having regard to the fact that the amount involved is very small, I do not make this further order because it would involve the parties in more costs at the time of the withdrawal of the amount from the Court of the 2nd Munsif, and therefore with the consent of opposite party No. 4 and the petitioner I direct that the money which would fall to the respective shares of the opposite party No. 4 and the petitioner should be paid by the Munsif, 1st Court,

1. *Thakurdas Motilal v. Joseph Iskender*, 1917 Cal 18=41 I O 516=21 C W N 887=25 C L J 595=44 Cal 1072.

Manikganj. The opposite party No. 3 would of course get the money that falls to his share from the 1st Munsif's Court. The rule is accordingly made absolute. The order of the learned Munsif, No. 16, is modified in the way indicated above. There will be no order for costs in favour of or against any of the parties.

V.B./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 392

D. N. MITTER AND PATTERSON, JJ.

Radharani Dassya and others—Plaintiffs—Appellants.

v.

Brindarani Dassya—Defendant and others—Respondents.

Appeal No. 140 of 1932, Decided on 17th January 1936, from original decree of Sub-Judge, 5th Court, Dacca, D/- 20th April 1932.

(a) **Hindu Law—Widow—Widow's estate—Widow, mother or daughter represents last male owner in estate fully.**

A Hindu widow or a Hindu daughter or a Hindu mother represents the last male owner of an estate fully, for some purposes and it would not be right to describe her right as a right of enjoying her husband's estate now that her rights are properly understood. It was so in 1877 : 5 Cal 776 (PC), Ref. [P 395 C 2]

(b) **Hindu Law—Widow—Surrender reserving Moshahara in substance in nature of maintenance allowance—Surrender is not invalid.**

Where a limited owner, be she a Hindu widow, or a Hindu daughter, surrenders her interest in the property in favour of the next reversioner, reserving a small monthly allowance (moshahara), which in substance is in the nature of a maintenance allowance, the surrender is not invalid and can be upheld as a surrender : 1921 P C 107 and 1919 PC 75, Ref.

[P 396 C 1]

(c) **Hindu Law—Widow — Surrender in favour of one reversioner as karta of others—Surrender is valid.**

A surrender by a Hindu widow, Hindu mother or a Hindu daughter in order to be effective must be in favour of all the reversioners for the time being at the time of the execution of the document. But where the surrender in effect is a surrender in favour of all the reversioners, as where the document is executed in favour of one of the reversioners as karta and that person is the de facto and de jure manager of the estate held by the reversioner and the intention to transfer in favour of all is apparent, the mere fact of the document being in favour of the one would not detract from the transaction being a valid surrender : 1918 PC 196 and 1935 Cal 689, Ref. [P 396 C 2; P 397 C 1]

(d) **Hindu Law — Family arrangement—Settlement of doubtful claim is sufficient consideration.**

The settlement of doubtful right is a sufficient consideration to support a family arrangement. [P 398 C 1]

Atul Chandra Gupta and Prokash Chandra Pakrashi—for Appellants.

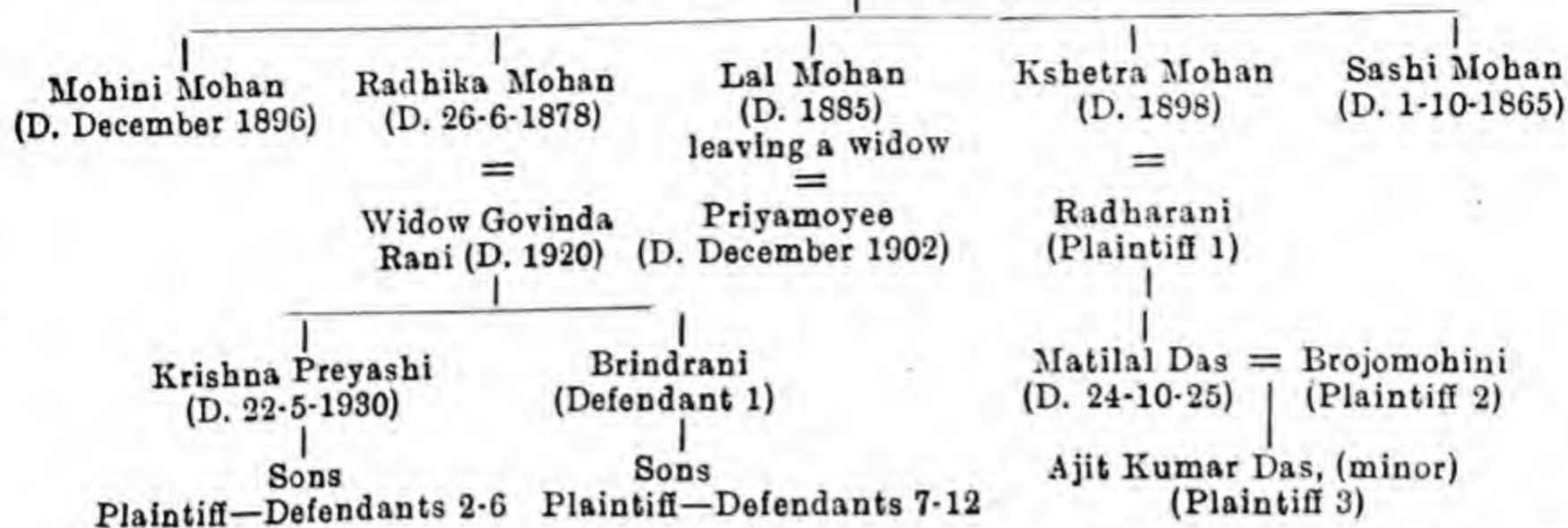
Brojolal Chakravarty, Rajendra Chandra Guha and Prafulla K. Guha—for Respondents.

D. N. Mitter, J.—This is an appeal against the decree of the Subordinate Judge of Dacca dated 20th April 1932 by which he dismissed the plaintiffs' suit for recovery of possession of about 16 gds. share of the estate of one Madhu Sudan Das, a wealthy banker and zemindar of the district of Dacca. The claim of the plaintiffs, who are appellants before us, turns on the legal effect of a document which was executed so far back as in the year 1877. In order to understand the questions raised by this appeal on behalf of the plaintiffs it is necessary to state a few circumstances which led to the execution of this document dated 29th September 1877 by Shyampeari Dassya in favour of Mohini Mohan Das, the eldest son of the said Madhusudan Das. The relationship of the parties are shown in the following genealogical tree which is admitted by both parties.

(See page 393)

It appears from the said tree that Madhu Sudan Das died leaving him surviving five sons Mohini Mohan, Radhika Mohan, Lal Mohan, Kshetra Mohan, and Sashi Mohan, and his wife Shyam Peary. One of the sons Sashi Mohan, died a few months after the death of Madhu Sudan Das on 1st October 1865, and under the Dayabhaga system of the Hindu Law Sashi Mohan's 1/5th share, which corresponds to 3 as. 4 gds. share in the estate of Madhu Sudan Das, devolved on his mother Shyampeari. It appears that a will was executed by Madhu Sudan on 24th November 1855, several years before his death which happened on 12th April 1865. That will is to be found printed at p. 1 of the second part of the paper book and has been marked as Ex. B in the suit. It is not necessary to refer to all the terms of the said will beyond stating that there is a provision in the said will by which the power of management of the estate left by Madhu Sudan after Madhu Sudan's death was given to the eldest son Mohini Mohan. Mohini according to the power given to him by the will was managing the properties

MADHUSUDHAN DAS = Shyam Peary
(D. 12-4-1865) | (D. 16-11-1918)



mentioned in the schedule as forming part of the estate of Madhu Sudan and other properties mentioned in the schedule. The next event which requires mention is the execution of the Nibandhan Patra on 7th December 1875, between the sons of Madhu Sudan except Sashi Mohan who had died in the meantime. See Ex. F printed at p. 11 of the second part of the paper book. In this Nibandhan patra it was stated that they were owners in equal shares of all the properties the moveable and immovable which stood in the name of their father Madhu Sudan as also of the money lending and trading concern, etc. In para. 1 of the said document it was stated that each of the sons would get a sum of Rs. 300 per month from the estate and that Mohini Mohan was to carry on the management and act as the Karta of the 16 as. of the estate left by his father. The karta was given the power to sell off any useless moveable or immovable property of unprofitable nature with the consent of all the brothers. The Karta was to conduct law suits relating to the estate in his own name after stating the names of the three other brothers.

The one important thing which need be noticed with regard to this Nibandhan Patra is that this document which was executed in 1875 ignores the fact that Sashi Mohan's 1/5th share in Madhusudan's estate had several years before devolved on the mother Shyampeari and practically ignores Shyampeari's interest in the estate. This brings us to the consideration of the Nadabinama which was executed by Shympeari in favour of Mohini Mohan as Karta of the joint family on 29th September 1875: See Ex. A printed at p. 21 of the second part of the paper book. It is important to notice in

connection with this document that there is a recital in this document of the will of Madhusudan, more particularly of the fact that Mohini Mohan, the eldest son, being capable, obtained a certificate from the District Judge of Dacca under Act 27 of 1860 according to the terms of the Will and had been in possession enjoying, managing and acting as Karta of all the moveable and immovable properties left by Madhusudan. There is a further statement that Mohini Mohan and other brothers who were alive were the real heirs of Madhusudan Das, but according to the Hindu Shastras Shyampeari was entitled to a right of enjoying her shares in the estate left by her deceased son during her lifetime and the following clause may be quoted in extenso; because it will bear on another question, namely, that this document had the effect of a family arrangement apart from its being a deed of release. That clause is to the following effect:

I having accordingly applied for obtaining a certificate under S. 27 of 1860, in respect of that share, my application was rejected up to the High Court, and the properties have remained in your possession and enjoyment and under your management. Although, being a Pardanashin woman of a respectable family, I was unable to carry on management, yet being led by the evil advice of mischievous persons, I at times expressed a desire for instituting a title suit in Court for the share of the said deceased son and thus caused pain to the good heart of you, my son, born of my own womb, and as you are dissatisfied on account of that, I am in great uneasiness of mind.

Then follows the clause by which she purports to give up the right of enjoyment which she had in respect of the share left by the deceased son in the properties mentioned in the document as well as in such properties as may in future be acquired with the profits thereto

on condition of her getting a Moshahara or monthly allowance on and from the time of execution of the document till the end of her life, at the rate of Rs. 150 at a lump per month out of the share left by the deceased son. The next clause is to the following effect:

Therefore being in full possession of my senses and out of my own accord, I give up, by this Nadabi (Release) whatever rights of enjoyment I have or had under the Sastras, in the share left by the deceased sons, on the aforesaid terms. Save and except getting this fixed monthly allowance in respect of the share of the said deceased son, I shall never be entitled to file any suit in Court, demanding any accounts, etc., for the past and making any sort of claims, etc., for the future.

The plaintiffs base their claim on the contention that this document as construed does not amount to surrender of Shyampear's interest in the property which she inherited from her son Sashi Mohan. The contention of the plaintiffs both here as also in the Court below is that it was not a surrender of her entire interest, but it was merely a transfer of the right of management to the eldest son. It was further contended that the surrender, even if it be assumed to be of the entire interest of Shyampear in her son's estate, was not right in form as it was in favour of only the eldest son Mohini Mohan who was only one of the four reversioners alive at the time of the execution of the document. The deed was also attacked on the ground that it was not a deed of surrender as there was a reservation of an allowance of Rs. 150 in a lump per month which is something very distinct from the reservation of certain portion of the estate for maintenance of the limited owner. It was therefore, contended that as this was not a deed which, in accordance with the Hindu Law was operative as a deed of surrender on the death of Shyampear which happened on 16th November 1918, the property would revert to the reversioners. Motilal Das, the father of plaintiff 3, was one of such reversioners he having died on 24th October 1925 and plaintiffs 1 and 2 are said to be trustees for plaintiff 3. On the other hand the contentions of defendants, now respondents, have been that this deed of 1877 is a deed of surrender within the meaning of the Hindu Law and had the effect of extinguishing the right of Shyampear in her son Sashi Mohan's estate.

In the alternative it was pleaded that even if it was not operative as a deed of surrender she being a limited owner under the Hindu Law the transaction could be upheld or sustained on the ground of this being a family arrangement and that the consideration for this family arrangement was the settlement of some dispute and it is said that the settlement of doubtful claims had been held to be a sufficient consideration for such an agreement, a family arrangement. The Subordinate Judge has accepted both these contentions urged on behalf of the defendants and has accordingly dismissed the plaintiffs' suit.

In appeal before us Mr. Gupta, who appears for the plaintiffs has raised the contention that the legal effect of the transaction of 1877, Ex. A, was not that it was meant to be a deed of surrender and relinquishment and so as to accelerate the estate for the benefit of the next reversioner, but that this was really a deed transferring the management of the estate to Mohini Mohan during the lifetime of Shyampear. He has based this contention on certain words in the documents to which we shall have to refer presently. He has further contended that even assuming that there was an extinction of the rights of Shyampear in her son's estate by the terms of the deed, the deed in law cannot operate as a relinquishment of her rights in her son's estate because in consideration of the deed a portion of the usufruct of the property was retained by the limited owner, the Hindu mother Shyampear. This transaction was further attacked on the ground that it was not in favour of the entire body of reversioners for the time being. It was only in favour of one of the sons who was one of the several reversioners and therefore it offends against the rule of the Hindu law that the surrender in order to be effective must be in favour of the entire body of reversioners. On the question of the family arrangement it was argued that there was no dispute between the parties, there was no settlement of doubtful claims and therefore there was no necessity to make the family arrangement valid. It is necessary to determine each of these two contentions separately. With regard to the first contention that this was merely a deed of arrangement concerning management and that this was really a deed of transfer transferring the

management to Mohini Mohan we have referred to the terms of Ex. A and stress was laid on the following expression in the document.

Whereas my sons, yourself and others, are the real heirs and owners of the share left by the said deceased son, and whereas I am never myself capable of managing the same without (the help of) those appointed to act as karta of the estate left by my husband, namely, yourself and others, I proposed to give up the right of enjoyment which I have and had in respect of the share left by the said deceased son.

Stress was also laid on another passage of the document, namely:

Therefore being in full possession of my senses and out of my own accord, I give up, by this nadabi (release), whatever rights of enjoyment I have or had under the Sastras, in the share left by the deceased sons.

It has been argued and very strenuously that she had only a right of enjoyment and that she was only parting with the right to enjoy this property during her lifetime, in other words by this document she was only surrendering the right to manage this property as a limited owner. It is not possible to accede to this contention. In this connexion it has to be remembered that the exact nature of a Hindu widow's or a Hindu daughter's or a Hindu mother's estate was not properly understood in the year 1877. But some Hindu widow's estate was regarded as an estate for life as is understood in English law and consequently expressions regarding the rights of a Hindu widow in her husband's estate being merely synonymous with the right of enjoyment for life were used. In that view the Bengali expression of the right to enjoy *upa bhoger je sathwa chila* would correctly represent her rights. That there was some misapprehension as to the exact nature of the rights of a Hindu widow in 1877 was recognized by their Lordships of the Judicial Committee of the Privy Council in 5 Cal 776 (1), at p. 789, where their Lordships pointed out that a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship, does not take a mere life interest in the property. And the whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest and that she holds an estate of inheritance to herself and the heirs of her husband.

It is not surprising therefore that in this document which was executed in the Mufassil in 1877 when the conveyancing was very little known, expression like the right of enjoyment of a Hindu widow or other females with limited rights was described as her sole right. A Hindu widow or a Hindu daughter or a Hindu mother represents the last male owner of an estate fully, for some purposes and it would not be right to describe her right as a right of enjoying her husband's estate now that her rights are properly understood. It was not so in 1877. In this connexion one has to remember that it was the intention of Shyampearī to surrender her rights in her son's estate is evidenced by another important event which happened during her lifetime about 6 (six) years after the execution of this document. That it was not a deed of transference of management in favour of Mohini Mohan would appear clear from the certified copy of the Register of Suits in the 2nd Court of the Subordinate Judge of Dacca relating to Suit No. 85 of 1883. See Ex. 8 printed at pp. 36 to 43 of the second part of the paper book. There Shyampearī was suing for a monthly allowance not only against Mohini but also against the other two sons of Madhusudan Das, namely Lal Mohan and Kshetra Mohan, and also against Gobinda Rani, the widow of the third son Radhika Mohan. This would show that she understood clearly enough that all that she could get from the surviving sons of Madhu Sudan, to whom by reason of this deed the entire interest of Sashi Mohan in the estate passed, was the monthly allowance of Rs. 150. This lady Shyampearī lived for nearly 41 years after the execution of this deed and it is a significant circumstance that during this long period she took up the position which showed that she had nothing to do with Sashi Mohan's estate and all that she was entitled to was the monthly allowance for which she from time to time asserted her claim.

It is next said that this deed does not operate as an absolute relinquishment of her rights because a substantial portion of the usufruct of the properties was reserved for her, and the argument turns on the expression "Moshahara" as used in this document. It is said that the word "Moshahara" does not mean maintenance and if this contention is right

1. Moniram Kolita v. Keri Kolutani, (1880) 5 Cal 776=7 I A 115=4 Sar 103 (P C).

it is contended that where anything else than maintenance is reserved by a deed which purports to be a deed of surrender under the authorities the deed of surrender must be held to be invalid. It is no doubt true that in some of the recent decisions of their Lordships of the Judicial Committee of the Privy Council deeds of surrender have been upheld where small portions have been reserved for maintenance of a limited owner be she a Hindu widow or a Hindu mother or a Hindu daughter. We may refer in this connexion to the case of 47 I A 233 (2). In that case small portions of land were conveyed to the widowed mother for maintenance and it was held that that circumstance did not affect the validity of the deed of surrender. In that case Lord Dunedin observed as follows :

The conveyance of small portions of land to the widowed mother was unobjectionable, as it was only for maintenance.

That has been the trend of the decisions of their Lordships of the Judicial Committee. The question therefore turns as to whether this expression as used in this document is to be regarded as maintenance allowance. In this connexion we may refer to a contemporaneous document which was executed on the same date, namely, the Ekrarnama executed by Mohini in favour of Shyampearri Ex. 1. (See p. 15 of the second part of the paper book). Towards the end of that document there is this recital which is important to notice in this connexion :

Whereas, in father's will, there is permission (provision) for maintaining you and the sisters so long as we are capable, and whereas you have by a Nadabi (deed of release) renounced all claims and demands regarding the enjoyment of the share left by the deceased brother Sashi Mohan, for your life, and have desired to receive a sum of Rs. 150 (one hundred and fifty rupees) in lump per month, from the present month up till the end of your life, out of the share of the said deceased brother, I, under the terms of the will of my deceased father and on the strength of my position as Karta of the estate left by him, of my own accord and in full possession of my senses execute this Ekrarnama and provide that so long as you live you shall get a sum of Rs. 150 (one hundred and fifty rupees) in lump per month out of the said share; you shall not be entitled to give away or sell the same to anyone, myself or the persons acting as Karta after we shall pay up the said money to you every month.

Reading the two documents together there can be doubt that Rs. 150 was

being given to this lady in lieu of maintenance. It is true that the word "Moshahara" means monthly share of allowance (See Wilson's Glossary); but it has to be read having regard to Ex. 1, and having regard to the circumstance, namely, that although a provision was made in their father's will for the maintenance of Shyampearri, as a matter of fact she received no maintenance from after the death of Madhu Sudan up to the time of the execution of this document as was directed by the will of Madhu Sudan. The amount of Rs. 150 per month was really a suitable maintenance, having regard to the value and income of the estate and it emerged in the course of discussion before us that there are papers on the record to show that the value of the share of Sashi Mohan's estate is about Rs. 2,36,000. See Ex. L, the certified copy of decree in Title Suit No. 73 of 1883 of the Second Court of the Subordinate Judge of Dacca between Sreemati Gobinda Rani Dassya, the widow of the late Radhika Mohan Das, on the one hand, and Mohini Mohan Das, Lal Mohan Das, and Kshetra Mohan Das on the other. This document is printed at p. 32 of the second part of the paper book. This is what is stated in that document :

The plaintiff (Gobindarani) has therefore instituted this suit for recovery of possession of a 5 as. 6 gds. 2 krts. share of the ancestral as well as acquired immoveable properties of her husband, valued at Rs. 2,36,000 and a 4 as. share of the moveable properties or in default thereof for the value thereof amounting to Rs. 15,000 and for getting Nikash (accounts), which is valued at Rs. 89,000 in all for Rupees 3,40,000 (three lacs and forty thousand rupees.)

From this it appears that the value of 5 as. 6 gds. would be over Rs. 15,000 which would fetch an income of nearly Rs. 600 per month. The maintenance was therefore a suitable maintenance to which she was entitled as heir of the estate of Sasi Mohan.

The next ground on which this deed is attacked is that it was not a surrender in favour of all the reversioners. If that fact could be established undoubtedly the appellant should succeed, for it is now established on high authority that the surrender must be in favour of all the reversioners for the time being at the time of the execution of the document. See the cases of 46 I A 72 (3) and

2. Sureshwar Misser v. Maheshrani Misrain, 1921 P C 107=57 I C 325=47 I A 233=48 Cal 100 (P C).

3. Rangaswami Goundan v. Nachlappa Goundan, 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).

47 I A 233 (2), and the recent decision in 43 C W N 208 (4). It is true that on the face of the document the deed of relinquishment appears to be in favour of Mohini, but he is described there in his capacity as karta and that the intention was to transfer the interest of Sashi Mohan's estate in favour of all, would be apparent also from the document Ex. 8, the certified copy of extract from the Register of suits of the second Court of the Subordinate Judge, Dacca, relating to Suit No. 85 of 1883, that liability of paying the mosahara allowance was imposed not on Mohini Mohan alone but also on the other brothers Lal Mohan and Kshetro Mohan as also on Gobindarani, the widow of Radhika Mohan, Radhika Mohan having died in the meantime. It would also appear from the claim of Gobinda Rani (Ex. L printed at p. 32 of the second part of the paper book) that she was treating the document of 1272 B. S., as a document in favour of all the reversioners. See para. 12, p. 34 of the second part of the paper book :

(My) mother Syampeary Dasya got a 1/5th share of the entire estate by virtue of inheritance from her deceased son Sasi Mohan Das and she having given up the same in favour of the plaintiff's husband and us, the defendants, by a nadabi (deed of release) executed in my favour on 14th Ashin 1284 B. S. the plaintiffs' husband's share that the plaintiff's title is established. In lieu of the said nadabi (release) I, on behalf of myself and all my brothers, agreed to pay a monthly allowance of Rs. 150 one hundred and fifty rupees, to my said mother Syampeary Dasya till the end of her life by executing a deed of ikrar (agreement) in her favour on the said date and am bound to pay the same.

This is really a statement taken from the particulars of the petition of defendant 1, that is Mohini Mohan Das, so that Mohini and other parties understood clearly enough that the deed was operative in favour of all the reversioners for the time being. We agree with the Subordinate Judge that this was a bona fide deed of surrender, that she got Rs. 150 per month as a sort of allowance or maintenance, and reserving such allowance she absolutely renounced her legitimate share in the estate. It was not a decree to divide the estate between the heirs and the reversioners for the time being. Whatever doubts there may be with regard to the transaction as con-

tended for on behalf of the appellant in substance and disregarding the form of Ex. A it seems to us that there was a complete self-effacement of the widow's share which precluded her from asserting any further claim to the estate of her son. The execution of Ex. A and the other ikrarnama which really forms part of the same transaction on 29th September 1877 followed by the acceptance for nearly 41 years of maintenance under the terms of these documents amounted in our opinion to a complete surrender by Shyampearri of her interest in her son's estate in favour of the entire body of reversioners. We may refer in this connexion to certain observations of their Lordships of the Judicial Committee of the Privy Council in 46 I A 259 (5), where the transfer was made in the circumstances somewhat similar to the present. There their Lordships point out thus :

In the present case there was indeed no formal surrender by the widow of her estate, but there was an express agreement, binding upon her, that for considerations which appeared to be sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing not of a surrender of an acknowledged right but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. The question is no doubt one of difficulty, but upon the whole their Lordships have come to the conclusion that the execution of the two ekrarnamas, followed by the acceptance for 30 years of maintenance under the terms of those documents, amounted to a complete relinquishment by Anandi Koer of her estate in favour of Mahabir, and accordingly that the title of Mahabir's representatives is established and the plaintiff's action should have been dismissed on this ground.

The contention, therefore, which challenges this deed as not being a deed of surrender valid under the Hindu law, must fail. Mr. Chakravarty has sought to support this deed as a deed of family arrangement. This is the view which has also been taken by the Subordinate Judge and we agree. It appears further that there was a dispute between the sons of Shyampearri with regard to the management of this estate and it appears from the recitals in Ex. A that she un-

4. Ram Krishna Prodhan v. Sm. Kousalya Mani Dasi, 1935 Cal 689=158 I C 925=62 C L J 490=40 C W N 208.

5. Bhagwat Koer v. Dhanukdhari Prasad Singh, 1919 P C 75=53 I C 347=46 I A 259=47 Cal 466 (P O).

successfully made an application for obtaining a certificate in respect of Sashi Mohan's share—her application having been rejected up to the High Court and that she intended to institute a title suit in respect of the share of her deceased son. In order to avoid that and in settlement of that dispute this arrangement of 1877 was entered into. It is difficult at this distance of time to get direct evidence of the circumstances under which the document was executed. It appears that in order to avoid litigation she entered into the family arrangement and surrendered the entire interest in the estate that she had inherited from Sashi Mohan and got Rs. 150 a month which really meant a monthly allowance. The settlement of doubtful right is a sufficient consideration to support a family arrangement. This arrangement can also be supported as a family arrangement. The substantial grounds that have been urged on behalf of the appellant having failed the entire appeal must fail. The appeal is dismissed with costs.

Patterson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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R. C. MITTER, J.

Rai Nalinaksha Dutta Bahadur —
Petitioner.

v.

Kazi Abdul Jalil and others—Opposite Parties.

Civil Rule No. 846 of 1936, Decided on 21st April 1936.

Bengal Tenancy Act (8 of 1885), S. 26 (1), (5) and (6)—Sale of share in occupancy holding—Pre-emption application by landlord—Pre-emption suit by another co-sharer by inheritance—Latter's suit decreed—Landlord's application held should be dismissed by reason of S. 26-F (1).

Certain co-sharers sold their share in an occupancy holding and getting notice of it the landlord filed an application for pre-emption under S. 26-F. Pending this application, another co-sharer of the transferors who had become a co-sharer by inheritance under Mahomedan law, filed a suit for pre-emption to enforce the right under Mahomedan law. Both the application and the suit were heard together. The suit was decreed:

Held: that the landlord's application should be dismissed as there was no right, title or interest left in the vendees and as there could be no order for pre-emption against the co-sharer who had obtained the decree by reason of S. 26-F (1): 1934 Cal 3, *Disting.*

[P 398 C 2 ; P 399 C 1, 2]

Hariprasanna Mukherji — for Petitioner.

Bijali Bhusan Sanyal and Surajit Chandra Lahiri (for Deputy Registrar) —for Opposite Parties.

Judgment.—This appeal raises a question, so far as I am aware, of first impression. The position is that six persons, namely Surman Mondal Kola and five others, who may conveniently be called the Kolas, had an interest in an occupancy holding; Muhamed Soleman was their co-sharer in the said holding. They are all Muhamedans. On 4th April 1934 the Kolas sold their share in the holding to opposite parties 1 to 3 who are also Muhamedans. The notice of this transfer was served upon the landlord, the petitioner before me.

On getting the notice the petitioner made an application for pre-emption under S. 26-F, Tenancy Act, in the Court of the Second Munsif at Krishnagar on 6th June 1934. The transferees, namely opposite parties 1 to 3, were made parties defendants to that application. While this application was pending Muhamad Soleman instituted in the same Court a suit to enforce the right which he had to pre-empt under the Mahomedan law. The landlord was made defendant 10. This suit for pre-emption and the application under S. 26-F were heard together and one judgment was pronounced. In dealing with the suit for pre-emption the learned Munsif came to the conclusion that the landlord, the petitioner before me, was not a necessary party. He came to the conclusion that Mohamad Soleman was a co-sharer of the Kolas and he had become a co-sharer not by purchase but by inheritance from his maternal grandfather who was a co-sharer of the predecessor of Surman and five other Kolas. The learned Munsif made a decree for pre-emption in favour of Mohamed Soleman and directed him to put in the consideration money for which the Kolas transferred the property, with interest together with costs of conveyance and registration, within a fortnight from the date of the judgment. The money was put in by Mohamed Soleman within time. Therefore he has got an absolute decree for pre-emption in his favour. The decree was given on the basis that as a co-sharer in the property

he had got the right of pre-emption both the transferors and the transferees being Mohamadans.

After disposing of the suit for pre-emption, the learned Munsif took up the application for pre-emption under S. 26-F. He came to the conclusion that the petitioner had not in the circumstances of the case any right of pre-emption because of sub-section 8 of that section. In my judgment the order is correct. By reason of the pre-emption decree passed in the pre-emption suit the transferees, opposite parties 1 to 3, ceased to have any right, title and interest in the property purchased by them since Mohamed Soleman has complied with the decree for pre-emption by putting in Court the necessary money. The title to that part of the holding which belonged to the Kolas is now in Mohamed Soleman and is not in opposite parties 1 to 3. S. 26-F, sub-section (1), Cl. (a) enacts that when the transferee of an occupancy holding is a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase, the landlord has no right to pre-empt. In the present case Mohamed Soleman, who has now acquired the interest of the Kolas by reason of the decree in his suit for pre-emption, is a co-sharer and he had derived his character as co-sharer tenant by inheritance. Sub-section (5) of the said section deals with the making of an order for pre-emption in favour of the immediate landlord, and sub-section (6) deals with the effect of such an order. That sub-section says :

From the date of the making of the order under sub-section (5), the right, title and interest in the holding or portion or share thereof accruing to the transferee from the transfer shall be deemed to have vested in the immediate landlord and co-sharer immediate landlord, if any, whose application has been allowed, &c.

At the date of the order, in Misc. Case No. 42 of 1935 the right, title and interest in the holding had already vested in Mohamed Soleman by reason of the pre-emption decree in the suit. There was no right, title and interest left to opposite parties 1 to 3 on which the pre-emption order, if made under S. 26-F, sub-section (5), can operate. That is to my mind a difficulty in the way of the landlord in the present case. The title in the holding which formerly belonged to the Kolas has now vested in Mohamed Soleman. There can be no order for

pre-emption against Mohamed Soleman by reason of the provision of S. 26-F, sub-section (1), Cl. (a). This is the main difficulty which I feel in the way of the petitioner landlord. In this view of the matter it is not necessary for me to consider the precise effect of sub-section (8), S. 26-F, although there is much force in the contention of the opposite parties based on the said sub-section. Both the landlord and Mohamed Soleman had based their cause of action for pre-emption on the self, same transfer, viz. the transfer by the Kolas. Mohamed Soleman, who is a co-sharer in the tenancy other than by purchase, has already got pre-emption order in his suit, and the title of the Kolas had vested in him.

In support of his contention the learned Advocate for the petitioner relied upon the decision in 37 C W N 848 (1). I do not think that this case has any bearing on the present case so far as the present controversy is concerned. In the last part of the judgment only an obvious proposition is laid down that a man can be pre-empt against himself. It is for these reasons that I discharge this rule, but in the circumstances I make no order as to costs.

K.S./R.K.

Rule discharged.

1. Abdul Jalil v, Sm. Mahamuda Khatun, 1934 Cal 3=147 I O 1040=37 O W N 848.

A. I. R. 1936 Calcutta 399

NASIM ALI AND EDGLEY, JJ.

Bogra Loan Office, Ltd.—Appellant—Petitioner.

v.

Jyotish Chandra Chanda and another—Respondents—Opposite Parties.

Civil Ref. No. 3 of 1935, Decided on 29th April 1936.

Stamp Act (1899), Sch. 1, Arts. 1 and 5—Implied promise by itself does not render document liable to duty higher than what is required under Art. 1—Addition of words indicating agreement would make it liable to duty under Art. 5.

A simple acknowledgment, which takes the case out of the Statute of limitation, implies a promise to pay. Such an implied promise by itself does not render the document liable to duty higher than what is required under Art. (1) of Sch. (1). But the addition of words such as are stated in the proviso to that article indicating an express promise to pay would make the document liable to duty as an agreement or a bond or a promissory note. [P 400 C 1]

An acknowledgment by the debtors of their liability to their creditor under a promissory

note for saving limitation which contained an express promise to pay contained the following clause "we are going to pay the whole debt soon:"

Held: that the document did not come under Art. 1 but that it was liable to stamp duty under Art. 5 as it amounted to an agreement: 33 Cal 1047 (PC), Ref. [P 400 C 1,2]

Bireswar Bagchi and Subodh Chandra Sen—In opposition of Reference.

Order.—This is a Reference under S. 61, Stamp Act, by the Collector of Bogra. The document in question was admitted in evidence by the Subdivisional Munsif of Bogra exercising Small Cause Court powers in Small Cause Court Suit No. 732 of 1934, as not requiring a stamp. We have perused the documents. It appears to us to be an acknowledgment by the debtors of their liability to their creditor under a promissory note for the purposes of saving limitation containing an express promise to pay. A simple acknowledgment, which takes the case out of the Statute of limitation, implies a promise to pay. See 33 I A 165 (1). Such an implied promise by itself does not render the document liable to duty higher than what is required under Art. (1) of Sch. (1), Stamp Act. But the addition of words such as are stated in the proviso to that article indicating an express promise to pay would make the document liable to duty as an agreement or a bond or a promissory note. In the document before us there are unconditional acknowledgments for saving limitation. It also contains the words "we are going to repay the whole debt soon." These additional words indicate an express promise to pay. The document therefore does not come under that Art. 1. The promise to pay contained in the document does not render it liable to stamp duty as a promissory note or a bond. Reading the document as a whole it appears to us that the debtors expressly promised to pay the entire debt as the creditors agreed not to sue them before the expiration of the period of limitation. It is however contended by Mr. Bagchi appearing on behalf of the creditors that the document simply contained a written request or offer and was therefore not an agreement within the meaning of Art. 5 of Sch. 1, Stamp Act, as there is nothing to show that it was accepted in writing. Art. 5 however refers

to an agreement or memorandum of an agreement:

The agreement is the writing by which the agreement is made. The memorandum of agreement is the record of an already completed oral agreement. It is treated as the agreement as it was the intention of the parties that it should be so treated and that it should be the only appropriate evidence of the agreement.

See Sir Dinshaw Mulla's Commentary, on the Stamp Act, Second Edition, 181. The language of the document indicates that it was the written record of a prior oral agreement. The document therefore was liable to stamp duty under Art. 5, Stamp Act. We therefore accept the reference and declare that the document should not have been admitted in evidence by the Small Cause Court Judge without the payment of Rs. 8-4-0 as duty and penalty under S. 35, Stamp Act. We impound the document. Let a copy of this declaration and the document be sent to the Collector.

K.S./R.K.

Reference accepted.

A. I. R. 1936 Calcutta 400

GUHA AND BARTLEY, JJ.

Abdul Sattar Choudhury and others — Plaintiffs—Appellants.

v.

Abdul Rusan and others—Respondents.

Letters Patent Appeal No. 36 of 1935, Decided on 19th March 1936, against judgment of R. C. Mitter, J., D/- 30th April 1935.

(a) Civil P. C. (1908), S. 47—Judge passing order recording satisfaction — Suit for the rectification of petition of adjustment is not barred by S. 47.

Section 47 is no bar to a suit for the rectification of a petition of adjustment, as the question of rectification of the petition of adjustment cannot be decided, by the successor in office of the Judge before whom it was filed, under S. 47, in view of the order passed by the Judge recording satisfaction. [P 401 C 1]

(b) Limitation Act (1908), S. 14—Plaintiff applying for execution—Objection by judgment-debtors of adjustment allowed and confirmed by final appellate Court—Suit by plaintiff for rectification of petition of adjustment—Plaintiff is entitled under S. 14 to exclude time taken from his execution application to final appellate order confirming adjustment.

Plaintiffs applied for the execution of their decree to which objection was raised by the judgment-debtors on the ground of adjustment; the order on that proceeding was against the plaintiffs, the objections raised by the judgment-debtors having been allowed to prevail. The proceeding was carried on in Courts

1. Maniram v. Seth Rupchand, (1909) 33 Cal 1047=33 I A 165=2 N L R 130 (PC).

of appeal; and the ultimate order passed in the proceeding in execution, started at the instance of the plaintiffs, was against the plaintiffs. Plaintiff then brought a suit for the rectification of the petition of adjustment:

Held: the proceeding started by the application for execution made by the plaintiffs and ended by its disposal in the final appellate Court was a proceeding, which the plaintiffs had been prosecuting with due diligence under S. 14 and the plaintiffs were entitled to deduct that time in computing the period of limitation for the suit for the rectification of the petition of adjustment. [P 402 C 1]

Birendra K. De—for Appellants.

Benoyendra Nath Palit—for Respondents.

Judgment.—This is an appeal under S. 15 of the Letters Patent from a decision of our learned brother R. C. Mitter, J., dismissing an appeal to this Court preferred by the plaintiffs in a suit in which the main relief claimed was for rectification of a petition of adjustment of a decree filed in Court on 22nd August 1925 in a proceeding in execution. The Court of first instance, as also the Court of appeal below, on the evidence in the case, came to the finding, in favour of the plaintiffs, that a mistake had crept into the petition of adjustment. The learned Judge in this Court in second appeal held that the suit was maintainable, overruling the decision of the Court of appeal below, which held otherwise. There can be no question that the decision of Mitter, J., holding that the plaintiffs' suit was maintainable, and that S. 47, Civil P. C., was no bar to the same, is unassailable, as the question of rectification of the petition of adjustment could not be decided by the successor-in-office of the Judge before whom it was filed, under S. 47, Civil P. C., in view of the order passed by the Judge recording satisfaction.

The substantial question for consideration in the appeal before us, is whether the learned Judge, Mitter, J., is right in his decision that the plaintiffs' suit was barred by limitation. The suit to which the provisions contained in Art. 96, Sch. 1, Lim. Act, was applicable, was filed out of time, and was prima facie barred by limitation, unless S. 14, Lim. Act, could be invoked in aid of the plaintiffs. The plaintiffs, it would appear, were the parties who had applied for execution of their decree on 21st August 1926, upon which there was objection preferred by the judgment-

debtor under S. 47, Civil P. C., and the execution proceedings started by the plaintiffs was held to be not maintainable, in view of the order passed by the Court on 27th August 1925, recording full satisfaction. The order passed by the Court of execution on 8th January 1927, against the plaintiff, was appealed against; and there was a further appeal by the plaintiffs against the decision of the appellate Court to this Court. The order in the execution proceedings holding against the plaintiffs that they were not maintainable was affirmed by this Court on 18th March 1929. The suit giving rise to this appeal was instituted by the plaintiffs on 26th March 1931, and the bar of limitation was sought to be avoided by asserting that the plaintiffs were prosecuting some other proceedings as contemplated by S. 14, Lim. Act.

In our judgment the application for execution made by the plaintiffs on 21st August 1926, giving rise to Title Execution Case No. 331 of 1926, must be taken to be a proceeding which the plaintiffs had been prosecuting till 18th March 1929, and it would be going against the scope and operation of S. 14, Lim. Act, if it were held that it was the judgment-debtor's objection that was the proceeding before the Court of execution, and not the proceeding in execution started by the plaintiffs to which objection was raised by the judgment-debtors. The proceeding before the Court of execution was the one started on the application of the plaintiffs as decree-holders, to which objection was raised by the judgment-debtors under S. 47, Civil P. C.; the order on that proceeding was against the plaintiffs' objection raised by the judgment-debtors having been allowed to prevail. The proceeding was carried on in Courts of appeal; and the ultimate order passed in the proceeding in execution, started at the instance of the plaintiff, was against the plaintiffs. In the above view of the case before us, we have no hesitation in holding that the plaintiffs were entitled to invoke the aid of the provisions contained in S. 14, Lim. Act, for saving the bar of limitation. It may be mentioned that we are unable to hold, as it appears to have been held by Mitter, J., in the case before us, that the fact that there was an objection under S. 47, Civil P. C., by judgment-debtors, operated as a complete bar to

the plaintiff's invoking the aid of S. 14, Lim. Act.

It was the application for execution made by the plaintiffs which gave rise to the objection by the judgment-debtors, who were parties resisting the decree-holder's application to execute their decree; and it appears to us to be unreasonable, and not at all in consonance with justice, to place the plaintiffs seeking to execute their decree in the position of defendants or opposite parties resisting the objection raised to execution in contradistinction with plaintiffs and applicants as mentioned in S. 14, Lim. Act, and thus denying them the benefit of the operation of the law, so far as exclusion of time during which another proceeding was being prosecuted by them with due diligence. The plaintiff's suit was maintainable; it was not barred by limitation; and on the finding arrived at by the Court of appeal below, that a mistake had crept into the petition of adjustment filed in the Court of execution on 22nd August 1925, the plaintiffs in the suit, the appellants before us, were entitled to the relief claimed by them so far as the rectification of the petition filed on 22nd August 1925 was concerned. The decree passed in favour of the plaintiffs by the Court of first instance, so far as the claim for rectification as mentioned above, is restored.

The plaintiffs' claim for declaration of their title and for possession, as made in the suit in which the appeal has arisen, is dismissed on the findings arrived at by the Court of appeal below. In the result the appeal is allowed in the manner mentioned above, the decree of the trial Court being restored in part. The plaintiffs-appellants are entitled to get their costs in the litigation throughout from the defendants-respondents.

D.S./R.K. *Appeal partly allowed.*

*** A. I. R. 1936 Calcutta 402**

GUHA AND BARTLEY, JJ.

Naokhila Loan Co., Ltd. — Judgment-debtor—Appellant.

v.

Hemendra Narayan Roy — Decree-holder—Respondent.

Appeal No. 282 of 1934, Decided on 6th April 1936, from original order of Sub-Judge, Pabna and Bogra, D/- 19th March 1934.

* Companies Act (1913), S. 153—Depositors of company meeting to pass scheme — Court's sanction—Scheme relating to distribution of funds among depositors deemed as creditors pro rata — Depositor obtaining decree prior to passing of such scheme held not bound by it.

The depositors of a company held a meeting in which they passed a scheme. The Court also sanctioned it, which gave effect to the resolution carried at the meeting of the depositors held after a depositor-creditor of the company had obtained the decree. The scheme related to distribution of the available funds among the depositors who were to be deemed as creditors pro rata. The creditor-decree-holder took out execution:

Held: that the scheme could not possibly be held to apply to the depositor-creditor who had already obtained a decree before the scheme as he had ceased to be a depositor and as such he was entitled to execute his decree.

[P 403 C 1]

Sarat Chandra Basak, Jitendra Kumar Roy and Provash Chandra Bose — for Appellant.

Sushil Chandra Sen and Hari Prasanna Mukherjee—for Respondent.

Judgment.—This appeal has arisen out of an application under S. 47, Civil P. C., made by the appellant, raising objections to the execution of a decree obtained by the respondent on 3rd February 1933, in respect of the money deposited with the appellant, the Naokhila Loan Co., Ltd. The case of the appellant was that having regard to the scheme of arrangement sanctioned by this Court on 27th March 1933, under the provisions of the Companies Act, the application for execution as made by the decree-holder was not maintainable. The application under S. 47, Civil P. C., raising the objections aforesaid was resisted by the decree-holder, respondent in this Court, on the ground that he was not bound by a scheme which was passed at a meeting of the depositors after he had obtained the decree, and a scheme which was sanctioned by this Court subsequently. It is not disputed that the decree sought to be executed in the case before us was obtained before the scheme was adopted at a meeting of the depositors, of which notice was given to the respondent after he had obtained the decree. The Court of execution gave its decision against the appellant on the ground that as the respondent had ceased to be a depositor by obtaining a decree before the scheme was adopted at a meeting of the depositors, he was not bound by the scheme.

The application under S. 47, Civil P. C. was dismissed by the Court below.

It was urged in support of the appeal that the Court below should have held that in view of the scheme of arrangement under S. 153, Companies Act, sanctioned by the Court, the respondent was not entitled to proceed with execution of his decree against the appellant company. On the materials on the record in the case before us we are unable to give effect to this contention. In our judgment the scheme as passed at the meeting of the depositors on 22nd March 1933, and sanctioned by this Court on 27th March 1933 which gave effect to the resolution carried at the meeting of the depositors held after the respondent had obtained the decree and put that into execution, related to distribution of the available funds among the depositors who were to be deemed as creditors pro rata. On a proper construction of the scheme as it stands, and considering the same in the light of the materials placed before us, the scheme could not possibly be held to apply to the depositor who had obtained a decree. The appeal is accordingly dismissed with costs. The hearing fee in this Court is assessed at three gold mohurs.

R.W./R.K.

Appeal dismissed.

✓ * **A. I. R. 1936 Calcutta 403**

GUHA AND BARTLEY, JJ.

Aswini Kumar Gupta—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1267 of 1935, Decided on 22nd April 1936.

* Penal Code (1860), Ss. 419, 468—Person pretending to be another candidate for examination forging answer-papers purporting to be answered by candidate—He is guilty of both cheating and forgery.

Accused pretending to be certain candidate for an examination forged answer papers purporting to be answered by such candidate:

Held: that he was guilty of both cheating and forgery; [P 405 O 1]

Held further: that the fact that the other candidate had failed miserably in the other papers answered by himself did not affect accused's guilt: 25 *Mad* 726, *Dissent.*; 12 *Mad* 151; 28 *Mad* 90 (*F B*) and 15 *All* 210, *Rel. on.*

[P 404 O 1, 2]

S. K. Sen, *S. C. Taluqdar* and *Ajit Kumar Dutt*—for Petitioner.

D. N. Bhattacharjee—for the Crown.

Order.—The petitioner Aswini Kumar Gupta was charged with having committed offences under Ss. 419 and 468, I. P. C., and on conviction was sentenced by the learned 3rd Presidency Magistrate of Calcutta, to rigorous imprisonment for six months under each of the above provisions of the law: the sentences running concurrently. The charges against the petitioner were that he cheated the Registrar of the Calcutta University by pretending to be Samaresh Chandra Mukherjee, a candidate for B. A. examination for 1935, bearing Roll Call. No. 160, in the examination hall, and that he forged answer papers of the B. A. Economics, purporting to be answer papers by Samaresh Chandra Mukherjee, intending that they shall be used for the purpose of cheating as aforesaid. As has been indicated already, the conviction of the petitioner was under both the charges mentioned above. The Rule granted by this Court, on the application of the petitioner, was to show cause why the conviction and sentence passed on the petitioner should not be set aside on grounds Nos. 3, 4, 8, 17 and 22 mentioned in the application. The first of these grounds was that the facts and circumstances accepted by the trial Court did not constitute any offence under Ss. 419 and 468, I. P. C., or for the matter of that, any section of the Indian Penal Code. The second ground was that the conviction and sentence complained of were bad in law, inasmuch as they were based upon erroneous hypothesis and assumptions not warranted by the legal materials on the record. The eighth ground mentioned in the application to this Court was that the necessary materials of an offence under S. 419, I. P. C., had not been established, the conviction and sentences were accordingly illegal and liable to be set aside.

The fourth of the grounds on which this Rule was issued was that in view of the findings as to the admissibility of an alleged confession by the petitioner, the Magistrate acted illegally in considering that evidence against the petitioner. The last ground related to the severity of the sentence passed on the petitioner. As the Rule was issued by us, it may be mentioned at the outset that of the several grounds referred to above, the one relating to a confession by the petitioner appealed to us most, when we decided to issue the rule and we felt

inclined to examine the nature of the confession made by the accused to which definite reference was made by the trial Court in its judgment. At the hearing of the rule, no stress was laid by the learned Counsel appearing for the petitioner on the ground bearing upon the confession. We have ourselves examined the materials on the record to satisfy ourselves that the Magistrate's appreciations of the confessional statement was correct; and we are unable to hold that the Magistrate, in the case before us, acted illegally in considering the confession as evidence against the petitioner. The findings arrived at by the trial Court in the case before us cannot be challenged, and were not challenged before us at the hearing of the rule. The questions raised in support of the Rule were those bearing upon the ground taken in the application to the Court that the necessary elements of an offence under S. 419, I. P. C., had not been established. It was urged that it was not established in this case, that the Registrar of the Calcutta University, who was alleged to have been cheated, or the University of Calcutta had suffered damage or harm in reputation, as contemplated by S. 415, I. P. C., and conviction under S. 419, I. P. C., was therefore not sustainable under the law. In this connexion, it was pressed before us, that the fact that the Registrar had not given his evidence was very significant, and that went to the root of the matter.

We are entirely of a different opinion, so far as the effect of the non-examination of the Registrar as a witness for the prosecution was concerned, as the findings arrived at by the trial Court in the case before us were not, and could not, be challenged on the materials on the record establishing the case for the prosecution, in the matter of deception as contemplated by S. 415, I. P. C. The question was whether the act done by the petitioner through deception had caused damage or harm to the reputation of the Registrar or the University; and in this connexion it was pressed before us that the deception practised by the petitioner could not have caused any damage or harm, inasmuch as Samaresh Chandra Mukherjee, whom the petitioner personated falsely, could not possibly have passed the B. A. examination he having failed miserably in the papers answered by himself on dates previous to the date

on which the petitioner wrote answer papers purporting to be written by Samaresh Chandra Mukerjee.

It is somewhat difficult to appreciate this argument in support of the case for the petitioner; and we fail to understand how the act of Samaresh Chandra Mukerjee could be brought in to the aid of the petitioner, in the matter of falsely personating Samaresh Chandra Mukerjee and forging answer papers for the purpose of cheating. In our judgment, the only question that required consideration in this case was one to which reference has been made, namely, whether on the facts proved, it was made out that harm or damage to the reputation of the Registrar or of the University had resulted, so as to sustain a charge under S. 419, I. P. C., and that question must be answered in the affirmative, an answer directly following from the facts proved against the petitioners. On this part of the case, reference was made to the decision of the Madras High Court, on the case of 25 Mad 726 (1) where in the case of a person charged with cheating the Registrar of the University of Madras by passing himself off for another person and trying to obtain a duplicate of the Matriculation certificate of that other person, it was held that as there was no proof of harm or damage to the Registrar or to the University and no wrongful gain to the accused or loss to the University, the charge of cheating must fail. It is worthy of notice, however, that the above decision is not in consonance with the view taken by the Madras High Court in 12 Mad 151 (2) where in the case of a person falsely representing himself to be another at a University examination, getting a hall ticket under that other person's name, and signing answer papers of questions, it was held that offence of cheating by personation as also of forgery had been committed.

The decision in 25 Mad 726 (1) was expressly disapproved by the Madras High Court, in 28 Mad 90 (3), and it is also opposed to the decision of the Allahabad High Court, in 15 All 210 (4).

1. Emperor v. C. Srinivasan, (1902) 25 Mad 726 = 1 Weir 481 = 12 M L J 68.
2. Queen-Empress v. Appasami, (1899) 12 Mad 151 = 1 Weir 480.
3. Kotamraju Venkatrayadu v. Emperor, (1905) 28 Mad 90 = 1 Weir 588 (F B).
4. Queen-Empress v. Soshi Bhusan, (1893) 15 All 210 = 1893 A W N 96.

In the state of authorities indicated by the decisions, to which reference has been made above, we have no hesitation in expressing agreement with the reasons underlying the decisions of the Madras High Court in 12 Mad 151 (2) and 28 Mad 90 (3), and the decision of the Allahabad High Court in 15 All 210 (4), and dissenting from the view taken by the Madras High Court in 25 Mad 726 (1), on which reliance was placed by the learned counsel for the petitioner in support of the position that no harm or damage to the reputation of the Registrar or the University had resulted. In our judgment the necessary elements of an offence of cheating and forgery for the purpose of cheating as contemplated by law, was committed by the petitioner, regard being had to the conclusions on evidence arrived at by the Magistrate in the case before us.

On the above conclusion on the questions submitted for our consideration in the case, the conviction of the petitioner must be affirmed; and we direct accordingly. The sentence of rigorous imprisonment for six months passed under Ss. 419 and 468, I. P. C., to run concurrently, do not, on the facts and circumstances of the case before us, appear to be severe, regard being had to the gravity of the offence committed as also to the position that the petitioner, a brilliant alumnus of the Calcutta University occupying the post of a lecturer of an important College in Calcutta took a defence which was entirely false and unworthy of a person of his status in society. The sentence is required to be deterrent as far as possible. The Rule is discharged, the conviction of the petitioner and the sentence passed on him are upheld. The petitioner must surrender to his bail, and serve out the sentence passed on him.

K.S./R.K.

*Conviction affirmed.***A. I. R. 1936 Calcutta 405**

NASIM ALI AND EDGLEY, JJ.

Annada Charan Dutta—Defendant
No. 4—Appellant.

v.

Kamala Sundari Rai and others—
Plaintiffs—Respondents.Appeal No. 1499 of 1933 Decided on
31st March 1936, from appellate decree
of Addl. Dist. Judge, Chittagong, D/
24th May 1933.

Will—Construction—Absolute dedication of property to idol—Subsequent clause giving surplus to wife and sons—Prohibition of alienation—Held no absolute dedication to deity but expenses of deity formed burden on estate—Interest obtained by sons held liable to be sold in execution of decrees against them.

The material portion of a will ran as follows:

"I dedicate all my ancestral and self-acquired immoveable and moveable properties to my family deity. For the present my wife and my son shall go on managing the said properties. Out of the profits of the said properties the managers shall maintain the deities and all my usual annual festivities and the surplus profits shall be enjoyed in equal shares by my wife and my sons. Be it known that the said sons shall not be competent to gift away, sell or alienate any portion of the said properties nor shall they be able to put up to auction or sell any of these properties for their debts":

Held: that the intention of the testator as expressed in the will taken as a whole was not to apply the whole income of the estate for the benefit of the idol. The expenses for the maintenance of the idols and other usual annual festivities which were being carried on by the testator at the time of his death formed a burden upon the properties left by him and that the properties were not made absolute debutter by the will: 1917 PC 177, *Rel. on.*

[P 407 C 1]

Held further: that the directions in the will that the surplus income was to be enjoyed by the members of the family in equal shares amounted to a bequest of the surplus to them for their own use and benefit and their interest was liable to be sold in execution of a decree against them even though the testator had declared that they should not be competent to sell or gift away or alienate any portion of his properties as these directions being inconsistent with the interest given were wholly beyond the power of the testator and must be rejected as having no operation: 5 Cal 488 (PC), *Rel. on.*

[P 407 C 1]

Brojalal Chakravarty and Khitindra Kumar Mitter—for Appellant.

S. C. Basak and Chandra Sekhar Sen—for Respondents.

Judgment.—The properties in suit belonged to one Umacharan Roy. He died leaving a will the material portion of which is as follows:

I dedicate all my ancestral and self-acquired immoveable and moveable properties to my family deity Sree Sree Iswar Dayamayi Thakurani. For the present my wife, Srimati Kamala Sundari Thakurani and my son, Sri-man Durga Prosad Roy shall go on managing the said properties. Out of the profits of the said properties the managers (Sarbarakars) shall maintain the deities, Sri Sri Iswar Dayamoyi, Sri Sri Iswar Dasabbhuja and all my usual annual festivities and the surplus profits shall be enjoyed in equal shares by my wife, the said Kamala Sundari Thakurani, and my sons Sriman Durga Prosad Roy and Kalika Prosad Roy and Sriman Karuna Kumar Roy, the

minor son of my eldest son, the late Kishory Mohan Roy, and the manager (Sarbarakar) shall be bound in every way to bring up the minors Sriman Kalika Prosad Roy and Sriman Karuna Kumar Roy during their minority. Be it known that the said, Durga Prosad Roy or Kalika Prosad Roy or Karuna Kumar Roy, shall not be competent to gift away, sell or alienate any portion of the said properties, nor shall they be able to put up to auction or sell any of these properties for their debts.

Probate of this will was taken by Kamala Sundari and Durga Prosad. They got their names registered as Shebaites of the deity in respect of all the revenue paying estates. Defendant 1 obtained a decree for money against Durga Prosad and Kalika Prosad defendants 2 and 3, and in the execution of the decree attached these properties. The idol Dayamoyi Thakurani through the Shebait Kamala Sundari preferred a claim under O. 21, R. 58, Civil P. C. This claim was disallowed. She therefore raised the present suit under O. 21, R. 63, Civil P. C., for a declaration that the properties in suit are debuttar properties and are not liable to attachment and sale. She obtained an injunction from the Court restraining defendant 1 from selling the property pending the hearing of the suit but before the order of injunction was communicated to the executing Court the properties were sold and purchased by defendant 4. The defence of defendant 4 is that the disputed properties are not debuttar, that they are the secular properties of defendants 2 and 3 which they had inherited from their father and that they are liable to be sold in execution of the decree obtained against them. He also pleaded that he had obtained possession of the lands purchased by him at the auction sale and consequently S. 42, Specific Relief Act, was a bar to the present suit.

The trial Judge decreed the suit. He declared the properties to be absolute debuttar and not liable to be sold in execution of the decree obtained by defendant 1 against defendants 2 and 3. He also held that plaintiff was in possession of the disputed properties and was not dispossessed by defendant 4 after the latter obtained symbolical possession through Court. Defendant 4 took an appeal to the lower appellate Court. The learned Additional District Judge has come to the conclusion that the plaintiff has not been dispossessed by

defendant 4, that by the will the disputed properties were made absolute debuttar of the idol and were not liable to be sold in execution of the decree against defendants 2 and 3. He accordingly dismissed the appeal. Hence this second appeal by defendant 4. The point for determination in this appeal is whether the disputed properties are liable to be sold in execution of the decree obtained by defendant 1 against defendants 2 and 3.

Now if by the terms of the will of Uma Charan there was a complete or absolute dedication to the deity the properties are not liable to be sold. If on the other hand by the will only a charge for sheba of the deity and other usual annual festivities were created on the properties by the will the right, title and interest of defendants 2 and 3 subject to that charge are liable to be sold. The question in this case therefore ultimately resolves itself into a question of the construction to be put upon Umacharan's will. The first point which arises on the construction of the will is whether according to the true intent of the will the deity for whom the properties in suit was granted was intended to take the property absolutely. From the terms of the will quoted above it appears that the will begins with the dedication of the properties to the idol. The testator then appoints his wife and his son Durga Prasad, the manager or shebaites, and directs that out of the income of the properties dedicated the expenses for the maintenance of the deities mentioned in the will and for performance of all his usual annual festivities should be met first and the surplus is to be enjoyed by the members of his family in equal shares. He then prohibits his sons and grandsons from alienating the properties. Although the will purports to begin with an absolute gift in favour of the idol its subsequent provisions relating to the disposition of the surplus income to the members of his family cut down this absolute gift. In 39 All 553 (1), Viscount Haldane, while explaining the decision of Sir George Turner in 8 M I A 66 (2), observed as follows :

1. Jadunath Singh v. Thakur Sitaranji, 1917 P C 177=42 I C 225 = 44 I A 187 = 20 O C 200=39 All 553 (P C).
2. Sonatun Bysack v. Jagat Sundari, (1859-61) 8 M I A 66=2 Suther 37=1 Sar 721 (P C).

Although nominally there was a gift at the beginning to the idol, that gift was so cut down by subsequent disposition as to leave it clear that the subsequent disposition ought to prevail, rather than the earlier one and that consequently there was no gift to the idol so as to make the property pass an absolute and entire interest in its favour.

The intention of the testator as expressed in the will before us taken as a whole was not to apply the whole income of the estate for the benefit of the idol. We are therefore of opinion that by the provisions of the will the expenses for the maintenance of the idols and other usual annual festivities which were being carried on by the testator at the time of his death form a burden upon the properties left by him and that the properties were not made absolute debutter by the will. The next question that arises is whether the dispositions in favour of defendants 2 and 3 by the will created such an interest in them as are liable to be sold in execution of a decree against them. Applying the principle laid down by the Judicial Committee in the case of 6 I A 182 (3), to the directions in the will before us that the surplus income is to be enjoyed by the members of the family in equal shares, we are of opinion, that this direction amounts to a bequest of the surplus to them for their own use and benefit. There are no words in the will to indicate that the testator intended to limit this bequest to the lifetime of defendants 2 and 3. It is true that the testator has declared that defendants 2 and 3 or Karuna Kumar, shall not be competent to sell or gift away or alienate any portion of his properties. But these directions being inconsistent with the interest given were wholly beyond the power of the testator and must be rejected as having no operation: 6 I A 182 (3), cited above. This being so, under the will of Uma Charan, defendants 2 and 3 obtained a share in the properties in question which after satisfying the expenses actually incurred for the maintenance of the idols and the performance of the usual annual festivities may have some value and was therefore liable to be sold in execution of the decree obtained by defendant 1 against them. Defendant 4 has therefore acquired by his purchase at the Court-sale the right, title

and interest of defendants 2 and 3 in the disputed properties under the will.

The learned advocate for the appellant contended that the share of defendants 2 and 3 was one half. This was not disputed by the respondent. The expenses with which these properties are charged are incurred for the maintenance of the idols mentioned in the will and certain usual annual festivities by which apparently the testator meant the periodical pujas and the customary *sradh* which, according to the finding of the trial judge, used to be performed by him during his lifetime and which are now being performed by the *shebais*. The trial Judge did not allow any evidence as to the actual amount spent in these connections. This amount will have to be ascertained in some future proceeding. The result therefore is that the appeal is allowed and the decrees of the Courts below are set aside. It is declared that the effect of the will of Umacharan was to charge the properties in suit with the payment of such sums of money as might be necessary to defray the expenses which might be incurred by the managers or *shebais* of the idol for the daily worship of the idols mentioned in the will in the manner in which such service was performed at the time of the death of the testator and with the expenses which might from year to year be incurred by them in performing the usual annual ceremonies which were being performed by the testator in his lifetime in the manner in which such ceremonies were being performed at the time of his death. It is also declared that defendant 4 has acquired by his purchase at the auction-sale the right, title and interest of defendants 2 and 3 in the disputed properties under the terms of the will as construed by us. The parties will bear their own costs throughout this litigation.

K.S./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 407

CUNLIFFE AND HENDERSON, JJ.

Emperor

v.

Gostho Sardar and others—Accused.

Jury Ref. No. 80 of 1935, Decided on 8th April 1936.

(a) Criminal Trial—Reference in acquittal.

Judges must convince appellate Courts with extreme particularity in cases of references with regard to acquittals than in cases of reference with regard to convictions. [P 408 C 1, 2]

3. Ashutosh v. Durga Charan, (1878-79) 5 Cal 488=6 I A 182=4 Sar 58 (P O).

(b) Criminal P. C. (1898), S. 307—Reference—When it should be made.

Where a case entirely depends on the statement of an approver and two retracted confessions which are of usual type of non-incriminating confessions and the jury hold that evidence is not sufficiently corroborated and hence give a verdict of not guilty, a Sessions Judge has ordinarily no right to put up to High Court a report on such a pure question of fact, the jury being regarded as the masters of facts.

[P 408 C 2]

(c) Criminal Trial—Confessions—Confession implicating others and safeguarding the person confessing—Such confessions should be taken warily.

Confession which seeks to implicate a number of other persons whilst carefully safeguarding the conduct of the person cannot be read without seeing that they are of a kind very familiar to the Judges. This type of confessor never really does anything at all, but is always on the spot through compulsion and all that it is useful for is to testify the various happenings which involve other people. Such confessions should therefore be considered with great caution.

[P 408 C 2]

(d) Criminal Trial—Trial by jury—Jury refusing to convict on uncorroborated testimony of approver—Their action is not perverse.

Where the jury refuse to convict an accused on a mere uncorroborated testimony of an approver they cannot be said to be acting perversely.

[P 409 C 1]

(e) Criminal P. C. (1898), S. 307—Unreasonable—Jury not satisfied that property was stolen in course of dacoity—Verdict is not unreasonable.

Where it is alleged by the approver that the accused told him that he had sold the stolen property to A, but A when put in the witness box claimed it as absolutely his own and the articles are not extraordinary, the opinion of the jury that they are not satisfied that the articles in question are proved to have been stolen in the course of dacoity, cannot be said to be unreasonable.

[P 409 C 1]

Khundkar (Deputy Legal Remembrancer)—for the Crown.

Sudhansu Sekhar Mukerjee and *Sailendranath Mitra*—for Accused.

Cunliffe, J.—By the terms of the reference before us now, Mr. S. C. Chakravarty the Assistant Sessions Judge at Alipore, indicates that he is by no means in agreement with the decision of the Jury sitting with him, who acquitted three persons; Gosto Sardar, Ishan Sardar and Haran Sardar of the crime of dacoity. We are getting a good many of these references now, and I may say, at once, that if the phrase may be used with propriety where acquittals are concerned there is a much greater onus upon the learned Judge to convince an appellate Court with extreme particularity

than there is when he makes a reference with regard to a conviction. Now, here it seems to me that the learned Judge has absolutely no right to put up to this Court a report which is intended to substitute his judgment on a pure question of fact, rather than the judgment and opinion of the jury, who was sitting with him.

This dacoity case depended almost entirely upon tainted evidence. There was an approver, and two confessions were made, both of which were retracted, and the only view that the learned Judge seems to have taken with regard to bringing home the question of guilt to the accused was that he thought that the circumstantial evidence, such as it was, ought to have been accepted by the jury as confirming the facts contained in the retracted confessions and in the approver's testimony in the case. One cannot read these confessions without seeing that they are of a kind very familiar to the Judges of this Court, the sort of confession which seeks to implicate a number of other people whilst carefully safeguarding the conduct of the person confessing it. This type of confessor never really does anything at all, but is always on the spot through compulsion, and all that it is useful for is to testify to various happenings which involve other people. There was certain evidence with regard to the pawning of the articles, said to constitute the loot of the dacoity, but the answer to that contention on the part of the prosecution seems to have been that the articles in question were common objects, claimed equally by the persons who pawned them as being their property as well as by the persons who were the victims of the dacoity. The jury were perfectly entitled on this plain issue of fact to accept the evidence of ownership on the innocent side, if they wished to. In the circumstances of this case, we must reject this reference, and express the hope that references of this type consisting of very exiguous materials will be less frequent than they have been lately on our board. The accused must be acquitted and released forthwith.

Henderson, J.—I agree. The evidence by which the prosecution sought to establish their case consisted in the testimony of an approver, the recovery of certain articles which were said to be part of the loot, and in the case of the

accused Gosto's and Haran's confessions. This should be enough to show that the case is one which is eminently suitable for trial by a jury, but it will be almost impossible to say that the verdict, whatever it might be, was unreasonable or perverse. With great respect to the learned Judge, so far as the accused Ishan is concerned, the view of the jury was eminently sound, because on going into the case we find that there is really nothing against him, except the uncorroborated testimony of the approver. We are certainly not prepared to say that a jury refusing to convict on such testimony is acting perversely. In addition to that deposition the prosecution produced Exs. 6, 7 and 8 said to be part of the loot which were recovered from prosecution witness No. 15 Paresh. Now, the approver said that this accused Ishan admitted to him that he sold some of the loot to Paresh. Supposing Paresh had come forward and supported that story, the prosecution might urge that there was some corroboration of the approver's evidence. But even then the jury might refuse to accept, as satisfactory corroboration, an exculpatory statement made by the person in whose possession the stolen property was actually found and in doing so would clearly be taking a thoroughly reasonable view of the matter. The present case is even weaker than that; when put into the witness box, Paresh absolutely denied that these articles had been sold to him by Ishan, and claimed them as his own.

The identification of the property alleged to have been stolen is common to the cases of all the three accused persons. It is also common to all the three cases that the persons, from whose possession these very ordinary articles were recovered claimed them as their own. Where in a case of counter-claims of this sort the jury are not satisfied that the property in question is proved to have been stolen in the course of dacoity, it cannot be said that their view is unreasonable.

The only other evidence consisted of two confessions made by the accused persons Gosto and Haran. As my learned brother has pointed out, those confessions are of a character which suggests that they are not made from any desire to tell the truth, but for some other purpose. We are not at all surprised that the jury refused to accept those confes-

sions. Neither of them is a full or frank statement. Both the accused persons alleged that they were compelled to join in the dacoity against their will. That is always a suspicious circumstance because there is no advantage to the rest of the gang in taking reluctant persons to participate in the crime. Then again, neither of them did anything when he got there. As I have already said, we are not at all surprised that the jury refused to convict on these statements.

D.L./R.K.

Reference answered.

* A. I. R. 1936 Calcutta 409

GUHA AND BARTLEY, JJ.

Bank of Dacca, Ltd.—Decree-holder—Appellant.

v.

Gour Gopal Saha—Judgment-debtor—Respondent.

Appeals Nos. 2 and 3 of 1936, with Rule 206 (M) of 1936, Decided on 7th April 1936, against appellate orders of Dist. Judge, Dacca, D/- 6th September 1933.

(a) Banker and Customer — Relationship between, explained.

The relationship of banker and customer is generally that of agent and principal, of debtor and creditor or of pledgor and pledgee; there are however cases where the banker stands in the relation of trustee as well as agent for his customer. [P 410 C 2; P 411 C 1]

* (b) Banker and Customer—Relationship between—Banker no trustee of money deposited by customer for his own use—But case different where banker using securities deposited for bank's use and not for customer—Customer depositing securities with banker as cover for advances—Transaction held to be in nature of pledge.

The banker is not a trustee for the customer in respect of money paid in or responsible for him for the use he makes of it, but the position is not the same where the banker uses the securities deposited with him for his own use, and there is conversion of the securities for the purposes of the Bank and not for the purpose of customer. [P 411 C 1]

Where securities are deposited as cover for advances and for the purpose of securing overdrafts or advances, the transaction is strictly of the nature of pledge: *Re Hallet's Estate*, (1879) 13 Ch D 696 and 19 Cal 322 (PC), *Rel. on.* [P 411 C 1]

(c) Banker and Customer—Sale of securities—Payment of bank's loans—Customer held entitled to balance of money over and above his liabilities to bank.

The customer is entitled to enforce his ownership to the amount in the hands of the banker, after the sale of the Government Promissory Notes deposited in the Bank as security to cover overdrafts or advances after payment of

loans from the Bank for which they are security: 19 Cal 322 (P C), Rel. on [P 411 C 1, 2]

* (d) Civil P. C. (1908), O. 21, R. 19 and S. 47—Provisions in O. 21, R. 19 are not exhaustive regarding questions covered by S. 47.

The provisions contained in O. 21, R. 19, Civil P. C., cannot and should not be taken to be applicable and exhaustive in regard to questions arising for consideration under S. 47 of the Code relating to execution, discharge or satisfaction of decrees. [P 411 C 2]

* (e) Executing Court—Powers of—Executing Court can give set-off even in cases not coming under O. 21, R. 19, Civil P. C.

On general principles and in the exercise of its inherent power, an executing Court can entertain and give effect to a claim to set off even in case which does not come strictly under O. 21, R. 19, Civil P. C. [P 412 C 1]

Bireswar Bagchi, Prokash Chandra Pakrasi, Jitendra Mohan Banerji and Nirmal Kumar Sen—for Appellant.

Nares Chandra Sen Gupta, Benoyendra Pr. Bagchi and Radhikaranjan Guha—for Respondent.

Misc. Appeal No. 2 of 1936.

Judgment.—This appeal has arisen out of an application under S. 47, Civil P. C. made by a person in the position of a judgment-debtor being a share-holder of a Bank, the Bank of Dacca, in liquidation against whom there were orders for recovery of money passed in favour of the Bank in liquidation in respect of unpaid calls for shares allotted to him. The applicant raising objections under S. 47, Civil P. C., respondent in this appeal, had an account with the bank of Dacca and as security against overdraft, had deposited Government Promissory Notes. These notes were deposited by the Bank of Dacca with the Bengal National Bank, and were sold by the Receiver appointed by the Court for the Bengal National Bank, and the sale-proceeds after certain deductions made therefrom on account of dues of the Bank of Dacca to the Bengal National Bank, were sent to the Liquidator of the Bank of Dacca. The amount received by the Liquidator exceeded the sum realisable from the appellant under the balance order put into execution. The objections to execution raised by the appellant related to the position that the Liquidator of the Bank of Dacca seeking to execute the balance order should meet the decretal dues out of the amount recovered from the Receiver of the Bengal National Bank which was the objector's property, being trust money which could not be applied for any purpose other than that for which the Government Promis-

sory Notes were deposited. The contention of the debtor under the balance order was that money in the hand of the liquidator would fully satisfy their liability under the balance order and the execution should not therefore be allowed to proceed.

The Liquidator of the Bank of Dacca on the other hand, asserted that the applicant under S. 47, Civil P. C. was only a creditor of the Bank, and his objection by way of set off was not maintainable. The learned District Judge in the Court of Appeal below, in affirming the order passed by the Court of execution, held that on the facts and in the circumstances of the case, the Bank of Dacca was trustee in respect of Government Promissory Notes deposited by way of security for advances; that the debt of the Bank could be squared without taking the matter into Court at all, that the case was not one of set off or of a contributory claiming a deduction before a share out among the creditors. The respondent was not, according to the Judge, in the position of a creditor, but was entitled to enforce his ownership of the Government Promissory Notes deposited with the Bank. It appears that on 13th August 1931, the respondent addressed a letter to the Liquidator of the Bank of Dacca mentioning the Government Promissory Notes deposited by him as security for advances and claiming the amount covered by the same with interest up-to-date. There is a note on the letter showing that Rs. 5,601-7-10 was the amount the respondent was entitled to get from the Bank. It may be noticed that in view of the use of the word trustee in the judgment of the Courts below, which appears to us to have been used in a very general way, a great deal of time was taken by the learned advocates representing the parties to this appeal, for explaining the position created by the deposit of Government Promissory Notes as security for advances or overdrafts. The position was debated before us with a reference to some decisions of Courts in England, practically without reference to the facts of the case before us, and without consideration for a position which may be taken to be well established now. The relationship of banker and customer is generally that of agent and principal, of debtor and creditor or of pledger and pledgee; there are however cases where

the banker stands in the relation of trustee as well as agent for his customer, as for example in the case of securities lodged for safe custody, the banker is not entitled to sell or pledge them, and must be prepared to hand back the identical securities deposited; should he convert them to his own use, he becomes criminally liable. (See Sykes on Banking, Edn. 6, pp. 126-127). As has been mentioned in Paget's Law of Banking the relation of banker is primarily that of debtor and creditor, and observations of Jessel, M. R. in 13 Ch D 696 at p. 727 (1) do not affect the general rule. The banker is not a trustee for the customer in respect of money paid in or responsible for him for the use he makes of it, but the position is not the same where, as in the case before us, the banker uses the securities deposited with him for his own use, and where there is conversion of the securities for the purposes of the Bank and not for the purpose of the customer.

In the circumstances of the case before us where securities were deposited as cover for advances, and for the purpose of securing overdrafts or advances, the transaction was strictly of the nature of a pledge, (Paget, p. 242), and this rule must be taken to be the rule guiding the relationship of a banker and a customer in the position of the respondent in this appeal in view of the decision of their Lordships of the Judicial Committee in 19 I A 60 (2). On the principles adopted in 19 I A 60 (2), and on the facts and circumstances of the case before us, the bank became liable for the value of the G. P. Notes as for conversion. The bank had converted the G. P. Notes to its own use, and was liable for the value of them including interest on them. The customer was of course bound to pay the loans for which the G. P. Notes were security: see 19 I A 60 (2) at pp. 67-68. The position taken up by the respondent in his letter to the bank in liquidation dated 13th August 1931, mentioned above, was justifiable on principle and authority to which reference has been made, and the Judge in the Court below is right in holding that the respondent was entitled to enforce his ownership to the amount in the hands of the liquidator, after the sale of the

G. P. Notes deposited in the Bank of Dacca as security to cover overdrafts or advances after payment of loans from the bank for which they were security.

The question for consideration next is whether the respondent against whom execution was levied for realization on unpaid share call moneys, in pursuance of a balance order made under the Companies Act, was entitled to take up the position that the Liquidator applying for execution should meet the decretal dues out of the amount in his hands, representing the sale-proceeds of the G. P. Notes, which is the respondent's own property. The Court of execution expressed the opinion that as soon as the respondent asserted as he did, that the money in the hands of the Liquidator was to be applied to the satisfaction of the decretal debt, the Liquidator should have entered satisfaction of the decree, as the money in the hands of the Liquidator was far in excess of the decretal amount. There was no question of set off in the case. The Judge in the Court of appeal below agreed with the Court of execution in the above view of the case and observed that the respondent simply sought to utilise his own property in the hands of the Liquidator for the purpose of meeting dues decreed against him as a contributor. It was urged before us in support of the appeal by the Liquidator that the question of a set off not having been raised in the liquidation proceedings, the respondent was not entitled to raise the question in the proceedings in execution started by the Liquidator. There is no question that the provisions contained in O. 21, R. 19, Civil P. C., relating to cross-claims, have no application to the case before us; but in our judgment those provisions cannot and should not be taken to be exhaustive in regard to questions arising for consideration under S. 47, Civil P. C., relating to execution, discharge or satisfaction of decrees. Their Lordships of the Judicial Committee of the Privy Council in 19 I A 166 (3) prohibited placing a narrow construction on the language of the statute, and expressed the opinion that an enactment of which the scope was to provide for expeditious procedure for trial of question without recourse to separate suit, should be used for the benefit.

1. *Re Hallet's Estate*, (1879) 13 Ch D 696=49 L J Ch 415=28 W R 732.

2. *Nelkram Dobay v. Bank of Bengal*, (1892) 19 Cal 322=19 I A 60 (P C).

3. *Prosanna Kumar Sanyal v. Kalidas Sanyal*, (1892) 19 Cal 633=19 I A 166 (P C).

cient purpose of checking needless litigation and disposing of objections to execution as speedily as possible. In this connection we desire to express our entire agreement with the position indicated by this Court in 39 C W N 106 (4) that on general principles and in the exercise of its inherent power, an executing Court can entertain and give effect to a claim to set off even in cases which do not come strictly under O. 21, R. 19, Civil P. C.

The result of the conclusion we have arrived at, as mentioned above, is that the order passed by the Courts below, against which this appeal is directed is affirmed; and this appeal is dismissed with costs. The hearing fee in this Court is assessed at two gold mohurs.

The connected Rule, Rule No. 206 (M) of 1936 is discharged. There is no order as to costs in this Rule.

Miscellaneous Appeal No. 3 of 1936.

The question arising for consideration in this case is similar to those decided by us in appeal from Appellate Order No. 2 of 1936. The point of difference as between this case and the other is that in a letter to the Liquidator, Bank of Dacca (in liquidation) the respondent mentioned that he was laying his claim to G. P. Notes deposited by him with the bank as security against overdraft, as creditor. There was also an endorsement on the letter showing that the respondent's claim was admitted. The G. P. Notes deposited by the respondent as security were made over to the Bengal National Bank by the Bank of Dacca. The National Bank sold these notes, and after deduction of the major portion of the sale proceeds in respect of the dues of the Bank of Dacca, the Receiver of the National Bank sent the remainder of the sale proceeds to the Liquidator of the Bank of Dacca. The respondent, raising objection to the proceedings in execution for realization of amounts due from the respondent in respect of unpaid share call moneys, sought to use the amount in the hands of the Liquidator towards the payment of the decretal dues, as shown in a balance order made in liquidation proceedings.

The questions arising for consideration in this appeal have been decided in our judgment in the other appeal No. 2 of

4. Krishna Chandra Bhowmik v. Pabna Dhanabhandar Co. Ltd., 1935 Cal 225=155 I C 991=39 C W N 106=62 Cal 298.

1936, and for the reasons stated in that judgment, this appeal must be dismissed as in our opinion the learned District Judge in the Court of appeal below is right in holding that the mere use of the words "as creditor" in the letter referred to above, could not reasonably be taken to mean that the respondent abandoned his rights of ownership in respect of property held by the Bank of Dacca for him. The word "trust" used by the Judge in this connexion, may be strictly accurate in view of the legal position created by the deposit of G. P. Notes as security for advances or overdrafts, and by the sale of the notes at the instance of the Bank. It may also be noticed as has been mentioned by the District Judge in his judgment the words "claim admitted" appearing on the letter addressed to the bank proves nothing, and could not result in the respondent's surrendering his right of ownership in the amount recovered in respect of his G. P. Notes from the Receiver of the National Bank by the Liquidator of the Bank of Dacca, or that the respondent had chosen to rank as a creditor. The respondent was not on the facts and circumstances of the case, and on the decision given by us in Appeal No. 2 of 1936, mentioned above, entitled to enforce his right of ownership and defeat the Liquidator's claim in the proceedings in execution giving rise to this appeal.

The appeal is dismissed with costs; the hearing fee in this Court is assessed at two gold mohurs.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 412

GUHA AND BARTLEY, JJ.

Mohini Mohan Saha—Plaintiff—Appellant.

v.

Janaki Nath (dead) and others—Respondents.

Appeal No. 128 of 1934, Decided on 27th April 1936, from original decree of Sub-Judge, Burdwan, D/- 28th March 1934.

Transfer of Property Act (1882), S. 58 (f)—Deposit of title-deed under agreement to cover present and future advances—Each advance becomes charge on property and no fresh deposit of title-deeds is necessary.

Where title deeds are deposited under an oral agreement to cover present and future advances, as each advance is made, it becomes a charge on the property comprised in the title-

deeds by the force of the prior oral agreement that it shall be so. Fresh deposit of title deeds for subsequent advances is not necessary: *Ex parte Langson*, 17 Ves 227; *Ex parte Whitebread*, 19 Ves 209 and 10 Bom 634, Ref.

[P 413 C 2]

Bijon Kumar Mukherjee and *Biswanath Naskar*—for Appellant.

Apurbadhone Mukherjee and *Pannalal Chatterjee* (for Deputy Registrar)—for Respondents.

Judgment.—The question for consideration in this appeal is whether a mortgage was created by delivery of documents of title to immoveable property with intent to create a security thereon, in respect of a transaction of loan evidenced by a hand note executed by Janaki Nath Samanta, the father of the respondents 1 to 5 (b) in this appeal in favour of Mohini Mohan Saha, the appellant, on 6th April 1932 for Rs. 2,500. The evidence in the case before us establishes the position that before the hand-note in question, Ex. 3 in the case, was executed, Janaki Nath Samanta handed over to the appellant his title deeds in respect of his rice mill at Burdwan and the site thereof and of the adjacent land and garden, on the date on which the title deeds were delivered, a loan of Rs. 12,500 was advanced by the appellant, and Janaki Nath Samanta stated that he would take loan up to a maximum of Rs. 20,000 and that the deposit of title deeds would be the security for loan up to the said sum of Rs. 20,000. This position is clearly made out on evidence coming from the side of the appellant; and we see no reason to hold that the evidence was untrustworthy and unreliable, as we were invited to do on behalf of the respondents in this appeal. It would appear that on the evidence, the Judge in the Court below came to the conclusion that it might probably have been intended that the second advance of Rs. 2,500 would come to be covered by the previous delivery of title deeds when an amount of Rs. 12,500 was advanced; but as there was no fresh deposit of title deeds it could not be held that there was any delivery of title deeds for the second hand-note for Rs. 2,500 from a "mere tacit intention" of the parties concerned. On the above conclusion the decision was given by the learned Subordinate Judge in the Court below, that so far as the hand-note of Rs. 2,500 was concerned, there was no mortgage. In our opinion

the decision is erroneous and cannot be supported.

It is well settled that in the case of a mortgage by delivery of title deeds, the debts must be proved; the deposit of title deeds has to be established; and the intention that the title deeds deposited as a part of the transaction should be security for the debt made out. It may further be taken to be established on authorities, that a mortgage by delivery of title deeds as contemplated by law, is not created when the deeds are deposited before any money is advanced with a view to prepare a future mortgage, and there is no express agreement that they shall stand as security for future advances. Title deeds may be deposited under an oral agreement to cover present and future advances. As each advance is made, it becomes a charge upon the property comprised in the title deeds from the force of the prior oral agreement that it shall be so [see 17 Ves 227 (1) and 19 Ves 209 (2), referred to in 10 Bom 634 (3)]. Applying the rule mentioned above to the evidence in the case before us, the conclusion is irresistible that a mortgage was created by the transaction evidenced by the hand-note Ex. 3 in the case, by the deposit of title deeds, and by the force of the prior express oral agreement between the parties concerned, that the title deeds deposited were to cover the present and future advances up to Rs. 20,000. In our judgment, the plaintiff-appellant was entitled to get a mortgage-decree for the amount covered by the hand-note Ex. 3 in the case on the materials before us.

It may be mentioned that it was contended on behalf of the respondent in the appeal that the delivery of title deeds related only to the advance of Rs. 12,500 made at the time at which they were delivered, and the provisions contained in S. 91, Evidence Act, operated as a bar to leading oral evidence that the deposit of title deeds as made related to future advances. The argument in this behalf was based on the contents of a memorandum creating collateral security for the amount of Rs. 12,500, dated 10th March 1932, Ex. 2 in the case, in which the words "collateral security for the repay-

1. *Ex parte Langston*, (1810) 17 Ves 227.

2. *Ex parte Whitebread*, (1812) 19 Ves 209.

3. *Jaitha Bhima v. Abdul Syad Oosman*, (1886) 10 Bom 634.

ment of Rs. 12,500 only" were used. It is impossible for us to give effect to the argument, seeing that the oral agreement between the parties concerned did not relate to the transaction in which the amount of Rs. 12,500 was advanced, and for the reason that it was open to the appellant before us to prove a separate oral agreement as to any matter on which the document, Ex. 2, was silent. On the conclusion we have arrived at, the part of the decision and decree of the Court below against which this appeal is directed, must be set aside; and we direct accordingly. The claim of the plaintiff-appellant based on the hand-note dated 9th April 1932, Ex. 3 in the case, is allowed on the footing that a mortgage was created in respect of the loan of Rs. 2,500 advanced by delivery of title deeds. The Court below will now proceed to pass a mortgage-decree for the entire claim made in the suit in which this appeal has arisen, in accordance with law, entitling the plaintiff-appellant to recover the mortgage money claimed by him with costs in the litigation, up to the present stage, including the costs in this appeal. The hearing fee in this appeal is assessed at three gold mohurs.

V.B./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 414

LORT-WILLIAMS AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Kali Raman Bhattacharjee—Accused—Opposite Party.

Govt. Appeal No. 3 of 1935, Decided on 7th August 1935.

Assam Criminal Law Amendment Act (1934), S. 20 (1)—Act has no force outside Assam.

A resident of Assam was served with a notice under S. 16 (1) (a) of the Act directing him to notify his residence and any change of residence to the Superintendent of Police. He left for Bombay after duly notifying this to the Superintendent of Police at Sylhet. On his return from Bombay he wrote a letter to the Superintendent of Police stating that he had stayed at a certain place at Bombay and that he had arrived at Calcutta. On his return to Sylhet he was arrested:

Held: that the Act had no force outside Assam and was not intended to apply to such a person outside the limits of Assam.

[P 414 C 2; P 415 C 1]

D. N. Bhattacharji—for Appellant.

J. C. Gupta and Radhananda Bhattacharji—for Opposite Party.

Lort. Williams, J.—This is an appeal on behalf of the Government of Assam by the Superintendent and Remembrancer of Legal Affairs, Bengal, against the order of the Second Additional Sessions Judge of Sylhet, dated 13th February 1935, acquitting the accused respondent on appeal from the order of the Additional District Magistrate of Sylhet, who had convicted him under S. 20 (1), Assam Criminal Law Amendment Act, 1934, and sentenced him to suffer rigorous imprisonment for six months. The appellant was served with a notice under S. 16 (1) (a) of the Act on 7th August 1934, directing him to notify his residence and any change of residence to the Superintendent of Police, Sylhet. The appellant was then residing at Sylhet town and he notified his residence duly. On 21st October 1934 he wrote a letter to the Superintendent of Police, Sylhet, to say that he was starting for Bombay that evening to attend the Congress Session as a representative of a local weekly, and he left Sylhet on the same evening. The appellant returned to Sylhet on 2nd December 1934. On 26th November 1934 he wrote a letter from Calcutta stating that at Bombay he had stayed at Abdul Gafur Nagar (the Congress site) and had been detained by illness and that he had arrived at Calcutta a few days previously and was staying at 175/1 Upper Circle Road. On the appellant's return to Sylhet on 2nd December 1934 he was arrested on a charge under S. 20 (1), Assam Criminal Law Amendment Act.

Apart from the merits of the case, a point of law was raised on behalf of the appellant to the effect that the order under S. 16 (1) of the Act, being an Assam Act, has no force, so far as the appellant was concerned, when he was outside the boundaries of Assam. The extent of the application of the Act is defined by sub-s. (1) thereof, viz., that it extends to the whole of Assam. It is clear therefore that the Act has no force outside Assam. An Act intended to have effect outside the limits of the province would probably have to be passed by the Government of India. But it is not necessary for us to decide that point. This is a Provincial Act of the Assam Government. It was intended, as the learned Sessions Judge observed, to prevent subversive action within the jurisdiction of the Local Government of the Province of

Assam. That Government is not *prima facie* concerned with the good government of areas outside its jurisdiction. Undoubtedly, it is necessary to take steps to prevent a person believed to be engaged in subversive activity in one province from working freely for the same object in another province. But as the learned Judge observed the remedy for this is that when such a person leaves the jurisdiction and enters the jurisdiction of another province, the authority which made the original order should notify the authority in the area to which that person has gone, and that authority should take the necessary steps.

For these reasons, it is necessary for such a person leaving Assam, before doing so, to notify his change of residence, that is, to state the place of residence to which he intends to go. With regard to this, the complaint is that all that he told the authorities was that he was going to Bombay. But it seems that he had some excuse for this omission, because when he started he did not know where he was likely to stay in Bombay, as he was only going there to attend the Congress Session as the representative of a local newspaper. However he gave the authorities this information, and if the police had been vigilant it would have been comparatively easy for them to have got into touch with the appellant when he was attending the Congress Session at Bombay. Instead of that they waited for over a month before they took any action in the matter. Apparently, the authorities had no objection to the appellant's going to Bombay to attend the Congress Session. But they complained of the fact that he had not informed them of his subsequent changes of address in Bombay and Calcutta. In my opinion the Assam Act does not and is not intended to apply to such a person outside the limits of Assam. But the Assam authorities are interested in the movements of such a person directly he returns within the limits of the province. If these restrictions are not considered to be sufficient by the various Local Governments, steps should be taken to obtain legislation which will affect the whole of India irrespective of the limits of any particular Province. Apart from the question of law I am satisfied that the appellant in this case acted in good faith as is shown by the letter which he wrote on 26th November

1934, and by his return to Sylhet on 2nd December 1934. In these circumstances the appeal must be dismissed.

Jack, J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 415

GUHA AND BARTLEY, JJ.

(*Shebaita of Sree Sree Idol Issur*) *Sridhar Thakur and others*—Plaintiffs—Appellants.

v.

Jamini Sundari Dassya—Defendant—Respondent.

Appeal No. 184 of 1934, Decided on 6th May 1936, from original decree of Sub-Judge, Rajshahi, D/- 23rd April 1934.

(a) Bengal Land Revenue Sales Act (9 of 1859), Ss. 6 and 7—Sale on account of arrears of revenue and cesses not amalgamated—Mention of arrears of cesses in notification does not make sale for arrears of revenue illegal.

Where a sale for arrears of revenue is held not only on account of arrears of revenue but in respect of the arrears of cesses due on the estate in question, the amount due on account of cesses having been separately mentioned in sale proclamation but not amalgamated with or included in the amount of revenue, the mention of the amount of cesses due along with the arrears of revenue in the sale notification does not make the sale for arrear of revenue illegal or *ultra vires*. [P 417 C 1]

(b) Bengal Land Revenue Sales Act (9 of 1859), S. 6—Publication of notification of sale in Gazette—Period of 30 days does not apply.

The provision of S. 6 does not prescribe a period of 30 days in the matter of publication in the Gazette of the notification of sale; nor does the provision relating to affixing the sale notification at certain places, which precedes the one relating to the publication of the sale notification in the Gazette, fixing a period of 30 days, apply also to the publication of the sale notification in the Gazette. [P 417 C 2]

(c) Bengal Land Revenue Sales Act (9 of 1859), Ss. 6 and 7—Mere suit for declaration that sale was illegal is not maintainable.

A suit merely for a declaration that the revenue sale was illegal and *ultra vires* and without any force and effect, is not maintainable under the law, in the absence of any prayer for consequential relief for setting aside the sale held for arrears of revenue. A suit with a prayer for a declaration, pure and simple presumably for the purpose of avoiding payment of proper court-fees is not a suit which is contemplated by the Revenue Sale Law. [P 418 C 1, 2]

Sarat Chandra Basak and Bijan Kumar Mukherjee—for Appellants.

Bireswar Bagchi and Jatindra Mohan Sanyal—for Respondent.

Judgment.—This appeal has arisen out of a suit for a declaratory decree in respect of a revenue sale held on 24th June 1932, of Mahal Taraf Ratahar and others, appertaining to Touzi No. 365 of the Rajshahi Collectorate, after having the same determined to be bad and inoperative (illegal and ultra vires), and of no force and effect. In the plaint, there was also a prayer for temporary injunction against the defendant respondent, restraining her from taking possession of the disputed property till the disposal of the suit. The prayer for temporary injunction was withdrawn during the pendency of the suit. The case of the plaintiffs before the Court was that the revenue payable in respect of the Touzi in question for the March kist of 1932, became arrear only on 1st April 1932, and as such the sale that was held on 24th June 1932, was illegal and ultra vires; it was further stated by the plaintiffs that the revenue payable for the Mahal in suit was payable in four kists, namely, 12th January, 28th March, 28th June and 28th September, and that the plaintiffs paid the revenue in the said manner all along and could not pay the revenue for the March kist on account of the world wide economic depression. It was the case of the plaintiffs that the Mahal in question was advertised for sale not only for arrears of revenue but also for cesses due, and that as such the sale held on 24th June 1932, was not legal. It was asserted by the plaintiffs that the sale notices and the sale proclamations required to be served under the provisions of Ss. 6 and 7, Revenue Sale Law, were not served in the locality, and were not duly published in the Calcutta Gazette in the manner provided by law. It was the case of the plaintiffs also that owing to irregularity referred to in the plaint, the property having an annual income of Rs. 1,744, and worth Rs. 17,000, was sold at an inadequate price of Rs. 1,100 only and that thereby the plaintiffs suffered substantial injury. It was further stated by the plaintiffs that they had suffered extreme hardship as a Telegraphic Money Order for Rs. 1,000 was not delivered to their agent on the date of the sale by the Post Office, and that as such the arrears of revenue could not be deposited in the Collectorate on the date of the sale. The last of the above allegations of fact on which the plaintiffs' case before the

Court rested, relating to hardship could not be considered to be the basis of a ground for holding that the sale was not in accordance with law. The evidence in the case does not establish the position that the telegraphic money order arrived at the post office on the 24th June, and that the amount covered by it could not be paid by the post office to the plaintiffs' agent on account of shortness of fund. The ground of hardships as aforesaid, was not made out, and no question of irregularity or illegality arose on the facts alleged, relating to non-deposit of arrears on the date of sale. The claim made by the plaintiffs in the suit was resisted by the defendant. The allegations of fact made in the plaint on which the plaintiffs' case before the Court was based were denied; and it was asserted by the defendant that notices of the sale were properly served and published in the manner provided by law. In addition to the denial of the allegations made in the plaint, there was the definite statement made by the defendant in her written statement filed in Court that the suit was not maintainable in the form presented in the plaint, without any prayer for setting aside the sale. On the pleadings of the parties, various issues were raised for determination in the case. The learned Subordinate Judge in the Court below gave his decision against the plaintiffs on the material issues arising for consideration in the case, and the plaintiffs' suit was dismissed. The plaintiffs have appealed to this Court against the decision and decree of dismissal passed by the trial Court on 23rd April 1934.

In support of the appeal to this Court the main questions raised by the learned Senior Government Pleader appearing for the plaintiffs-appellants may be dealt with under the following heads: In the first place it was urged in consonance with the statement made in the plaint that the revenue payable for estate No. 365 which was sold on 24th June 1932, was payable in four kists, and the kist of the 28th March, became arrear on the 1st April, and that the sale could not under the law, be held before the next kist day, the 28th June; and that as the sale was held on 24th June 1932, it was in law illegal and ultra vires. The question thus raised in has to be decided and the date on which the revenue pay-

able by the plaintiffs for a particular kist became arrears has to be determined with reference to the materials placed on the record. The most relevant evidence on this part of the case was that afforded by the Douk Kistibandi, Ex. C in the case, in respect of Touji No. 365, dated 14th December 1813. It was apparent from that document, that the 28th March could not be the relevant date for a particular kist, inasmuch as the kists mentioned in the Douk Kistibandi were 12 in number according to the 12 Bengali months. The 28th March was not the date when any kist was payable; the Pous, Magh and Falgun kists became arrear on the 1st Chaitra, the 14th March; and the latest day of payment under the Revenue Sale Law was therefore the 28th March.

This view of the matter is established on other materials placed on the record, namely the Arrears List Ex. 7, and the sale notices, Exs. E (6) and E (7) series. That the plaintiffs themselves knew, and considered that the kist in question became arrear on the 1st Chaitra, i.e., 14th March, is apparent from their statement in Ex. A, the memorandum of appeal filed by them before the Commissioner, for setting aside the revenue sale that had taken place on 24th June 1932. It may be that the statement contained in Ex. A does not amount to an admission operating as an estoppel against the plaintiffs; but there is no doubt that it was a relevant piece of evidence which went to indicate clearly what the date was when the kist in question became in arrear, according to the plaintiffs themselves. On the materials before us, we are unable to come to the conclusion, as we were invited to do, that the trial Court was wrong in not coming to the conclusion that 28th March 1932 was subsequently fixed for payment of the kist in question, and it became arrear on 1st April 1932. The Douk Kistibandi, Ex. C, taken along with the other evidence on the record, establishes the position as indicated above, that the sale held on 24th June 1932 was not illegal and without jurisdiction. It was suggested in the course of argument that the sale for arrears of revenue in the case before us, having been held not only on account of arrears of revenue but on account of arrears of cesses due in respect of the estate in question, it could not be said that the sale was one

for arrears of revenue. The contention was not however pressed, in view of the position, well established now, that in a case even of amalgamation of dues on account of cesses with revenue payable in respect of an estate, a sale for arrears of revenue could not be set aside on the ground that it was illegal or ultra vires. In the case before us, the amount due on account of cesses was mentioned in the sale proclamation; but it was not amalgamated with, or included in, the revenue; the amount of revenue in arrear and the amount of cesses due were separately mentioned. In this view of the case, there can be no question that the mention of the amount of cesses due along with the arrears of revenue in the sale notification, in pursuance of which the revenue sale in question was held, did not make the sale illegal under the law.

The next question raised before us related to the non-service or non-publication of the sale notifications and notices, as required by Ss. 6 and 7, Revenue Sale Law. The ground of irregularity in the matter of actual service of processes was not urged before us, and on the facts proved in the case, there can be no question that the conclusion arrived at by the Court below that the allegation of non-service of sale notification or notices, as required by law, had not been established, is correct. The ground urged before us on this part of the case related to the position that there was no publication in the Calcutta Gazette, of the sale in proper time as mentioned in S. 6, Revenue Sale Law. The position is this, the notification of the sale was published in the Calcutta Gazette at a time when there was remaining, not the full period of 30 days before the sale, but only 28 days. It was urged that the law enjoined publication of the notification in the Gazette leaving a full period of 30 days before the sale of arrears of revenue could be held. It has to be noticed in this connection that the provision of S. 6, Revenue Sale Laws does not prescribe a period of 30 days in the matter of publication in the Gazette of the notification of sale; and it cannot be said that the provision relating to affixing the sale notification at certain places, which precedes the one relating to the publication of the sale notification in the Gazette, fixing a period of 30 days was applicable also to the publication of the sale notification in

the Gazette. Even if it were conceded in favour of the appellants that there was an irregularity in the matter of publication of sale proclamation in the Gazette, within the time prescribed by law, that amounted to an irregularity; and for the purpose of avoiding the sale on the ground of irregularity, it had to be made out by the plaintiffs that they had suffered substantial injury by reason of the irregularity complained of.

The next question therefore was whether it had been established in the case before us that there was substantial injury attributable to any irregularity in the matter of publishing the sale. The evidence in the case to which detailed reference has been made by the learned Subordinate Judge in the Court below, does not establish the case of inadequacy in the price fetched at the sale, as alleged by the plaintiffs, or that the inadequacy of price was attributable to the irregularity or illegality in publishing the sale, and that substantial injury had resulted by reason of the same. That the property sold used to fetch a net annual income of anything like Rs. 1,700 was not at all established in evidence, and it was made out that in view of the economic depression in the country, the price at which it was sold at the sale for arrears of revenue, at which sales prices are almost always low, was altogether inadequate. Evidence on the record went to show that properties in the locality have been sold at sales for arrears of revenue at their annual net profits or even at half of that. The position therefore is this: that conceding in favour of the appellants that there was any irregularity in the matter of publication of the notification of sale, although there was none established, no case of substantial injury, as contemplated by S. 33, Revenue Sale Law, having been made out, the plaintiffs were not entitled to avoid the revenue sale.

The conclusions arrived at on the different points raised in the appeal before us, as indicated above, dispose of the appeal; and on those conclusions the appeal must be dismissed. It may be mentioned that in view of the defence raised by the contesting defendant in the suit, respondent in this appeal, that the suit was not maintainable in the present form without a prayer for setting aside the sale, decision was given by the Court

below on the question of the maintainability of the suit. It is not necessary to express any opinion on that question in view of the conclusions we have arrived at on the merits of the case. The inclination of our opinion however is that the suit as framed merely for a declaration that the revenue sale was illegal and ultra vires and without any force and effect, was not maintainable under the law, in the absence of any prayer for consequential relief. The relief that had to be applied for in the case was one for setting aside the sale held for arrears of revenue; that was not done and the suit with a prayer for a declaration, pure and simple, presumably for the purpose of avoiding payment of proper Court-fees, was not a suit which was contemplated by the Revenue Sale Law. In the result the appeal fails, and it is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 418

CUNLIFFE AND HENDERSON, JJ.

Abdul Gafur—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1074 of 1935, Decided on 15th May 1936.

Registration Act (1908), Ss. 35 (2) and 82—Harmless lie—Sentence of imprisonment is too heavy.

Where in an enquiry under S. 35 (2) a person makes an untrue statement, without any intention to benefit himself and cheat anybody, but solely with a view to save certain ladies of the household not accustomed to go to office from appearing in the Registrar's Office, no doubt the act constitutes an offence making such person liable under S. 82, but as the lie is harmless a sentence of imprisonment should not be passed. [P 419 O 2]

Ajit Kumar Dutt—for Petitioner.

Khundkar and Nirmal Chandra Das Gupta—for the Crown.

Cunliffe, J.—The petitioner here obtained a rule against his conviction and sentence under S. 82, Registration Act. When he was tried before the Magistrate of Comilla, there were two other men with him as co-accused and they were convicted of abetment. On an appeal being heard on the part of the three persons before the Sessions Judge at Tipperah, the two persons who were charged with abetting the petitioner were acquitted. The sentence, the petitioner received in the trial Court, was one

year's rigorous imprisonment and before the appellate Court this sentence was reduced to six months.

The actual charge against the petitioner was that he made a false statement before the Sub-Registrar in relation to a certain deed. This is how the lower appellate Court describes the material facts. The learned Judge says : One Asafali executed a deed of gift in favour of the sons of his only son Abdul Gafur (who is the petitioner here). But before the deed could be registered, Asafali died. On a certain date Abdul Gafur presented the deed for registration before the Sub-Registrar of Muradnagar when Abdul Gafur himself as well as the attesting witnesses Ramijaddin, Fazarali and Chandmia said that Abdul Gafur was the only child and heir of Asafali. The Sub-Registrar was about to register the deed when a deed-writer, Baikuntha Debnath, who apparently knew Asafali, came forward and said that Asafali had left four daughters also who were his heirs along with Abdul Gafur. It is also found as a fact that thereafter the Sub-Registrar had refused to accept the deed for registration. The next day then turned up at the office the husbands of the four sisters and admitted the proper execution of the deed and after that it was registered in due form. Nevertheless Abdul Gafur was prosecuted.

The main point argued before us was that this scene before the Sub-Registrar was not really a happening which is contemplated by the Act and that there was not enough formality to bring it within the language of the Act and more especially within S. 35. The statute however does contemplate these informal inquiries such as the Sub-Registrar was making on this occasion. Sub-s. (2), S. 35, for example, seems to be particularly appropriate to what was taking place with regard to this execution. It lays down that the registering officer, may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, examine any one present in his office.

No doubt the statement made by Abdul Gafur was made in furtherance of the procedure under this section. It seems to be contemplated by the Act that particular care should be exercised when the executant of the document which was

being presented is dead. One cannot understand this. But we are not convinced that the action of Abdul Gafur on this occasion and the statement he made, although undoubtedly untrue, was a very serious lie. We think there can be very little doubt that the reason which prompted him to give vent to this half truth was to save his sisters (who were Mahomedan ladies not accustomed to go to offices) from the trouble of turning up before the Sub-Registrar. To me it is rather irritating to find that the lower appellate Court Judge and the Magistrate pompously delivered themselves of the opinion that this was a very very serious offence indeed. No doubt it is an offence but it is certainly not a serious one. We shall reduce the sentence, whilst upholding the conviction, to the period the petitioner has already undergone and direct his release. The rule is made absolute to this extent.

Henderson, J.—I agree. I have no doubt that the reasons given by the learned Judge in reaching the conclusion at which he arrived have been rightly characterised as unsound by the learned advocate who has appeared in support of this rule. On the other hand, the learned Magistrate reached the same conclusion for reasons which appear to me to be good reasons. Under S. 35, sub-s. (2) of the Act, the Sub-Registrar was entitled to examine the petitioner for any purpose contemplated by the Act. Under the Act if a representative of Abdul Gafur appeared and denied execution, the Sub-Registrar would have been compelled to refuse to register this document. It seems to me to be impossible to say that this officer when endeavouring to find out whether there were such persons, was not carrying out some purpose contemplated by the Act.

I am bound to say that I find it difficult to appreciate why either the Magistrate or the Judge thought it necessary to impose a sentence of imprisonment. This lie was the most harmless lie that has ever been told. This petitioner was not attempting to benefit himself or to cheat his sisters. It is the Mukhtear who told him that if the Sub-Registrar became aware of their existence, they would have to be brought to the office in person and it is quite obvious that Abdul Gafur suppressed the fact of their existence in

order to save them from this to their wholly unwarranted trouble.

V.B./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 420

GUHA AND BARTLEY, JJ.

Syed Fateh Ali Mirza—Appellant.

v.

Sahebzadi Meherunnessa Begum and others—Respondents.

Appeal No. 510 of 1935, Decided on 23rd April 1936, from original order of Dist. Judge, 24-Parganas, D/- 16th September 1935.

(a) Mussalman Wakf Act (42 of 1923), S. 10—Order appointing receiver is not appealable.

An order appointing a receiver in a proceeding under Act 42 of 1923 is not appealable as no appeal lies against an order in a proceeding in the Act. [P 420 C 2]

(b) Mussalman Wakf Act (42 of 1923), Ss. 3, 9 and 10—District Judge has no jurisdiction to appoint receiver—Order appointing receiver is liable to be set aside in revision though appeal is not maintainable.

There is no jurisdiction conferred on the District Judge in the exercise of which a receiver can be appointed by him in a proceeding started on an application for direction on a mutawali to file particulars and accounts contemplated by Act 42 of 1923. An order therefore appointing a receiver being without jurisdiction is liable to be set aside in revision, though no appeal lies against such an order. [P 420 C 2]

A. N. Bose, Tarakeswar Nath Mitra and Bimla Charan Deb—for Appellant.

B. K. Mukerjee and A. S. Akram—for Respondents.

Judgment.—This appeal has arisen out of a proceeding under Act 42 of 1923 (the Mussalman Wakf Act), started on an application made to the learned District Judge of 24-Pargannas praying that a mutawali in possession of wakf properties be directed to submit a statement of the particulars of the wakf as required by S. 3 of the Act, that the account submitted by the mutawali be examined and audited, and that the applicant be allowed to inspect and obtain copies of statements and particulars furnished by the mutawali. At a certain stage of the proceeding, parties other than the applicants who started the same, applied for the appointment of a receiver to take charge of all the wakf properties for reasons stated by them in their application before the Court. The application for appointment of a receiver was granted

by the learned District Judge, and this appeal was directed against the orders appointing a receiver passed on 12th and 16th September 1935. An objection to the maintainability of the appeal was raised before us, and we are of opinion that an appeal from the orders complained of does not lie, as they are made in a proceeding under Act 42 of 1923. There can, however, be no question that a question of the exercise of jurisdiction by the Court below arises in the case before us. In our judgment, the orders appointing a receiver in the proceeding pending before the Court below were passed under an entire misapprehension of the scope and operation of the provisions contained in Act 42 of 1923, as there was no jurisdiction conferred on the District Judge in the exercise of which a receiver could be appointed by him in a proceeding started on an application for direction on a mutawali to file particulars and accounts as contemplated by Act 42 of 1923, which specifically provided for enforcement of orders in that behalf by penalties in the shape of fine.

The orders passed by the learned District Judge on 12th and 16th September 1935 must, in the above view of the case before us, be set aside as passed without jurisdiction, and we direct accordingly. The receiver appointed by the learned District Judge is to be discharged and the proceeding under Act 42 of 1923 pending before the Court below in which the receiver was appointed is to be dealt with by the learned District Judge, in accordance with law. No orders are necessary on the application filed by the appellant in Court on 8th April 1936. The application filed in Court to-day will be kept on the record and the decision in the case before us is given on that application the prayer made in the same being allowed. The appeal is dismissed. There is no order as to costs either in the appeal or in the application. Let the records be returned as soon as possible.

V.B./R.K.

Order set aside.

* A. I. R. 1936 Calcutta 421

GUHA AND BARTLEY, JJ.

Monmohini Das Purkayastha and others
—Appellants.

v.

Behari Shaha and others—Defendants
41 to 43—Respondents.

Letters Patent Appeal No. 37 of 1935,
Decided on 25th March 1936, against
judgment of R. C. Mitter, J., D/- 21st
May 1935.

(a) Decree—Setting aside — Revival of suit
—No difference between decree set aside in
subsequent proceeding and decree declared
null and void and inoperative in subsequent
proceeding — Suit can be revived against
party in whose favour decree is set aside.

There is no difference in substance or principle between a case in which a decree passed against a person is set aside by a subsequent proceeding, and a case in which the decree is declared null and void and inoperative in subsequent proceeding; and the suit in which the inoperative decree was passed can be revived against a defendant in whose favour such a decree is passed in a subsequent proceeding.

[P 422 C 2]

* (b) Minor—Suit properly filed — Defendants minors—Defective procedure followed by Court in appointment of guardian—Guardian not objecting to appointment — Decree set aside by minors and suit revived—Minors should be deemed to be parties to suit at time of institution.

Where an institution of a suit is complete and there is no defect but the Court follows a defective procedure in the appointment of guardian for the minor defendants but such guardian takes no objection and the decree passed is subsequently set aside at the instance of the minors, the suit is revived and the minors should be deemed to be parties at the time of institution of the suit: 1917 All 477, Foll.; 31 All 572 (P C), Expl.

[P 423 C 1]

Birendra K. De—for Appellants.*Bijan K. Mukherjee, Nripendra Ch. Das and Nikunja B. Ray* — for Respondents.

Judgment.—This is an appeal from the decision of our learned brother R. C. Mitter, J. The plaintiff appellant instituted a suit, Title Suit No. 2149 of 1909, in the Court of the Munsif at Sunamgunj in the District of Sylhet, for possession, on declaration of his title, and there were other incidental and consequential reliefs prayed in the suit, which was filed in Court on 16th July 1909, against nineteen persons impleaded as defendants; to meet the objection on the score of defect of parties, raised by the defendants, 52 more persons were added as defendants.

Of these defendants subsequently made parties to the suit, defendants 41 to 43 were minors at the time when they were made defendants to the suit; the mother of these three defendants was proposed as their guardian and the order of the Court relating to the matter of appointment of guardian of defendants 41 to 43, passed on 11th June 1910 was this:

Service of notice pressed on 16th April 1910. No objection petition filed yet. The proposed guardian be appointed guardian for the minor defendants to conduct the case.

There was no appearance by any of the defendants in the suit and the suit was decreed in favour of the plaintiff. The decree of the Court of first instance was ultimately affirmed by this Court on 23rd April 1914, on a second appeal preferred by some of the defendants in the suit. In the year 1918, defendants 41 to 43 in the suit instituted a suit, Title Suit No. 47 of 1918 subsequently registered Title Suit No. 12 of 1919, for a declaration that the decree passed against them in Title Suit No. 2149 of 1909 was invalid and inoperative against them, on the ground that there was no proper appointment of a guardian to represent them in the suit. The aforesaid suit No. 47 of 1918, was decided in favour of defendants 41 to 43, the plaintiffs in that suit, on the ground that the mother proposed as guardian had not consented to her appointment, as the guardian-ad-litem of her minor sons, and that it was settled law that no person could be appointed guardian-ad-litem of a minor without express consent. It was held that the decree passed in the suit being ineffectual and inoperative against defendants 41 to 43, they were not bound by it. The decree passed in Title Suit No. 2149 of 1909 was declared null and void and inoperative against these defendants by the decision and decree passed by the Additional Subordinate Judge, Sylhet, on 20th September 1919. Thereafter, on the January 1928, the plaintiff filed an application in the Court of the Munsif at Sunamgunj, praying that the Title Suit No. 2149 of 1909, be proceeded with, as against defendants 41 to 43, and the application was allowed, the suit being revived.

The result of the hearing of the suit after its revival was that the suit against defendants 41 to 43 was decreed in part on contest by the said defendants. The

decree passed by the trial Court on 16th December 1931 was affirmed by the Subordinate Judge, in the lower appellate Court, on 20th December 1932, with certain modification, as mentioned in the ordering portion of the judgment of the Subordinate Judge. On appeal by defendants 41 to 43 to this Court, the decision of the lower appellate Court was reversed, and the decree passed by the lower Court directed against defendants 41 to 43 were discharged by our learned brother R. C. Mitter, J., on the ground that the suit against the order of revival of the suit against defendants 41 to 43 was without jurisdiction. It may be noticed in this connexion that the decision of Mitter, J., is in favour of affirming the decision of the lower appellate Court on the other questions relating to the merits of the case before us and the question of limitation arising in the same.

In the appeal before us preferred by the plaintiff, the first ground urged was that the learned Judge of this Court was not right in the view taken by him that the rule was well settled that if a decree passed against a person was set aside by a decree passed in a suit brought to set it aside, the original suit was revived and must be proceeded with, could not be extended or applied to a case where the decree passed is null and void on the ground that it was passed against the minor who was represented by a guardian-ad-litem. In the case before us the Court made an order appointing a guardian-ad-litem without express consent, there having been no objection to the proposal for appointment of guardian; this was not strictly in accordance with law, in view of the provisions introduced some time before the order in question was made in the year 1910, that "no person shall without his consent be appointed guardian for the suit" [O. 32, R. 4 (3), Civil P. C.]. A decree followed, after the order defective under the existing law was made. Defendants 41 to 43 instituted a suit for avoiding the decree, and relief was given to them in terms of the prayer made by them. The decree passed in Title Suit No. 2149 of 1909 was declared null and void and inoperative as against them, on the finding that they were not bound by it. The expression that the decree was set aside was not used in view of the position that defendants 41 to 43 prayed for a declara-

tion only and not for a consequential relief, which they could very well have done in the circumstances of the case before us. The effect of the decree of the suit of 1918, brought by defendants 41 to 43, was that there was a declaration that the procedure adopted in the matter of appointment of guardian was defective and the decree passed in suit was inoperative so far as those defendants were concerned.

There is no difference in substance as between declaration that a decree is null and void and inoperative as such and setting aside the same in a case in which the only prayer was for a declaration that a decree was inoperative. This distinction was far too technical to be appreciated properly; and it could not, in our judgment, be allowed to stand in the way of justice being done in a case. The authority of decisions of this Court are, as has been pointed out by our learned brother, in favour of the position that the original suit is revived, and must be proceeded with, in the case of a decree being set aside in a suit brought for the purpose of setting aside the same; and no authority of any decided case was pointed out to us that there is any difference in substance as between a decree declaring a decree null and void and inoperative as such and a decree setting aside a decree previously passed on the ground that a procedure followed was defective under the law. In our judgment, there is no difference in substance or principle between a case in which a decree passed against a person is set aside by a subsequent proceeding and a case in which the decree is declared null and void and inoperative in subsequent proceedings; and the suit in which the inoperative decree was passed can be revived against a defendant in whose favour such a decree is passed in a subsequent proceeding.

The question next raised in support of the appeal was, whether Mitter, J., was right in his decision that defendants 41 to 43 were not parties to the suit in the eye of the law, and the suit could not for that reason be revived later on, against persons who were not parties to it at all, at the time when the decree was passed in it. So far as this question was concerned, it would appear that Mitter, J., has dissented from the view taken not only by the Courts below, but from the decision

in 39 All 8 (1). It appears to us however that the position indicated by the learned Judges of the Allahabad High Court is sound; and we see no difficulty in giving effect to the same in the case before us. The suit was instituted and could be instituted against defendants 41 to 43 by name. The institution of the suit was complete and was not defective under the law, and it was the duty of the Court to appoint a proper person to be guardian for the suit for the minors (O. 32, R. 3, Civil P. C.). The Court did appoint such a guardian; but the procedure followed was defective under the law; and a decree followed, to avoid the effect while a suit was instituted by defendants 41 to 43. The decree was ultimately declared null and void and inoperative, so far as the minor defendants 41 to 43 were concerned. The Court which followed a procedure held to be defective in a subsequent proceeding, and whose duty it was to see that a proper guardian was appointed had jurisdiction to revive the suit so as to restore the minors to the same position in which they were on the date on which the suit was filed against them. This is the position indicated in the judgment in 39 All 8 (1), referred to above; and we unhesitatingly follow the same. It would not be right to hold and it would amount to denial of justice in the case before us, if we hold that defendants 41 to 43 were not to be regarded as parties to the suit when the suit was instituted by the plaintiff, and hold further that the suit could not be revived at the instance of the plaintiff after the decree that was passed against the defendant was declared to be null and void and inoperative as against them for the reason of a defect of procedure followed by the Court, in the matter of appointment of their guardian for the suit. If any case of prejudice so far as defendants 41 to 43 were concerned were made out, the position might have been different.

- We are not unmindful of the decision of their Lordships of the Judicial Committee of the Privy Council, and of the decision of Courts in this country, that in certain cases and in certain circumstances it has to be held that a minor not properly represented by a guardian must

be treated as a person who was never a party to the suit. The observations of the Judicial Committee in 36 I A 168 (2), related to a case in which a guardian appointed by the Court had an interest adverse to that of the minor in question; and those observations in support of the position that in the case of an inherent defect in the matter of appointment of guardian, the minor should not be deemed to be party to a suit, could not be held applicable to a case like the one before us, in which the defect in the appointment of guardian was purely a formal one, arising out of the position that the mother proposed as guardian not having objected to her appointment, was taken to have consented to her appointment. The fact remains that in the suit not only the guardian of the minor defendants 41 to 43, appointed by the Court after an erroneous procedure was followed, but none of the defendants in the suit appeared to contest the same.

The conclusion we have arrived at, as indicated above, is that the suit was rightly revived in the year 1928, on the application of the plaintiff appellant before us. Defendants 41 to 43 who had attained majority by the time that the suit was revived defended the suit, and the decision of the final Court of fact substantially in favour of the plaintiff-appellant, has been affirmed by the learned Judge of this Court, on appeal. The decision of the learned Judge, R. C. Mitter, on the question of the Court's jurisdiction to revive the suit being reversed by us, the decision and decree of the Subordinate Judge in the Court of appeal below are restored. The plaintiffs-appellants in this appeal will get their costs in all the Courts from defendants 41 to 43, respondents in the appeal before us. The cross-objections filed in this Court are dismissed. There is no order as to costs in the cross-objections.

R.W./R.K.

Appeal accepted.

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2. Rashidunnessa v. Mahammad, (1909) 31 All 572=36 I A 168=3 I C 864 (P C).

1. Bhagwan Dayal v. Param Sukh Das, 1917 All 477=36 I C 366=39 All 8=14 A L J 818.

A. I. R. 1936 Calcutta 424

GUHA AND BARTLEY, JJ.

Gopesh Chandra Aditya — Plaintiff—Appellant.

v.

Benode Lal Das and others—Respondents.

Letters Patent Appeal No. 12 of 1935, Decided on 24th January 1936, against judgment of R. C. Mitter, J., in Appeal No. 1854 of 1934, D/- 22nd March 1935.

(a) Appeal—Right of—Right of appeal not lost unless decree conditional, for benefit of appellant, and appellant accepts condition and benefit.

Right of appeal given to a person by statute should not ordinarily be taken away unless the decree or the order of the lower Court imposes term or condition on the opposite party and which is for the benefit of the appellant and the appellant accepts the benefit of the term or condition so imposed on the opposite party. The principle however ought not to be extended and the Courts should be jealous in granting that right and ought not to curtail it: 1929 *Cal* 796, *Foll.*; 12 *C L J* 556 and 1917 *Cal* 546, *Ref.*

[P 425 C 2]

(b) Assam Municipal Act (1 of 1923), Ss. 21-A, 10 and 14—Elections set aside by civil Court — Unseated candidate accepting appointment under S. 21-A—Right of appeal by unseated candidate is not lost.

Where the elections are set aside by the civil Court, and the Local Government in exercise of powers conferred upon it under S. 21-A, accepts the correctness of the decree and appoints the defendant—candidate unseated—Commissioner, such person by accepting the appointment does not lose his right of appeal against the decree of civil Court.

[P 426 C 1]

(c) Assam Municipal Act (1 of 1923), Ss. 13 and 296 (2) and rules thereunder—Jurisdiction of civil Court to adjudicate on election disputes is not ousted.

So long as the proviso to S. 13 is retained in the statute the jurisdiction of the civil Court to adjudicate upon the validity or the invalidity of the elections is not affected by anything contained in the rules framed under S. 296 (2) or by establishment of special tribunals to consider election petitions: *Case law discussed.*

[P 428 C 1]

(d) Assam Municipal Act (1 of 1923), S. 296 (2)—Rules—Rr. 13 and 14—Provision regarding submission of nomination paper to chairman is mandatory.

Provisions in S. 13 regarding submission of nomination paper to the chairman is mandatory and the candidate must send his nomination paper to the chairman. If he sends it to anybody else, even to the Magistrate appointed to hear objections under R. 14, he does not comply with the rule, nor does the fact that the Magistrate sends back the nomination paper to the chairman would satisfy the requirements: *Merks v. Eackson* (1876), 1 *C P D* 683, *Ref.*

[P 428 C 2]

(e) Eastern Bengal and Assam General Clauses Act (1 of 1909), S. 14—S. 14 cannot be invoked to shorten period fixed under R. 13 of rules under S. 296 (2), Assam Municipal Act.

Section 14 has no application when an act is required to be done in such a way as to leave a clear margin of a definite and stated period of time between the date of the act and the fixed date and consequently cannot be invoked for shortening the interval of fifteen days mentioned in R. 13.

[P 429 C 1]

Amarendra Nath Bose and Hemendra Kumar Das—for Appellant.

Sarat Chandra Basak, Krishna Kishore Basak, Biswanath Roy, Provash Ch. Chatterji, Provat Kumar Bose and Nagendra Kumar Dutt—for Respondents.

Appeal No. 1854 of 1934.

R. C. Mitter, J.—This appeal is on behalf of defendant 3 in a suit for a declaration by the plaintiff that his nomination paper has been illegally rejected and for a further declaration that defendants 2 to 4 have not been elected as members of the Municipal Board of Sylhet.

The plaintiff stood as a candidate for election from Ward No. 11 of the Sylhet Municipality, as also defendants 2 to 4. The 18th April 1934 was fixed for the election. The plaintiff filed two nomination papers: one on 28th March and one on 29th March 1934. These nomination papers are admittedly not in order. On 3rd April 1934 he, however, sent a nomination paper, otherwise in order, to the Election Magistrate. As under the rules framed by the Local Government under the Assam Municipal Act, nomination papers have to be sent to the Chairman of the Municipality and not to the Magistrate, the latter sent the said nomination paper to the Municipal Office, and it is admitted that it reached the Chairman of the Municipality on 5th April 1934. The Municipal Office was closed from 30th March to 4th April. Defendants 2 to 4 had filed valid nomination papers before 30th March 1934. An objection was preferred to the validity of the nomination paper of the plaintiff. The Magistrate heard the objection under R. 14, and held that it was not a good nomination. There being three seats, defendants 2 to 4 were declared elected after the rejection of the plaintiff's nomination paper.

The plaintiff filed this suit praying for the declaration set out above. In the

suit the Municipal Board of Sylhet is made defendant 1, and the other defendants are the persons declared elected from Ward No. 2. The defence filed by all the defendants are on the same lines. The question on the merits is whether the plaintiff's nomination paper had been rightly rejected by the Magistrate. Two further questions have also been raised before me namely: (1) that the appeal before me is incompetent; and (2) that the civil Court has no jurisdiction to entertain a suit of this description. Both the Courts below have held that the civil Court has jurisdiction to entertain the suit, and that the plaintiff's nomination paper had been illegally rejected by the Election Magistrate. The plaintiff got a declaration that the election of defendants 2 to 4 was not valid. The judgment of the lower appellate Court was pronounced on 28th June 1934. As two Courts had held the election to be invalid the Local Government, under the Assam Municipal Act, has appointed, on 9th July 1934, some persons to be members of the Municipal Board to fill up the vacancies caused by the Courts below holding that defendants 2 to 4 have not been validly elected. One of the persons so appointed is defendant 3 who had alone filed, on 30th August 1934, the appeal to this Court.

The said defendant has accepted the appointment, and it is said that he is taking part in the proceedings of the Municipal Board. A preliminary objection has been taken to the competency of the appeal. It has been put on two grounds namely: (a) that the Municipal Board not being made a party to this appeal it is incompetent; and (b) that defendant 3 having accepted the appointment made by the Local Government, the appointment having proceeded on the footing that the decree made by the lower appellate Court is a good decree, cannot prefer or proceed with the appeal. I do not think that there is any substance in any of these objections. Regarding the first one defendant 3 had the undoubted right to prefer an appeal and proceed on with it. The Municipal Board, was a co-defendant. The defence of defendant 3, and of the Municipal Board was the same and the decree passed against all the defendants has proceeded upon a common ground. Defendant 3 has accordingly, by himself, the right to

prefer the appeal and to proceed on with it. Regarding the second ground of the preliminary objection the position stands thus: S. 21-A, Assam Municipal Act runs thus:

If the persons entitled to elect a member or members to a Board at any election under this Act fail, within the prescribed time, duly to elect the member or the full number of members required, the Local Government, may, notwithstanding anything contained in S. 10 or S. 14, appoint a member or members to make up the deficiency.

Section 10 which is relevant to this case, provides that at least four-fifths of the total number of members of a Municipal Board shall be elected members. It may be conceded therefore that when the Local Government exercised the powers under S. 21-A, it accepted the correctness of the decree made by the learned Subordinate Judge on 28th June 1934. The question therefore is whether defendant 3 by accepting the position of an appointed commissioner had debarred himself from appealing from that decree. In my judgment he has not debarred himself. The right of appeal given to a person by statute should not ordinarily be taken away, unless the appellant brings himself definitely within those class of cases in which it has been laid down that by his conduct he had lost the right of appeal. The principle of these cases ought not in my judgment to be extended. The right of appeal is the creature of statute, and is a very valuable right. The Courts should in my judgment be jealous in guarding that right, and ought not to curtail it. My reading of the case law on the subject is that the right of appeal is lost if (a) the decree or the order of the lower Court imposes a term or condition on the opposite party and which is for the benefit of the appellant, and (b) if the appellant accepts the benefit of the term or condition so imposed on the opposite party. That is to say, in order that a preliminary objection may succeed, the first condition is that the decree or order must be in essence a conditional decree or order conferring a benefit on the appellant. If the decree or order is not a conditional order, the principle by which an appeal is held to be barred has no application. There is no principle that a plaintiff who has got a part decree loses his right of appeal in respect of the part of his claim disallowed either by receiving payment from

the judgment-debtor or by executing the decree he has obtained.

In such a case the decree made confers on him a benefit and by getting the decretal amount either amicably or by execution he obtains the benefit under the decree, but inasmuch as the decree so obtained is not dependent upon any term or condition connected with the dismissal of the part of his claim, he does not lose the right of appeal by realising the decretal amount, or by accepting payment from the judgment-debtor. In any event there can be no scope for a preliminary objection unless there is a benefit conferred on the appellant by the decree itself. The principle and its precise scope which I have indicated above is borne out by the decision of Sir George Rankin, C. J., in 57 Cal 386 (1), where not only the earlier decisions of this Court on the subject, 12 C L J 556 (2) and 21 C W N 232 (3), but the English authorities are subjected to a critical analysis and close review. In the case before me no benefit has been conferred on defendant 3 by the decree of the Subordinate Judge, and I cannot persuade myself to the position that defendant 3 has lost his right of appeal simply because the Local Government thought that the decree made by the Subordinate Judge was a correct decree, and on that footing appointed defendant 3 as a member of the Municipal Board. I accordingly overrule the preliminary objection. On the merits two points have to be considered : (1) Whether the suit lies. (2) Whether the nomination paper of the plaintiff, which reached the Chairman of the Municipality on 5th April 1934, had been rightly rejected by the Magistrate.

For the purpose of deciding these points it is necessary to notice and examine some of the sections of the Assam Municipal Act 1 of 1923, and the rules framed by the Local Government under S. 296 of the said Act, as also the provisions of S. 9, Civil P. C., S. 42, Specific Relief Act, and S. 14, Eastern Bengal and Assam General Clauses Act 1 of 1909. S. 12, Municipal Act, defines the persons

who are entitled to vote. They must possess certain qualifications and their names must appear on the Voters' Register. S. 13 defines the circumstances which would make a person eligible for election as member of the Municipal Board. They must be persons entitled to vote at an election and must not be under the disabilities mentioned in the section. Some of these disabilities may be removed by the Local Government. The section ends with a provision in these terms : "Provided further that nothing contained in this section nor in any rules made under the authority of this Act shall be deemed to affect the jurisdiction of civil Courts." S. 296 empowers the Local Government to make rules for the purpose of carrying out the provisions of the Act. Sub-s. (2) of the said section provides that such rules may "determine the mode and time of election of members, the qualifications and disqualifications and registration of voters and candidates". R. 16 of the Election Rules framed by the Local Government authorises the Magistrate to fix the date of an election. Such date must be notified in the Assam Gazette. Rr. 13, 14 and 15 are important. I will quote these rules at some length. R. 13 runs thus :

Every person who is a candidate for election shall send his name to the Chairman in writing in form B with necessary particulars filled up in Cols. 2, 3, 4 and 5 by a date not less than fifteen days before the date fixed for election supported by the signatures in Cols. 6 and 7 of two electors in each ward in which he proposes to stand, or of the section of the Municipal voters he proposes to represent, who propose, and second his nomination.

The Chairman is then to prepare the preliminary list of all candidates and forward a copy thereof to the Magistrate. R. 14 requires the Magistrate then to publish a notification fixing a date for hearing objections to candidates, such a date to be not less than three and not more than five days later than the date of the notification. The rule then states that "the Magistrate shall hear and decide all objections to candidates and his decision shall be final." R. 15 requires the Chairman to publish the final list of candidates at the Municipal Office after receipt of the Magistrate's orders made under R. 14. R. 32 provides for election petitions to the Magistrate. He is invested with judicial powers, and is authorised either to confirm the election or set

1. *Hurry Bux Deora v. Johurmull Bhatia*, 1929 Cal 796 = 123 I C 661 = 33 C W N 711 = 57 Cal 386.

2. *Manilal v. Harendralal Roy*, (1910) 12 C L J 556 = 8 I C 79.

3. *Bankim Chandra Bose v. Marium Begum*, 1917 Cal 546 = 37 I C 804 = 21 C W N 232 (S B).

it aside and direct a fresh election to be held. Apart from the proviso to S. 13, Municipal Act, and the provisions of S. 9, Civil P. C., and S. 42, Specific Relief Act, the position is clear in respect of the jurisdiction of the civil Court to entertain a suit of the nature I have before me. In the case of 6 C B N S 336 (4) at p. 337, Willes, J., states the principle in these words :

There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at Common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely but provides for no particular form of remedy, there, the party can only proceed by Common law action. But there is a third class, viz. where a liability not existing at Common law is created by statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

There may possibly be a fourth class of cases as has been held by the Full Bench of the Patna High Court in 14 Pat 24 (5). It is where a right or liability has been created by statute, but the legislature had left to another authority the appointment of a tribunal to try such liability but the tribunal so contemplated by the legislature has never been brought into existence. In such a case the subject has the right to proceed in the ordinary civil Courts, unless and until the duty of appointing a special tribunal is carried. Sir Lawrence Jenkins states the third proposition of Willes, J., in 31 Bom 604 (6) in a slightly different form. He says thus :

But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as other-

wise expressly provided or necessarily implied, that tribunal's jurisdiction to determine these questions is exclusive.

To the same effect are the observations of Sir Ashutosh Mookerjee in 2 C L J 359 (7) which was a case coming within the first class of cases mentioned by Willes, J. In the case before me, applying these principles there would have been one answer, if there had been no proviso to S. 13. Municipalities are the creatures of statute, the right to vote and to stand as candidates flow from the statute. These rights are not, to use the expression of Willes, J., Common Law rights. The statute empowers the Local Government to set up tribunals to decide election disputes and such tribunals have been set up by the Rules by the Local Government. On the principles formulated above the jurisdiction of these tribunals would be exclusive and a party who wants to challenge an election would not have the right to commence an action in the civil Court. This would have been the result, as I have said, if there had been no proviso to S. 13, saving the jurisdiction of civil Courts. The question therefore is: Does the said proviso render inapplicable the principles I have formulated ?

In my opinion it does. To quote the words of Sir Lawrence Jenkins, the legislature has expressly provided that the civil Courts would also have jurisdiction. S. 13, although couched in negative terms, in essence defines the qualifications of candidates. S. 296 (2) empowers the Local Government to make rules to determine the qualifications and disqualifications of candidates and for registration of candidates. He must be a person qualified to vote and not otherwise disqualified. R. 13 requires a candidate to send in his nomination paper filled up in a prescribed form and in a prescribed manner to the Chairman, 15 days before the date of election. This rule is a rule which defines one of the qualifications of a candidate. It is that he must be duly nominated by certain persons in a certain way and before certain time: See Subhawardy, J., in 58 Cal 87 (8) at p. 90. The meaning of the proviso which is attached

4. Wolverhampton New Water Works Co. v. Hawkesford, (1859) 6 C B N S 336=28 L J C P 242=5 Jur N S 1104=7 W R 464=141 E R 486.

5. Lachmi Chand Sochanti v. Ram Protap, 1934 Pat 670=152 I C 805=14 Pat 24=15 P L T 623.

6. Bhai Sanker v. The Municipal Corporation Bombay, (1907) 31 Bom 604=9 Bom L R 417.

7. Bhandi Singh v. Ramdhan Roy, (1905) 2 C L J 359=10 C W N 991.

8. Ratish Chandra Munshi v. Amulya Charan Ghattak, 1931 Cal 36=129 I C 422=58 Cal 87=34 C W N 741.

to the section which defines the qualifications of candidates is that the civil Court's jurisdiction to adjudicate at least upon questions of qualifications of candidates shall not be taken to be affected either by anything contained in the Act or the rules framed by the Local Government under S. 296 of the Act. Section 9, Civil P. C., entitled a person to institute a suit of a civil nature in a civil Court unless the jurisdiction of the civil Court is either expressly or impliedly barred.

A suit for a declaration that a person was duly nominated as a candidate and that the election of his rivals is not valid is a suit of a civil nature. Such a declaration falls within S. 42, Specific Relief Act : 53 Cal 570 (9). If there had been no express saving of the jurisdiction of civil Courts, the jurisdiction of civil Courts to entertain a suit which is for impugning an election would have been impliedly barred on the principle that the special tribunals set up have exclusive jurisdiction on the principles I have already noted. The fact that by R. 32, election tribunals have been set up and provisions for election petitions made does not, in my judgment, having regard to the proviso to S. 13, modify in any way the cases decided under the provisions of the Bengal Municipal Act of 1882 which are in the same terms as the proviso to S. 13, Assam Municipal Act. It was held in these cases that civil Courts had jurisdiction to entertain suits concerning elections: 24 Cal 107 (10), 53 Cal 570 (9), and 58 Cal 87 (8). The observations of Suhrawardy, J., at p. 92 in the last mentioned case, implying that the jurisdiction of the civil Court would have been ousted if the legislature provided for election tribunals and for election petitions, are obiter, which are not binding on me. I hold that so long as the proviso in question (proviso to S. 13) is retained in the statute the jurisdiction of civil Courts is not ousted although by the rules special tribunals have been set up before which election petitions would lie. It may be that on the principle of election of remedies a party, who has approached the special tribunal and has been unsuccessful, would be prevented from re-agitating

the same matter by a suit filed in a civil Court. For this proposition there is support from a considerable body of weighty authorities, amongst which may be noticed the observations of Willes, J., which I have quoted above, and the decision in 2 C L J 359 (7). I accordingly hold that the suit is maintainable in a civil Court.

Regarding the last point I am of opinion that the Courts below have gone wrong. R. 13 provides that a candidate shall send to the Chairman his nomination paper "by a date not less than fifteen days before the date fixed for election." This rule is mandatory. In the first place the candidate must send his nomination paper to the Chairman. If he sends his nomination paper to anybody else, as in the present case to the Magistrate, he does not comply with the rule. I do not think that the fact that the Magistrate sends back the nomination paper to the Chairman would satisfy requirements of the rule. The Magistrate, when he received the nomination paper, was not bound to be prompt or to send or re-direct it to the Chairman. He did so in the present case, no doubt ; but that was only an act of courtesy. Rules of a *pari materia* have been construed very strictly. For instance where the rule required nomination papers to be delivered to the town clerk "by the candidate himself, or his proposer or seconder," it was held that there was no valid nomination of a candidate when the nomination paper was delivered to the town clerk by an agent of the candidate : (1876) 1 C P D 683 (11). But in the case before me there is a more formidable objection to the validity of plaintiff's nomination. The nomination paper reached the Chairman on 5th April; the date of the election was the 18th April; and hence there was not an interval of clear fifteen days between the date of the submission of the nomination paper and the date of election. The time mentioned therein is an essence of the thing. If there be not clear fifteen days' interval the nomination is not valid. This position is not challenged, but what is stated is that by reason of the provisions of S. 14, Eastern Bengal and Assam General Clauses Act, it must be taken that between the 5th and 18th April there was an interval of clear

9. Nishi Kanta Chaudhury v. Gopeswara Chatterjee, 1926 Cal 1070=96 I C 620 = 30 C W N 977=53 Cal 570=44 C L J 31.
10. Sabhapat Singh v. Abdul Gaffur, (1897) 24 Cal 107.

11. Merks v. Eackson, (1876) 1 C P D 683.

fifteen days. This contention has found favour with both the Courts below. I have already stated that the Municipal Office was closed from the 30th March to the 4th April and the Chairman got the plaintiff's nomination paper on the 5th April when the Municipal Office re-opened. S. 14 of the Act runs thus:

Where by any Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then if the Court or office is closed on that day or the last day of the prescribed period the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open: Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act of 1908 applies.

The saving is made because there is no analogous provision in the Limitation Act, S. 4. This section does not in terms fix the period within which the nomination paper is to be filed or to fix the last date of presenting the nomination paper. The nomination paper is not to be filed in the Municipal Office but sent to the Chairman. No doubt the last date of presenting the nomination paper can be determined by a process of calculation, by a process of subtraction. But unless the last date for putting in the nomination paper is fixed, or the period for filing it is prescribed by an authority which has the power to fix the date or prescribe the period, the section has no application. This section has no application when an act is required to be done in such a way as to leave a clear margin of a definite and stated period of time between the date of the act and the fixed date. I hold accordingly that S. 14, General Clauses Act, has no application to the case before me and it cannot be invoked for shortening the interval of fifteen days mentioned in R. 13. I hold accordingly that the plaintiff's nomination paper was not illegally rejected by the Magistrate, and there being only three candidates validly nominated, and only three seats in Ward No. 2, the order declaring defendants 2 to 4 as duly elected was a right order. The appeal is accordingly allowed with costs, and the plaintiff's suit dismissed with costs throughout. Leave to appeal under the Letters Patent asked for is granted.

L. P. A. No. 12 of 1935.

Judgment.—This appeal must be dismissed for the reason that no ground has

been made out, for interference with the decision of our learned brother, R. C. Mitter, J., against which it is directed. The questions arising for consideration in this appeal have been exhaustively dealt with by the learned Judge; and we do not consider it necessary to add anything to his judgment which was criticised before us at very great length, in support of the appeal. The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 429

CUNLIFFE AND HENDERSON, JJ.

Alkasulla and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 902 of 1935, Decided on 6th May 1936.

Criminal Trial—Trial by jury — Misdirection — Committing Magistrate charging accused with common object to take possession — Trial Judge adding common object of assaulting—It is wrong to include contradictory cases at the same trial and in one charge.

In a trial for rioting, it is one thing to say that common object of the accused was to get possession of disputed land, and it is quite another to say that common object was to beat apparently for the mere pleasure of beating. It is wrong to include those two contradictory cases at the same trial even more so in one charge. So where a Judge tells the jury that in the event of prosecution failing to establish the case of getting possession of disputed land, with which they come into Court or in the event of jury being unable to come to a decision on the real point of issue between parties, they are to consider the possibility as to the existence of another common object, such procedure is wrong and Judge ought to strike it out of the charge. [P 430 C 1, 2]

Hamidul Huq—for Appellants.

Khundkar and Bireswar Chatterjea — for the Crown.

Henderson, J. — The appellants have all been convicted of rioting and sentenced to various terms of imprisonment. Two of them were also convicted under S. 323 I. P. C., but no separate sentence was passed. Unfortunately when the case came on at the trial the learned Judge adopted a procedure which has given us trouble in one or two other cases and the result is that it is quite impossible to uphold this verdict. The learned Deputy Legal Remembrancer, however, asked us in view of the prosecution case that the appellants' party were mortgagees attempting to get possession with-

out the assistance of the Court to order a new trial on a suitably framed charge.

There can be as far as we can gather, no doubt whatever that this fight, in which persons on both sides were injured, took place in regard to the dispute about possession. The committing Magistrate took the commonsense view that if possession was really with the complainant, the common object of the accused was to take possession themselves. In our opinion, that must be so. However, when the trial was taken up at the request of the Public Prosecutor, the learned Judge added the words "and assaulting them"; the result was the introduction of not only inevitable but unjustifiable confusion. It is one thing to say that the common object was to get possession of the disputed land, it is quite another to say that the common object was to beat apparently for the mere pleasure of beating. It is quite wrong to include those two contradictory cases at the same trial even more so in one charge. The learned Judge dealt quite properly with the plain straightforward case which the prosecution originally made and he put the defence case with regard to the right of private defence in a manner to which no objection could be taken. Having done that, he went on to say this:

If you fail to find which of the parties was in possession, next consider the evidence whether the crown has been able to establish the alternative common object of assaulting the complainant's party. For this purpose, refer to the medical evidence. This shows that Farasatulla was fatally wounded, and Sukur Ulla and Mabarak Ulla were also wounded and it also shows that Gatha, a deadly weapon was used in the fight. You are to consider the evidence and decide whether the prosecution has established the existence of the common object of assaulting the complainant's party.

Unfortunately this was precisely what the jury did. The foreman said this:

We have not been able to find in whose possession the land in dispute is. In our decision, as regards conviction under S. 147, I. P. C., we have found that the common object of the assembly was that of assaulting the complainant's party.

When once the matter is logically examined, it becomes apparent that there was no justification for this at all. What the learned Judge told the jury to do really was that in the event of the prosecution failing to establish the case with which they came into Court or in the event of the jury being unable or too superior to come to a decision on the

real point at issue between the parties, they were to consider the possibility as to the existence of another common object merely because certain persons were injured and weapons used, although in fact there never was a scrap of evidence to support the existence of this purely fictitious common object. What the learned Judge ought to have done was to have struck this out of the charge altogether and never put it before the jury at all. It is perfectly idle for the prosecution to pretend that there was any common object other than that of taking possession of the disputed land and there was no evidence at all to support this alternative theory. We have considered the suggestion made by the learned Deputy Legal Remembrancer; but taking all the circumstances into consideration, we are not prepared to order a retrial. The appellants have already had a lengthy trial once and we do not see why they should be put in peril again because the prosecution has made a muddle of the case. The appeal, accordingly must be allowed and the conviction and sentence set aside. The appellants, who are on bail, will be discharged from their bail bonds.

Cunliffe, J.—I concur.

D.S./R.K. *Appeal allowed.*

A. I. R. 1936 Calcutta 430

CUNLIFFE AND HENDERSON, JJ.

Ajit Kumar Basu—Judgment-debtor—Petitioner.

v.

Surendra Nath Mandal and others—Opposite Parties.

Civil Rule No. 1071 of 1935, Decided on 24th January 1936, from order of Sub-Judge, 3rd Court, Alipore, D/- 3rd August 1935.

Bengal Tenancy Act (8 of 1885), S. 174 (3). Proviso (b)—Appeal cannot be preferred unless deposit is made—But deposit is not required for initial application.

The whole of the proviso read as a whole has this effect that whereas no deposit need be made on the initial application to the lower Court, no appeal can be preferred unless the deposit has taken place, thus directly postponing the payment of the necessary money before the appeal is heard but allowing the application to be put forward without making any deposit at all: 1936 Cal 275 and 1934 Cal 491, *Rel on.*

[P 431 C 2]

Bijan Behary Das Gupta and Mahendra Kumar Ghose—for Petitioner.

Abinash Chandra Ghose—for Opposite Parties.

Cunliffe, J.—In this matter the petitioner obtained a Rule against an order of the Subordinate Judge, 3rd Court, 24 Parganas, in which the Judge refused to entertain an application on the part of the petitioner judgment-debtor for rent on the ground that he had not made the preliminary deposit under S. 174, sub-s. 3, proviso (b), Ben. Ten. Act. The view taken apparently by the learned Subordinate Judge was an extremely common-sense one, but I am inclined to think although I had considerable doubts at first that the construction that he put upon the proviso was erroneous. He seems to have thought that the expression used in the proviso "shall be allowed" ought to mean and did mean "shall be entertained" and in taking that view he certainly had the support of a very experienced Judge of this Court, M. N. Mukerji, in 60 C L J 112 (1). I have no doubt whatever that Mukerji, J.'s view that the word "allowed" should be construed as meaning "entertained" is an exceedingly sensible one and it would be very much better if the word "entertained" were substituted in the section for the word "allowed" because as the section stands at the present time in my view; it is a direct encouragement to frivolous applications. The whole section deals with matters of arrears of rent and if a defaulting tenant is able, as I believe he can under the section, to put in what I may call, for want of a better expression, a rambling application, he can substantially stave off the final compliance with the decree made against him. Unfortunately the meaning of the proviso seems to be subsequently made clear by the specific language employed in the latter part of the proviso which deals with appeals.

The words which I consider to be conclusive deal also with the question of deposits and run as follows: "Provided that where the Court has refused to set aside the sale on the application of the judgment-debtor or any person whose interests are affected by the sale and the amount recoverable in execution of the decree is not in deposit in Court," (and those are the important words 'is not in deposit') "no such appeal shall be admitted unless the appellant deposits such amount

in Court." So it can be clearly seen that the latter part of the proviso dealing with the appellate procedure contemplates directly the non-payment of the deposit up till the time that the lower Court has delivered its judgment. It really means that the whole of the proviso read as a whole has this effect, that whereas no deposit need be made on the initial application to the lower Court, no appeal can be preferred unless the deposit has taken place, thus directly postponing the payment of the necessary money before the appeal is heard but allowing the application to be put forward without making any deposit at all. To my mind, the effect of the section is not salutary. It certainly encourages persons of dishonest character to apply to Courts of law on the offchance that they may be successful in their application without giving any security but with the certainty that if they do make the application they will delay the payment of the just dues. For these reasons, I consider that the granting of the Rule is justified and the Rule must be made absolute. I might also note that the learned advocate for the opposite parties here did urge us to consider the question of exercising our discretion on the merits of the application. We should be very willing to do so if the Judge in the Court below had applied his mind to the merits of the case, thus giving us some kind of guidance as to what was to be done. It is quite obvious however from the short order that he passed that he did not consider and had no intention of considering the merits of the case. I consider that the application should be disposed of with all expedition in the Court below.

Henderson, J.—The point which arises for consideration in this Rule was considered by Khundkar, J., and myself, in 39 C W N 1176 (2) in which we reached the conclusion that the point had been correctly decided by Lort-Williams and M. C. Ghose, JJ., in 61 Cal 338 (3). While listening to Mr. Ghose's arguments on behalf of the opposite party, I have been impressed by the difficulties that beset one in attempting to solve this problem

1. Kuloda Prasad Majumdar v. Pratiba Nath Roy, 1935 Cal 91=154 I C 424=62 Cal 149=60 C L J 112.

2. Gunabhinnessa Choudhrani v. Gopendra Prosad Sukul, 1936 Cal 275=63 Cal 49=39 C W N 1176=62 C L J 356.

3. Mofjuddin Muhuri v. Mofjuddin, 1934 Cal 491=151 I C 94=61 Cal 338=38 C W N 334=59 C L J 69.

by speculating as to what was the intention of the legislature. It is suggested that that intention was to discourage frivolous applications. Now I could well understand that a provision which required the deposit of a certain sum assessed by the Judge to be awarded to the opposite party in the event of the application being unsuccessful would have a deterrent effect. But I cannot conceive how the deposit of the amount due should necessarily have such an effect: it may be merely a few annas or it may be hundreds of rupees. In a case such as the present where the parties are creditor and judgment-debtor, the creditor is entitled to get it anyhow: in other cases where the parties are not judgment-creditors and judgment-debtors Lord Williams, J., has pointed out the difficulties that there are in deciding what is to be done with the deposit. In my judgment it is quite impossible to interpret the section from this point of view and the only thing to be done is to examine the language used.

My learned brother has pointed out the precise terms employed and I agree with what he has said. To admit an application is not the same thing as to allow it. In proviso (b) the word "allowed" is used and in sub-s. 5, the word "admitted" is used. In my opinion that is decisive. I therefore agree that this Rule should be made absolute and the learned Judge directed to proceed with the case according to law. Costs will abide the result; we assess the hearing-fee at two gold mohurs.

K.S./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 432

M. C. GHOSE, J.

Hrishikesh Ray and others—Plaintiffs—Appellants.

v.

Upendra Nath Mandal and others—Respondents.

Appeal No. 199 of 1934, Decided on 6th May 1936, from appellate decree of Sub-Judge, 1st Court, Midnapur, D/- 11th September 1933.

Bengal Tenancy Act (8 of 1885), S. 7—Permanent lease by shebait not justified by necessity—Rent may be lawfully enhanced under S. 7 and fair rent fixed.

The power of a shebait of an idol to make an alienation is a limited power. Ordinarily a shebait cannot grant a permanent lease at a

fixed rent, but he may do so in cases of unavoidable necessity. Where therefore the predecessor of the shebait has granted a permanent tenure, even though no justifying necessity like the preservation of the property was proved, the rent under the tenure is liable to enhancement under S. 7: 1922 P C 163 and 36 Cal 1003 (P C), *Ref.*; 1929 Cal 612, *Disting.*

[P 433 C 1; P 434 C 1]

The Court can in such a case consider the question as to what should be the fair and equitable rent (40 per cent of the gross collection allowed as fair rent to the landlord).

[P 434 C 1]

Sarat Chandra Basak, Sarat Chandra Janah, Asoke Nath Ray and Hiran Kr. Ray—for Appellants.

Atul Chandra Gupta and Indu Prokash Chatterji—for Respondents.

Satyendra Nath Mitra—for Deputy Registrar.

Judgment.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent and for enhancement of rent under S. 7, Ben. Ten. Act. The main question in appeal is whether the plaintiffs are entitled to enhance the rent under S. 7. The trial Court decided the issue in favour of the plaintiffs. In appeal the learned Subordinate Judge has decided the issue in favour of the defendants holding that the defendants' tenure is held at a fixed rent and not liable to enhancement under S. 7.

Upon hearing the learned advocates on both sides it appears that the tenure consists of land over 700 bighas in area. The defendants' predecessors obtained the tenure from the predecessors of the plaintiffs in the year 1855. Previously, before 1848, the estate was resumed by Government under Regn. 2 of 1819. Then it was settled to the plaintiffs' predecessors for a period of 20 years. Afterwards in March 1868 it was permanently settled with the plaintiffs' predecessors. Only a very small portion of the land had been brought under cultivation when the plaintiffs' predecessors leased the land to one Gopal Nandi at a rent of Rs. 9 per annum. The said Gopal Nandi surrendered the lease. Then it was leased to Madhusudan Poddar at Rs. 19 per annum. He also surrendered the lease. Then in 1855 it was leased to the defendants' predecessors at a rent of Rs. 22 per annum. In the patta and kabuliati, which were executed by the parties, it was stated that the tenancy was permanent and that there would be no increase or decrease of rent at any time; in other

words that the rent be fixed for ever. In 1874 the tenants instituted a suit for damages against the landlords on the ground that the landlords had cut away certain trees, etc. The suit was compromised between the parties. The plaintiffs' predecessors admitted that the defendants' tenure was a permanent tenure. In order to put an end to disagreement between the parties the defendants agreed to an increase of rent by Rs. 19 making the rent payable hereafter at Rs. 41 per annum and it was stated that the rent of Rs. 41 would never be increased or diminished. The present suit was instituted in 1932.

If the matter would be treated as one of contract between free parties then the defendants' claim would be correct that the rent of the tenure is fixed for ever. It is however proved that the property belongs not to the plaintiffs but to a certain idol, Sree Sree Krishna Rai Jiu, and the plaintiffs are shebait of the said idol. It is urged that as shebait of the deity their predecessors had no right to grant a permanent tenure at a fixed rate for ever. The law on the matter, which has been stated in many reported cases by their Lordships of the Judicial Committee, is that the power of a shebait of an idol to make an alienation is a limited power. Ordinarily a shebait cannot grant a permanent lease at a fixed rent, but he may do so in case of unavoidable necessity. On one side it is urged that apart from such necessity, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the shebait: 36 I A 148 (1). It is urged that in this case upon the evidence it cannot be held that the predecessors of the plaintiffs were under any unavoidable necessity to grant a permanent tenure at a fixed rate for ever. On the other side it is urged that where the validity of a permanent lease granted by a shebait comes in question a long time after the grant, so that it is not possible to ascertain what were the circumstances in which it was made, the Court should assume that the grant was made for neces-

sity: 49 I A 54 (2). Noting the principle of law we are to consider the facts of the present case. The learned Subordinate Judge noted his opinion thus:

I am satisfied that this lease of 1854 was the best bargain then possible for the idol and that it was absolutely necessary for the very preservation of the property. Thus I find there was justifying necessity.

It is urged for the appellant that this conclusion of the learned Subordinate Judge does not follow from the facts of this case. The lands were over 700 bighas in area. Only a small portion had been brought under cultivation at the time of the lease in 1855. It is a mere assumption that a fixed rent of Rs. 22 per annum was the best bargain possible for the idol. All that is in evidence is that previous to that the land had been leased to one tenant at Rs. 9 per annum and subsequently to another tenant at Rs. 19. Both of them had surrendered the lease. From this it is urged for the respondents that Rs. 22 was the highest rent that the land could bear at the time. Accepting the argument that in 1855 Rs. 22 was the best rent which the shebait of the idol could obtain, the question still is whether there was any necessity for them to contract that the rent of Rs. 22 would be fixed for ever, that their successors would be precluded in future time to enhance the rent though such enhancement would be fair and equitable. It does not appear that any premium was asked for or paid in 1855. Further, when there was a dispute between the parties barely 20 years after the lease of 1855, the defendant agreed with the plaintiff that the rent would be enhanced by Rs. 19. Though the rent fixed in 1855 was adequate at the time, the parties voluntarily agreed to increase it to Rs. 41 in 1874. It does not appear that, though the rent fixed in 1855 and 1874 were the best bargain the shebait could make at the time, there was any necessity to give up for ever the benefit of an augmentation of the rent. The cases where a mokarari patta of a Debutter land has been upheld as against the successor of the shebait were all cases where the shebait required the money either for the repair and completion of a temple for which no other funds could be obtained or for a purpose which fell into the cate-

1. *Abhiram Goswami v. Shyama Charan Nandi*, (1909) 36 Cal 1003=4 I C 449=36 I A 148 (P O).

2. *Bawa Magniram Sitaram v. Kasturbhai Manibhai*, 1922 P O 163=66 I C 162=49 I A 54=46 Bom 481 (P O).

gory of protecting the estate from injury or deterioration: 34 C W N 135 (3). In the present case there is nothing to show that there was any such necessity for granting a fixed rent for ever.

On the facts of the case I am of opinion that the conclusion of the Court of appeal below is wrong and the conclusion of the trial Court is correct, that the rent of the tenure may be lawfully enhanced under S. 7. The Court of appeal below found that the suit was defective inasmuch as all the persons who are shebaita did not join as plaintiffs in the suit. The facts are that there are a great number of shebaita, but they periodically select six of them to represent the body of shebaita and those six persons who were duly elected by all the shebaita instituted the present suit. These were showed their bona fides by getting their names registered in the Collectorate as the owners. In the circumstances it cannot be said that the suit is bad for defect of parties. The question then is what is the fair and equitable rent to which the plaintiffs are entitled. The trial Court found that the defendants tenure-holders got Rs. 200 a year from the tenure. That Court thought fit to enhance the rent to Rs. 125. The increase appears inequitable towards the tenants who have for over 60 years paid at a rent of Rs. 41. Taking Rs. 200 to be the gross collection of the tenants 40 per cent of the same may be allowed as fair rent to the landlords and the remaining 60 per cent be allowed to the tenants for collection charges and profits. The fair rent in my opinion should be Rs. 80 per annum and this enhancement will take effect from the beginning of the present Bengali year, namely 1343.

The arrears of rent were claimed for the period of two months only. This is in violation of S. 53, Bengal Tenancy Act, under which, in cases where there is no agreement or established usage, the rent is to be paid in four equal instalments falling due on the last day of each quarter of the agricultural year. The learned advocate for the respondents stated that they would not object to the decree for rent provided this is not taken as a precedent for claiming rent except as laid down in S. 53. In the result the rent for the two months will be decreed, but the plaintiffs will not get any interest or compensation

for the same. The appeal is accordingly allowed. The plaintiffs appellants will get their costs in all the Courts. Leave to appeal is refused.

V.B.B./R.K.

Appeal allowed.

*** A. I. R. 1936 Calcutta 434**

R. C. MITTER, J.

Arjun Das Kundu—Appellant.

v.

Marchia Telini—Respondent.

Appeal No. 283 of 1934, Decided on 30th April 1936, from original order of Dist. Judge, Hooghly, D/- 8th February 1934.

(a) **Insolvency—Adjudication**—All assets at time of petition and all assets subsequently acquired before absolute discharge vest in Court for distribution among creditors.

When a debtor is adjudicated an insolvent, whether at his instance or at instance of creditor, all his assets which he has at the time of the presentation of the application and all assets which he may acquire before his final discharge, must come in the hands of the Court in order that the said assets may be administered, and his creditors whose debts can be proved in the insolvency proceedings may get their debts pro rata from these assets. Hence an insolvent has no title in the properties in which he had beneficial rights at the date of the presentation of the application or which was acquired subsequently by him at any time before his absolute discharge. All such properties vest in the Court or in the Receiver appointed by the Court. [P 435 C 2; P 436 C 1]

(b) **Provincial Insolvency Act (1920), S. 44(2)**—S. 44 (2) does not extinguish altogether claims of creditors—It only limits remedy for realising claims.

The effect of S. 44 (2) is not to extinguish altogether the claims of the creditors whose claims are provable under the Act, but to limit their remedy for the purpose of realising the same from the assets vested in the Court or Receiver according to the provisions of S. 28, Insolvency Act. [P 436 C 1]

(c) **Provincial Insolvency Act (1920), Ss. 33 (3) and 64—Debt provable in insolvency**—It need not be proved before final discharge—Creditor can prove it as long as there are assets and till final dividend is distributed—S. 33 (3) is only directory.

There is no express period of limitation for a creditor, whose debt is provable in insolvency proceedings to prove his debt. A debt is to be proved ordinarily before any dividend is declared. That is necessary in order that the officer of the Court administering the insolvent's estate may have in his possession materials which will enable him to make pro rata and equitable distribution of the assets. The provisions of S. 33 (3) are directory and he can come on the schedules of creditors as long as there are any assets available for distribution amongst the creditors and till the final dividends are distributed and till the administration is complete. The same principle finds

support in S. 64 for, that Section requires a Receiver, before declaring a final dividend, to serve notice in the manner prescribed to persons whose claims to be creditors have been notified but not proved; and if such persons come and prove their claims within the time limited by the notice, they will be entitled to a share in the final distribution. The time of the discharge of an insolvent has no relation to and can have no relation to in any case to the time for declaring the final dividend: *McMurdo Penfield v. McMurdo*, (1902) 2 Ch D 684, *Foll.*; 1924 *Mad* 163; 1925 *Pat* 438 and 1927 *Rang* 263, *Rel. on.* [P 436 C 1, 2; P 437 C 1]

Gunendra Krishna Ghose and Durga Charan Chakravarti—for Appellant.

A. Quasem—for Respondent.

Judgment.—The respondent before me applied under S. 10, Provincial Insolvency Act for being adjudicated as an insolvent. She said in her application that her assets were almost nil. She mentioned the names of her creditors, the appellant being one of them. The application was dated 1st September 1930 and the adjudication order was passed on 25th August 1931, by which the insolvent was directed to apply for discharge within six months of the said order. As there were no appreciable assets, the Court did not appoint a Receiver on her adjudication. In the application she gave an information that she had instituted a suit for some land against her husband and if she won that suit, her assets could be used for the purpose of meeting the creditors, but she had no present means for satisfying her creditors. The present appellant, although his name was given in the application as a creditor, did not take any steps to prove his debt before the discharge of his insolvent. The insolvent applied for her discharge and on 9th September 1932, the Court directed that the final discharge should await the disposal of the suit then pending in the Serampore Munsif's Court, the suit which the insolvent had filed against her husband.

On 9th December 1932, the insolvent informed the Court that she had won the suit. The Court stated in its order that the creditors had not taken any interest in the case and she was not responsible for her debts in that they were caused by litigation forced on her. The Court accordingly granted an absolute order of discharge on 9th December 1932. After this order the appellant appeared on the scene. He wanted to prove his debts and wanted the property of the in-

solvent which she got as a result of the said suit, to be brought under the administration of the Court in the insolvency proceedings. The insolvent opposed subsequently, and it is against the order passed by the Court below on 8th February 1934, the present appellant has filed the present appeal. For the purpose of deciding the controversy in this case, two facts are important, firstly, that it was known to the Court from the time of the filing of the application for adjudication that the appellant was a creditor of the insolvent, and secondly that no dividend has been declared up to now, much less the final dividend. The learned District Judge in support of the order he passed, has held that the effect of the absolute discharge under the provisions of S. 44, Provincial Insolvency Act, was to release the insolvent from all debts provable under the act and that such debts had to be proved in the proceedings before the order of absolute discharge was made.

Under S. 33 (3) of the act, says he, it is imperative on the creditor to prove his debt before the discharge of the insolvent. The learned Judge has further remarked that as none of the creditors of the insolvent had proved their debts before the final discharge, the property which has been recovered by the insolvent as a result of the aforesaid suit is no longer available for distribution in the insolvency proceedings, but that property though acquired before the discharge order, is to be enjoyed by the insolvent absolutely and without any restriction. In my judgment none of these reasons appears to me to be sound and the learned Judge has overlooked not only certain important provisions of the Insolvency Act but has committed fundamental errors with regard to matters of principle applicable to such cases. The principle underlying all bankruptcy proceedings, in my judgment, is this: that when a debtor is adjudicated an insolvent at his instance all his assets there which he has at the time of the presentation of the application and all assets which he may acquire before his final discharge, must come in the hands of the Court in order that the said assets may be administered, and his creditors whose debts can be proved in the insolvency proceedings may get their debts pro rata from these assets. When an insolvency proceeding takes place at

the instance of the creditor there is the self-same principle.

The man adjudicated an insolvent is given a chance to become a freeman after his discharge, after he had placed in Court for the benefit of his creditors his assets. The next principle is that when this is done and he gets an absolute discharge, he is a free man and the legislature makes him a free man on high policy, that after his properties had been taken out of him for the purpose of meeting his creditors, he ought to begin again in his career without any impediment.

It follows therefore that an insolvent has no title in the properties in which he had beneficial rights at the date of the presentation of the application or which was acquired subsequently by him at any time before his absolute discharge. All such properties vest in the Court or in the Receiver appointed by the Court. This is the express provision of S. 28 of the Act. The effect of absolute discharge is defined in S. 44 of the Act. The insolvent is not freed in respect of certain particular debts which are specified in sub-s. (1) of S. 44. With regard to other debts provable in insolvency he is freed from the liability. It is on this principle the creditors are entitled to look only to those assets which had vested in the Court or receiver by reason of the adjudication. That is to say, the claims of such creditors are transferred from one fund to another. The claims of such creditors can only be realised from the assets which had vested in the Court or the Receiver and not against the assets which the insolvent may acquire after absolute discharge. The effect of S. 44 (2) in my judgment is not to extinguish altogether the claims of the creditors whose claims are provable under the Act, but to limit their remedy for the purpose of realizing the same from the assets vested in the Court or receiver according to the provisions of S. 28, Insolvency Act. There is no express period of limitation for a creditor whose debt is provable in insolvency proceedings to prove his debt. A debt is to be proved ordinarily before any dividend is declared. That is necessary in order that the officer of the Court administering the insolvent's estate may have in his possession materials which will enable him to make a pro rata and equitable distribution of the assets. If the Receiver has got materials in his

hands to show that there are creditors who have not proved their debts because they reside at distant places, and that they have had no time to tender proof of their debts, he can set apart a sum of money sufficient for the purpose of paying them, if and when they prove their debts, after meeting his expenses.

The learned District Judge has referred to the provisions of S. 33, Cl. (3) of the Act, for the purpose of laying down the proposition that a creditor is bound to come with the proof of his debts before the discharge of the insolvent, and if he comes after the discharge he is too late. The whole question is whether that subsection bears the meaning which the learned Judge has put upon it. That sub-section says that "a creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt. . ." The only question is whether that sub-section makes it obligatory on the creditor to come in before the discharge of the insolvent. For the reasons which I shall indicate later on, my judgment is that the provisions of that subsection are directory and that he can come on the schedules of creditors as long as there are any assets available for distribution amongst the creditors and till the final dividends are distributed and till the administration is complete. This view of mine has the support of the weighty authority of Vaughan Williams, L. J., in (1902) 2 Ch D 684 (1). The principle is laid down by that learned Judge at p. 699 of the report in these words :

Now according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is secured creditor, or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose.

Some indication is given in the Insolvency Act itself that the correct principle is the principle which is formulated by the said Lord Justice S. 64. Provincial Insolvency Act, required a Receiver before declaring a final dividend, to serve notice in the manner prescribed, to persons whose claims to be creditors have

1. In re Mo Murdo Penfield v. Mo Murdo, (1902) 2 Ch D 684=71 L J Ch 691=86 L T 814=50 W R 644.

been notified but not proved; and if such persons come and prove their claims within the time limited by the notice, then they will be entitled to a share in the final distribution. That contemplates that creditors who have not proved already can come in and prove their debts in time before the final dividend is declared and distributed by the Receiver. The time of the discharge of an insolvent has no relation to and can have no relation to in any case, to the time for declaring the final dividend. When making the order of adjudication the Court limits the time within which the insolvent is to apply for his final discharge and this without reference to the time that may possibly be taken up for the administration of the estate of the insolvent. Then when the insolvent makes an application for discharge the question whether he will get absolute discharge or not or from what date depends upon circumstances which have no relation to the administration of his estate. It may be that where the causes of his insolvency are his misfortunes he ought to be made a free man quickly, but the administration of his estate may be a complicated one, and it may take a large number of years to get in the assets and to distribute them amongst the creditors. S. 64 therefore will still have to be invoked in such cases where the discharge order has been made a long time ago but the assets have been realized by the Receiver a long time thereafter, and the time for making a final dividend may have arrived a long time after the discharge of the insolvent.

In such a case, on the wording of the statute, clearly a creditor who has not already proved his debt, will not be debarred from proving his debt within the time given in the notice issued under S. 64 of the Act. This principle leads me to think that the words of S. 33, Cl. (3), which include creditors whose claim had already been notified but whose debts have not already been proved, are merely directory. It is on this principle and on this limited ground, that I follow the decision of the Madras High Court in 47 Mad 120 (2), of the Patna High Court, in 4 Pat 128 (3) and of the Rangoon High

Court in 5 Rang 384 (4). I do not base my decision on the distinction which has been drawn in some of these cases between a conditional order of discharge and an order of absolute discharge. I go upon the principle laid down by Vaughan Williams, L. J., and on the principle laid down in S. 64 of the Act. I accordingly discharge the order of the learned District Judge and I direct that the Court would take immediate steps for the purpose of bringing the said property in its possession through any of its officers, that it would take steps for sale of the said property, and after the assets are realised would take steps (after complying with S. 64) for their distribution amongst those creditors who would prove their debts before the final dividend is declared. The appellant before me and all other creditors who may wish, may tender proofs of their debts at any time before the assets realized by the sale of the said property are distributed, that is before the final dividend is declared. The appellant before me will get his costs of this appeal not from the insolvent personally but from the assets realised in the insolvency proceedings, hearing fee being assessed at one gold mohur.

V.B.B./R.K.

Appeal allowed.

4. Jhan Bahadur Sing v. The Baliff of the District Court, Toungoo, 1927 Rang 263=104 I C 816=5 Rang 384.

* A. I. R. 1936 Calcutta 437

NASIM ALI, J.

Light of Asia Insurance Co., Ltd.—
Defendant—Appellant.

v.

Karatoya Debi—Plaintiff—Respondent.
Appeal No. 859 of 1934, Decided on 12th February 1936, against Appellate Decree of Addl. Sub-Judge, Sylhet, D/- 6th April 1934.

* Insurance—Life—Some answers in form giving family history false—Policy is void irrespective of question of materiality.

If some of the answers given by the assured in his proposal and declaration forming the basis of the contract of insurance are untrue, the policy is void irrespective of the question of its materiality. [P 439 C 1,2]

Where in the form headed 'Family History' the assured had to give the total number of brothers and sisters separate and also as to how many of them were dead and how many alive, but the assured mentioned under 'total number' only the actual number alive on date when he filled it up and left blank the other two columns without mentioning how many had died and particulars of death;

2. Sivasubramania Pillai v. Theethiappa Pillai, 1924 Mad 163=75 I C 572=47 Mad 120=45 M L J 166.

3. Babu Lal Sahu v. Krishna Prosad, 1925 Pat 438=85 I C 543=4 Pat 128=6 P L T 410.

Held: that 'total number' meant the total of living and dead members and that as the answers to questions which formed the basis of contract were false, the policy was void: *English Cases referred.* [P 439 C 2, P 440 C 1]

Amarendra Nath Bose and Hemendra Kumar Bose—for Appellant.

Priya Nath Dutta—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for recovery of money due on a policy dated 29th December 1928 assuring Rs. 1,000 to be paid by the defendant-company to the representative of one Parbati Charan Chakravarty on the expiry of 20 years from the date of the policy or on his prior death. He died on 11th August 1929 in his house at Mahmudpur, P. S. Habiganj, in the district of Sylhet. Before his death he paid premium in accordance with the terms of the policy. The plaintiff, who is the sole heiress of the insured, instituted the present suit in the first Court of the Munsif at Habiganj on 31st August 1932 against the defendant-company for recovery of Rs. 1,000. The defence of the defendant, so far as it is relevant for the purposes of the present appeal, is that the risk under the policy does not attach inasmuch as some of the answers to the questions put by the defendant's medical examiner which formed the basis of the contract were false. The Courts below have overruled the defence and have decreed the suit. Hence this second appeal by the defendant. The only substantial point for determination in this appeal is whether the policy is void on the grounds stated by the defendant in his defence. The relevant portion of the policy is in these terms:—

This policy of Insurance granted by the Light of Asia Insurance Co. Ltd., of Calcutta hereinafter called the Company witnesseth that in consideration of the payment already made to the Company of the first premium or the first instalment thereof as stated in the sub-joined Schedule for the Insurance the particulars of which are stated in the said Schedule and of the subsequent premiums or instalments of premiums if any to be paid as thereby provided the Company doth hereby agree that upon proofs satisfactory to the Directors of the happening of the event or events on which the sum assured is to become payable as mentioned in the said Schedule and of title of the person claiming, they will pay the sum assured to the assured's representative or assignee. Provided always (1): That the proposal for Insurance and declaration and answers to questions mentioned in the Schedule shall be held to form the basis of this contract. . . .

The Schedule shows that the answers which formed the basis of the contract were given by the insured on 5th December 1928. It is however, not stated in the policy that if the answers be false the policy would be void and no risk would attach. Neither is it stated in the policy that the conditions mentioned therein were warranties. In 1922 A C 413 (1), Viscount Cave observed as follows:

The basis of a thing is that upon which it stands, and on the failure of which it falls; and when a document consisting partly of statements of facts and partly of undertakings for the future is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach. No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in 4 H L C 484 (2) and 9 A C 671 (3), in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue, the policy, should be void; but I think that the effect is the same as if those words had been found in the present policy. Indeed, it is remarkable that in 4 H L C 484 (2), Lord Cranworth referred to the abovementioned provision, as to the avoidance of the policy, if any, if the statements in the proposal should be untrue, as a provision making those statements the basis of the contract; and in 9 A C 671 (3), Lord Blackburn said, "But I think when we look at the terms of the contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration should be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars is warranted". Lord Esher in 72 L T 140 (4) used the word 'basis' in the same sense. Upon the whole, it appears to me both on principle and authority that the meaning and effect of 'basis' clause taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy and if that be the contract of the parties, it is fully established by decisions . . . that the question of materiality has not to be considered.

Again in 1921 P C 195 (5), Lord Shaw observed as follows:

If in point of fact the answer is untrue, the warranty still holds, notwithstanding that

1. *Dawsons v. Bonnia*, (1922) A C 413=91 L J P C 210=128 L T 1=38 T L R 836=1922 W C & Ins Rep 302=1922 H C 156=59 Sc L R 599.
2. *Anderson v. Fitzgerald*, (1852) 4 H L C 484=17 Jur 995.
3. *Thomson v. Weems*, (1884) 9 A C 671.
4. *Hambrough v. Mutual Life Insurance Co. of New York*, (1895) 72 L T 140.
5. *Condogianis v. Guardian Assurance Co. Ltd.*, 1921 P C 195=(1921) 2 A C 125=90 L J P C 168=125 L T 610=37 T L R 685.

the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue, the parties having settled for themselves by making the fact the basis of the contract, and giving a warranty that as between them their agreement on that subject precluded all enquiry into the issue of materiality.

It is therefore clear from the authorities which I have cited above that if some

answers are untrue the policy is void irrespective of the question of its materiality. The learned advocate for the appellant contends that the following answers which were declared by the insured to be true and to have been correctly recorded are false.

No. 4 Family History.

Living.				Dead.					
Total number	No. alive	Ages.	Present state of health.	No. dead.	Ages at death.	Cause of death.	Description of last illness	Date of death	Previous health
Brothers Nil.									
Sisters 2	2	30 yrs. 27 yrs.	Good						

It is an admitted fact that the insured had one brother who died before the declaration. It is also admitted that he had four sisters of whom two were dead at the time when he made the declaration. The Courts below however have held that the word 'nil' under the column 'Total number of brothers' and the number 2 in the column 'Total number of sisters' mean that the insured had no brother living but had two sisters alive at the time. The learned Judge has recorded the following findings in this connexion :

The column Total number is rather ambiguous. It is very probable that when the insured was asked what was the total number of his brothers he replied that it was nil as he had no brother living at the time and in case of sisters also had said that the total number of sisters was 2 for he had then only two sisters alive. The columns 'No. dead, ages at death, and causes of death,' etc., were left altogether blank which would go to show that no question was asked by the doctor to the insured to fill up these columns.

The learned Judge says that the answers were given by the insured when he was asked to give the total number of his brothers and sisters. The medical examiner who put the questions was examined by the defendant. In his examination-in-chief he definitely stated that he had put all the questions mentioned in the report correctly. This statement

was not challenged in cross-examination by the plaintiff. The questions therefore were correctly put. As regards the answers the insured declared that they are correctly recorded. 'Total number' means the number obtained by adding the number living and the number dead. There is, therefore, no ambiguity in this. The word 'nil' under the heading 'total number' of 'brothers' evidently means that the insured had no brother living or dead. The learned Judge says that the fact that the other columns were left blank would go to show that no question was asked by the doctor to fill up these columns. But if question about the total number of brothers is answered by the word 'nil' the question for filling up the other columns cannot possibly arise. The learned Judge seems to think that by the word "nil" the insured meant that he had no brother living at the time, for in the case of sisters the total number is recorded as 2 as he had two sisters then living. This is really arguing in a circle. This argument proceeds on an assumption that the reply under the total number of sisters was in answer to a question about the number of sisters alive, which is the very thing to be determined. A separate answer about the number of sisters alive shows that after the insured had stated that the total number of

sisters alive and dead was two, the further question about the number of sisters alive naturally arose. When the insured stated that the number alive was also two, the questions under the other headings namely, number dead, ages at death, and causes of death, etc., could not possibly arise.

The other columns were left blank because the total number being two and the number alive being two the question about the number of sisters dead and the question of filling up the remaining columns did not arise. It is, therefore, clear that the answers about the number of brothers and sisters in the column 'Total number' did not mean brothers and sisters alive at the time. The answers clearly show that while giving his family history the insured represented to the company that he had no brother and that he had only two sisters both of whom were alive. He concealed the deaths of his brothers and two sisters which were necessary for the purpose of ascertaining the family history. In view of the declaration of the insured that the answers were correctly recorded the onus was heavily upon the plaintiff. The Courts below did not look at the case from a correct point of view. Their judgments show that they did not properly place the onus, and that they have given a meaning to the answers of the insured not justified by their plain language but only on surmises and conjectures. I have, therefore, examined the answers and the evidence in this case in detail and do not find any materials to justify the conclusions of the Courts below. My conclusion, therefore, is that the answers to the questions which formed the basis of the contract were false and that the appellant is not liable under the policy in question. I, therefore, allow the appeal, set aside the judgments and decrees of the Courts below and dismiss the suit. But in view of the facts and circumstances of this case I direct the parties to bear their own costs throughout the litigation. The prayer for leave to appeal is refused.

V.B.B./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 440**

GUHA AND BARTLEY, JJ.

Jatindra Nath Sircar and another—
Accused—Petitioners.

v.

*Emperor—Opposite Party.*Criminal Revn. Nos. 458 and 459 of
1934, Decided on 6th August 1934.Penal Code (1860), Ss. 420, 120-B—'Snow-
ball' scheme—Rules set out in black and
white—Scheme though rightly speculative
cannot be held to be dishonest.

Where a company is floated and registered under Companies Act and one of the schemes launched by the Company is advancing loans, as stated in Memorandum of Association and the conditions of loans and rules are set out in black and white, merely that the scheme is of 'snow ball' nature and highly speculative cannot make it dishonest or of fraudulent nature. Nor can directors be held responsible for the acts of the agents and supervisors in inducing persons to become members, by misrepresentations so long as they did not induce anybody to apply for loans and pay money: 1934 Bom 48, Foll. [P 441 C 2; P 442 C 1]

A loan scheme provided that every applicant for loan was to pay an admission fee and make deposit which alone was refundable in case loan was not granted, and provided that in order to entitle the applicant to loan he must secure co-members or secondaries who were also required to pay admission fee and the deposit, and that the applicant would be paid his loan or part thereof on his securing particular number of co-members or secondaries. The scheme was set out in Memorandum of Association deposited with the Registrar, Joint Stock Companies, and the rules and conditions of loans were set out in black and white and were made available to the public. The agents and supervisors appointed by the Company made misrepresentations and induced villagers to apply for loan and pay admission fee and deposit. The directors however did not induce anybody to apply for loan or pay any money to the Company:

Held: that the scheme was of 'snowball' nature and though highly speculative was not dishonest or of fraudulent nature; [P 441 C 2]

Held also: that so long as the directors did not themselves induce anybody to apply for loan and pay money to the Company, they cannot be held to be party to any fraud or conspiracy so as to attract operation of penal law. [P 442 C 1]

*C. C. Biswas, Bhagirath Ch. Das and Mahendra Nath Mitra—*for Petitioners.

Order.—The petitioners were tried by the Sadar Sub-Divisional Magistrate of Hooghly, for having committed offences under S. 120-B and S. 420, I. P. C., and on conviction were sentenced to rigorous imprisonment for six months under each of the above provisions of the law. The sentences as passed were to run concurre-

rently in the case of the petitioner Jatindra Nath Sircar, and consecutively in the case of other petitioner Dhirendra Nath Ghose. The conviction of and the sentences passed on the petitioners were upheld on appeal, by the learned Sessions Judge of Hooghly. The charges against the accused persons were: (1) that they were party to a criminal conspiracy to commit the offence of cheating by dishonestly inducing people to deliver money to them, through three other persons, and in pursuance of that conspiracy one Thakimani Dasi and others, were cheated of different sums of money, and (2) that through the agents in pursuance of the conspiracy mentioned above cheated Thakomani Dasi and others by dishonestly inducing them to deliver different sums of moneys to the accused persons and which moneys were the property of the Thakomani Dasi and others. The case for the prosecution, it appears to be clear, was based on the memorandum of association, and the loan rules of a Company started under the name and style of the Bengal Industrial Loan Co., Ltd. The accused Dhirendra Nath Ghose was the Managing Director of the Company, and the other accused Jatindra Nath Sarkar replaced Dhirendra Nath Ghose as such, a position which was accepted by the Registrar of Joint Stock Companies.

The loan rules of the Company contemplated different classes of loans and a reference to the scheme launched by the Company in question is necessary for the purpose of forming an idea as to the nature of the offence charged against the petitioner. The applicant for the loan was to pay an admission fee and make a deposit. He was required to secure two co-members or secondaries who were also required to pay admission fee and the deposit called the opening deposit. After payment by the secondaries, the company was to advance loan up to a fixed maximum to the original applicant within a fixed period of 45 to 60 days. After the two co-members had paid admission fees and deposits, the original applicant was to get a refund of his opening deposit; the co-members or secondaries were in the same way to get loans from the company on their securing two co-members or secondaries each. If however the original applicant failed to secure two co-members within a week of his application, he was,

on sending a notice to the company, to get a refund of his deposit money with interest at the rate of six per cent per annum within 180 days of the date of receipt of notice by the company. What was sought to be established on the side of the prosecution was that the accused persons engaged agents in villages and realised money from villagers and created confidence by giving loans to a few persons, but that in a large number of cases they put off payment of loans on various pretexts; the position taken up by the prosecution was that the acts of the accused persons in this behalf amounted to cheating.

There is no question that the petitioners did not induce any one to be a member or to apply for loan or to pay any money; it was the supervisors and the agents who were alleged to have induced persons to become members after they had complied with the loan rules of the company as has been mentioned already; the offence charged against the accused persons was sought to be established solely with reference to the scheme launched by the company of which they were managing directors in succession. The question therefore is whether the Courts below are right in their decision that those responsible for the framing of the scheme and the loan rules, and for their coming into operation, were guilty of cheating as contemplated by S. 420, I. P. C. The learned Judge's view that it was "safe to presume" that it was the petitioners who were alone responsible for the rules may be accepted to be correct on the materials on the record; but the question remains whether the scheme evidenced by the loan rules of the company of which the petitioners were the managing directors, and who may be held responsible for the same, was dishonest or fraudulent in the sense that it represented to the public something which was not true or concealed from them something which the company ought to have disclosed. In the words of Broomfield, J., in 35 Bom L R 1181 (1), the scheme in the case before us might be of the 'snow ball' nature but the literature of the scheme, principally the loan rules of which mention has been made above, could not be described as misleading and

1. Emperor v. Durgadas, 1934 Bom 48=1934 Cr O 245=148 I C 271=35 Cr L J 644=35 Bom L R 1181.

deceptive. All the conditions of the scheme launched by the company were set out in black and white. There was no room for misunderstanding. On a careful consideration of the scheme floated by the company of which the petitioners were the managing directors, and of the loan rules made available to the public, it is not possible to hold, in the case before us, that the petitioners were responsible for the starting and carrying through a scheme of a fraudulent nature, so as to attract the operation of the penal law against the petitioners. The scheme was a speculative one but could not be said to be dishonest. In the above view of the case, the conviction of the petitioners and the sentences passed on them cannot be affirmed. The rules are made absolute. The conviction of the petitioners and the sentences passed on them are set aside. The petitioners must be discharged from their bail bonds, and set at liberty.

V.B./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 442

NASIM ALI AND EDGLEY, JJ.

Satish Chandra Basu—Appellant.

v.

Harendra Kumar Ghose—Respondent.

Appeal No. 1872 of 1933, Decided on 27th March 1936, from appellate decree of Addl. Dist. Judge, Second Court, Bakarganj, D/- 3rd April 1933.

Registration Act (1908), S. 35 — "Person executing" means principal executing document.

The words "person executing" in the Act cannot be read merely as "person signing." They mean something more, namely the person who by a valid execution enters into obligation under the instrument: 1928 P C 38 and 1925 Cal 703, Foll.; 4 I A 166 (P C) and 1927 Bom 487, Disting. [P 443 C 2]

Atul Chandra Gupta and Prafulla Kumar Roy—for Appellants.

Sarat Chandra Basak, Rajendra Chandra Guha and Surajit Chandra Lahiri (for Deputy Registrar)—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of arrears of rent. Plaintiffs claimed rent at the rate of Rs. 3 per kani on the basis of a lease of the year 1264 B. S. in respect of their 5 annas 3 gandas 1 kara and 1 krant share of the land demised. The defence of the tenants is that the plaintiffs are entitled to get rent at the rate of Rs. 2 per kani. The trial Judge overruled the defence and passed a decree for arrears of rent at the rate claimed by the plain-

tiffs. The defendants appealed to the lower appellate Court. The learned Additional District Judge has allowed the appeal in part. He has affirmed the rate decreed by the trial Judge in respect of 1 anna share but in respect of the remaining share he has reduced the rate to Rs. 2. Hence this second appeal by the plaintiffs. The defendants have also filed cross-objections.

Mr. Gupta appearing on behalf of the plaintiffs appellants has raised two points in this appeal. The first contention is that the learned Additional District Judge was wrong in reducing the rate of rent on the basis of the two subsequent leases of the years 1289 and 1290 B. S. inasmuch as these documents were not registered in accordance with the provisions of Registration Act and are therefore inadmissible in evidence. His argument is that though there was no intention to demise certain shares in some properties lying within the local limits of the jurisdiction of the Registering Officer at Dacca where these documents were registered, these lands were included in the two documents simply for the purpose of getting the documents registered at the Dacca Registration Office and consequently the registration was void as the properties really intended to be demised by the two leases were situated wholly in the district of Bakarganj. The question about the intention is primarily a question of fact and it appears from the judgment of the lower appellate Court that the lessees being men of the Dacca District really took settlement of these properties in the Dacca District along with the lands in the District of Bakarganj. This contention therefore is overruled. The second point raised by Mr. Gupta is that the registration of the lease of the year 1289 B. S. (Ex. B-2) is invalid inasmuch as it was presented for registration by a person who had no power to do so. It appears that the name of the lessor who granted the lease was signed on these documents by the pen of her son on the basis of an ammuktearnama. It further appears that the son presented the document for registration before the Registering Officer and admitted the execution of the document and on that admission the document was registered. The question is whether the presentation of this document for registration by the son was a valid presentation. By S. 32,

Act 3 of 1877, a person executing a document or the agent of any such person is entitled to present the document for registration.

The words "persons executing the document" are capable of two constructions. They may mean persons actually signing the document by their own hands or persons executing the document by the hand of another duly authorised to sign on their behalf. In 4 I A 166 (1), Sir Montague E. Smith, while construing the provisions of S. 34, Registration Act of 1871 made the following observations:

There the persons described are the persons executing the document not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it:

There has been a divergence of judicial opinion in the Courts in India as to the precise effect of this passage. In some cases although these observations have been taken as obiter, nevertheless they have been taken to imply that the words "persons executing the document" in the Act mean persons who actually execute the document by their own hands and do not include the principal who only executes by means of an agent. In 29 C W N 539 (2) decided by this Court it was however observed that the observations of the Judicial Committee must be confined to the facts of that particular case and that the only question in that case was whether a partial registration of a document was valid. In this case it was held that the ordinary meaning of "executing a document" is signing a document as a consenting party thereto and that in case of Bakalam signature the person whose name is put with his authority in evidence of his assent to a document is executant within the meaning of S. 35. When this case went up in appeal to their Lordships of the Judicial Committee, 55 I A 81 (3), Lord Sumner, in affirming the judgment of this Court observed as follows:

The appellant contends that in these words "the person executing the document" executing means and means only actually signing. Their Lordships cannot accept this. A document

is executed when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required and another person duly authorised may, by writing the name of the party executing, bring about his valid execution and put him under the obligations involved. Hence the words "person executing" in the Act cannot be read merely as person signing. They mean something more, namely the person who by a valid execution enters into obligation under the instrument.

The decision of the Full Bench of the Bombay High Court in 51 Bom 971 (4) was given before the decision of the Judicial Committee in 55 I A 81 (3). Under these circumstances we are of opinion that the son who signed the name of the lessor on the lease is not the person executing the document. Now after the execution of the document the son presented it for registration. He admitted the execution of the document on the basis of a power of attorney which is noted by the Registering Officer in his endorsement of the document itself. The learned Additional District Judge on a consideration of the facts and circumstances disclosed in the evidence in this case has drawn the presumption that the son had authority not only to execute the document and to admit its execution before the Registering Officer on the basis of the power of attorney but he had the power also on the basis of that power of Attorney to present it to the Registering Officer for the purpose of registration. It appears that the lessor was very old about 90 years of age, at the time of the execution of this document. She had already executed a will appointing the son as her executor. There is nothing to show that the son practised any fraud on the mother. It is true that Ammuk-tearnama by which the son was appointed agent is not forthcoming and the extract of this document which has been exhibited in this case does not specifically mention the power to present the document for registration. The extract however is not exhaustive. The deed was executed and registered about 50 years ago. In view of these facts and the circumstances, as the final Court of fact has held that the son had authority on the basis of the power of attorney all the terms of which cannot be proved now to present the document for registration, we are not

1. Mohammad Ewaz v. Birj Lall, (1875) 1 All 465=4 I A 166=3 Sar 735 (P C).

2. Monmotho Nath Mukerji v. Puran Chand Nahatta, 1925 Cal 703=88 I C 33=29 C W N 539.

3. Puran Chand Nahatta v. Monmotho Nath Mukerji, 1928 P C 38=108 I C 342=55 I A 81=55 Cal 532 (P C).

4. Sitaram Laxmanrao Kadam v. Dharmasukhram, 1927 Bom 487=103 I C 906=51 Bom 971=29 Bom L R 1124 (F B).

prepared to say that the son had no such authority to present the document for registration and the registration of the document was invalid.

The two contentions raised by Mr. Gupta on behalf of the appellants therefore fail. The appeal is accordingly dismissed. The cross-objections filed by the respondents were not pressed and are therefore dismissed. There will be no order for costs either in the appeal or in cross-objections.

V.B./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 444

GUHA AND BARTLEY, JJ.

Lalit Mohan Saha and others—Appellants.

v.

Debendra Nath Thakur and others—Respondents.

Letters Patent Appeal No. 11 of 1935, Decided on 25th March 1936.

(a) Bengal Village Self-Government Act (5 of 1919), Ss. 19 and 31—"Vest" and "control"—Words are not used together but in connection with two different states of things.

The words "vest" and "control" have been used in the Bengal Village Self Government Act in connection with two different states of things, as mentioned in the two different and separate provisions contained in S. 19 and S. 31 of the Act. The works constructed by the Union Board were to vest in the Board under S. 19: the Union Board was given the control of roads not being private property under S. 31 of the Act. [P 445 C 2]

(b) Bengal Village Self-Government Act (5 of 1919), S. 31—Union Board cannot exercise control over private property.

The Union Board had no authority to exercise control over the private property purporting to act under S. 31. [P 445 C 2]

(c) Bengal Village Self-Government Act (5 of 1919), S. 31—Union Board exercising control under S. 31—It can act only consistent with rights of user of public.

The control and the power of the Union Board to make improvement under S. 31 can be exercised only in a manner consistent with the rights of user, so far as the members of the public are concerned. Hence where the public have acquired a right to use a halot as a boat passage during the rainy season and a footpath during the dry season, the right to use it as boat passage cannot be interfered with by the Union Board purporting to act under S. 31. [P 446 C 1]

S. C. Basak, Gopal Chandra Das and Bhuban Mohan Saha—for Appellants.

Atul Chandra Gupta, Bhagirath Ch. Sen and Ramendranath Roy Choudhury—for Respondents.

Bireswar Chatterjee—for Deputy Registrar.

Judgment.—The plaintiffs in the suit in which this appeal has arisen, suing as representatives of the public under O. 1, R. 8, Civil P. C., prayed for possession of what was mentioned as a public Halot, on removal of obstruction therefrom and for permanent injunction. The case of the plaintiffs was that the Halot described in the plaint and which was the subject of the litigation was a public pathway in dry season and a public boat passage in the rainy season, that the defendants had in collusion with one another totally obstructed the boat passage and made the same unfit for use as a pathway in dry season, and that the public had been inconvenienced by the obstruction thus caused. Defendant 1 was the President of the Bhagyakul Union Board, and represented the Board as such, and he supported defendants 2, 3 and 4, who filed written statements and pleaded that earth was raised on the part of the Halot mentioned in the plaint, in accordance with the resolution of the Union Board passed on the application of the defendants for the improvement of the Halot. The fact that boat passage of the public through the Halot was discontinued, as asserted by the plaintiffs, was not controverted. The case of the defendants was that the members of the public could use the Halot as a pathway in dry season, that so far as passage of boats were concerned, boats could easily pass through the northern portion of the Halot in question. According to the defendants the suit was not maintainable inasmuch as the action of the Union Board, which was sought to be challenged, was legal and bona fide in the discharge of their duties.

As it would appear from the judgment of the trial Court, defendants 1 to 4 admitted the Halot in suit to be a public Halot; it was further admitted that the boat passage had been totally obstructed by the raising of earth in front of the baris of defendants 2 to 6. The Halot, before the obstruction complained of was used as a footpath during the dry season and as a boat passage in the rainy season, by the public. The Munsif noticed the position, which was beyond the pale of controversy, that in the part of the country in which the Halot in question was situate, most of the big Halots were used as boat passages in the rainy season; and has observed that the power of the Union

Board to improve the public Halot used both as pathway and boat passage by the public, consistently with its user could be denied. It has to be noticed that according to the learned Munsif the disputed Halot was a waterway in the rainy season, and public pathway during the dry season, and that the action of the Union Board was not legal and bona fide. The trial Court, on the conclusions arrived at by it, on the interpretation of the provisions of the Village Self Government Act, 1919, and on the materials placed on record, passed a decree in favour of the plaintiffs. The plaintiffs were held entitled to get possession of the disputed Halot after removal of all obstructions therefrom. The Halot in suit was declared to be a public Halot for footpath during dry season and for waterway in the rainy season for all purposes as alleged in the plaint.

On appeal by the contesting defendants the decree of the trial Court was affirmed by the learned Subordinate Judge in the Court of appeal below. On the evidence in the case, the Court of appeal below held that at least for three months in a year the Halot was used as a boat passage. The user was from time immemorial, and the plaintiffs and the public had acquired a right to use the Halot as a boat passage during the rainy season. The finding on evidence, arrived at by the lower appellate Court, was also to the effect that the boat passage would entirely disappear by the raising of the Halot in the manner mentioned in the plaint. The Subordinate Judge has referred to acquisition of easement by the plaintiffs and of giving up of that right, so far as the user of the Halot as a boat passage was concerned; and gave his decision that the Union Board had no power to close the waterway. In the concluding part of the judgment, the Subordinate Judge has held that S. 31, Village Self-Government Act, did not apply to the Halot in suit, inasmuch as the Halot was the private property of the plaintiffs and some of the defendants.

The contesting defendants appealed to this Court from the decision of the Subordinate Judge; and the concurrent decisions of the trial Court and the Court of appeal below, were reversed by our learned brother R. C. Mitter, J., This appeal under S. 15, Letters Patent, is by the plaintiffs in the suit.

The learned Judge of this Court has rightly held that there was confusion of ideas, so far as the Subordinate Judge was concerned, in identifying easement with a public right of passage, concepts which were inconsistent. The learned Judge has dealt with the provisions of the Bengal Village Self-Government Act, bearing upon the facts of the case before us, and has given his decision based on certain observations contained in the judgment of Brett, L. J., in 4 Q B D 104 (1), in which S. 149, Public Health Act (38 and 39 Vict. Ch. 55), was interpreted. In that provision of the English statute, the words "shall vest" and "be under control" were used together, in connexion with vesting and control of streets within urban districts; and in our opinion the observations to which reference has been made are not of any assistance for the purpose of a decision in the case before us. The words "vest" and "control" have been used in the Bengal Village Self-Government Act in connexion with two different states of things, as mentioned in the two different and separate provisions contained in S. 19 and S. 31 of the Act. The works constructed by the Union Board were to vest in the Board under S. 19: the Union Board was given the control of roads not being private property under S. 31 of the Act.

On the facts found in the case before us that the Halot in question was private property of the plaintiffs and some of the defendants, the question of application of S. 31, Bengal Village Self-Government Act, could not arise; and we have no hesitation on the facts found in coming to the conclusion that the decision of this Court in 36 C W N 119 (2), a decision with which our learned brother R. C. Mitter, J., has expressed dissent, is right. On the fact found by the Court of appeal below, that the Halot in question is private property, the proprietary rights being with the plaintiffs and some of the defendants, the Union Board had no authority to exercise control over the same purporting to act under S. 31, Bengal Village Self-Government Act. It may be mentioned that Mr. Gupta, the learned advocate for the respondents before us, did not rely on the observations of Brett, L. J., in 4 Q B D 104 (1), in support of

1. Caverdale v. Charlton, (1843) 4 Q B D 104

2. Khowaj Ali v. Syed Mia, 1933 Cal 284=143 I O 110=36 C W N 119.

the decision against which this appeal was directed. In our judgment the observation of Brett, L. J., in 4 Q B D 104 (1) can have no application to the facts of the case before us: and the operation of S. 31 was excluded on the facts found.

The above decision arrived at by us concludes the question argued in this appeal, arising upon the judgment of our learned brother Mitter, J., in favour of the appellants before us. There is however another aspect of the case before us, which cannot be ignored. Even on the assumption that S. 31, Bengal Village Self-Government Act, applied to the case and that the Union Board had the control and power to make improvement in regard to the Halot in question, there can, in our judgment, be no question that the control and the power to make improvement could be exercised only in a manner consistent with the rights of user, so far as the members of the public were concerned. As has been indicated by the trial Court and by the Court of appeal below, and as has been pointed out above, with reference to the judgments of those Courts, the public had acquired a right to use the Halot as a boat passage during the rainy season; this passage of boats was totally obstructed by raising of earth as sanctioned by the resolution of the Union Board. On this aspect of the case before us the decision must be that the right of the public to use the Halot as a boat-passage during the rainy season could not be interfered with by the Union Board purporting to act under the provisions contained in S. 31, Bengal Village Self-Government Act, on the footing that the said provision of the law was applicable to the case of the Halot in question. The Halot was a public Halot in the sense that it was a public pathway during the dry season, and was a public passage for boats during the rainy season. It may be mentioned that the boat passage in the case before us could not be denominated a waterway as contemplated by S. 31, Bengal Village Self-Government Act, as has been done by the trial Court in its judgment.

The result of the conclusions we have arrived at, as mentioned above, is that the appeals must be allowed. The decision of our learned brother R. C. Mitter, J., is set aside, and the decree of the Court of first instance passed in favour

of the plaintiffs-appellants, which was affirmed by the Subordinate Judge in the Court of appeal below, is restored. The plaintiffs-appellants are entitled to get their costs in all the Courts.

R.W./R.K.

Appeals allowed.

A. I. R. 1936 Calcutta 446

R. C. MITTER, J.

Makhan Lal Samadder — Plaintiff — Appellant.

v.

Khagendra Nath Chakravarty and another—Respondents.

Appeal No. 1836 of 1933, Decided on 29th November 1935, from appellate decree of Sub-Judge, Khulna, D/- 22nd May 1933.

(a) Bengal Tenancy Act (1885), S. 174-A—Dispute as to rent between landlord and tenant settled by agreement—Agreement embodied in decree—Consent decree contravening provisions of S. 174-A—Rights of parties are governed by consent decree till it is avoided—Portion of compromise dealing with question of rent alleged to be in contravention of S. 174-A outside scope of suit—It has no force of decree but amounts to mere agreement—Party alleging agreement to be in contravention of S. 174-A need not avoid decree.

Where the dispute between the landlord and tenant as to the rate of rent is settled by an agreement between the landlord and the tenant, and if that agreement is embodied in a decree, the rights of the parties are to be regulated by the consent decree till it is set aside. If the consent decree is based by overlooking the provisions of S. 174-A, Bengal Tenancy Act, the decree is not void but it is to be avoided.

[P 448 C 1]

A petition of compromise may however deal with various matters extraneous to the suit in which the parties may agree. In such a case the whole of the petition of compromise and not a part thereof is to be recorded, that is to say, the petition of compromise must be introduced either by way of recital in the decree or by way of an annexure to the decree, but the decree itself must be confined to the subject-matter of the suit.

[P 448 C 1, 2]

Where therefore the portion of a compromise which deals with the question of payment of rent by the tenant to the landlord, and which is alleged to be in contravention of S. 174-A, is clearly beyond the scope of suit in which the compromise is made, it has no force beyond a mere agreement between the parties concerned and has not the force of a decree. It is not therefore necessary for the party alleging the agreement as being in contravention of S. 174-A, to avoid the decree before he can raise the contention: 1931 Cal 87 and 1919 P C 79, *Ref.*

[P 448 C 2]

(b) Bengal Tenancy Act (1885), S. 29—There cannot be any question of enhancement unless both parties to contract agree

upon one point, namely that there is to be enhancement.

Where there is no dispute between the parties as to the existing rent, and there is an intention to enhance rent on the part of both the parties, and there is an agreement between them as to the amount of enhancement, the matter is governed by S. 29, and if the agreement contravenes the provisions of S. 29 the landlord is not entitled to claim the enhanced rent: 1915 Cal 211, *Rel on*; 19 Cal 333; 28 Cal 90 and 11 C L J 106, *Ref.* [P 450 C 1]

Srish Chandra Dutt—for Appellant.

Hemendra Chandra Sen—for Respds.

Judgment.—This appeal is on behalf of one Makhan Lal Samaddar against the judgment and decree of the Subordinate Judge of Khulna, dated 22nd May 1933. The question involved in the appeal is as to the rate of rent payable by the defendants to the plaintiff. The plaintiff before the year 1924 purchased a Ganti tenure in execution of a rent decree. It is said that thereafter he served a notice under S. 167, Ben. Ten. Act, on the Dar Gantidars, who may conveniently be called the Bachars, and on the predecessors in interest of the defendants before me who were under tenants of the Bachars. Thereafter Makhan instituted a title suit (No. 16 of 1924) against the Bachars and the present defendants and others in the Court of the Subordinate Judge at Khulna. The basis of his claim was that the defendants of that suit were trespassers. He accordingly claimed recovery of khas possession and wasilaut. The rights of the parties were not adjudicated upon by the Court, as on 11th May 1925 a petition of compromise was filed signed by the plaintiff and some of the defendants.

The defendants in the present suit were defendants 5 and 6 in that suit. The material terms of the compromise are these: defendant 2, one of the Dar Gantidars, was accepted as such by the plaintiff, but he stipulated to pay rent at an enhanced rate to the plaintiff, viz., at the rate of Rs. 3 per bigha. Para. 8 is relevant for the purpose of the present suit. It is stated that as the rent of defendant 2 is being increased, defendants 5 and 6, the present respondents, and defendants 9 and 10 (we have no concern with them) would pay to defendant 2 an enhanced rent, viz. Rs. 3-6-0 per bigha. It is found that the previous rent of the holding which defendants 5 and 6 held under the Bachars with two other persons Jogendra and Nagendra who ought to have been made parties to the aforesaid title suit was at

the rate of Rs. 2-6-3 per bigha, that is to say the total rent of the holding was Rs. 44-13-7½. As a result of the compromise the rent went up to Rs. 60-12-0 per year, and the enhancement admittedly was more than two annas in the rupee. This compromise was recorded and a compromise decree was passed on 26th May 1935. The terms of the decree are these: "the suit is decreed in terms of compromise against defendants 1 to 11 and 16 and dismissed against the remaining defendants." The solenama filed formed a part of the decree. Later on the plaintiff purchased the interest of the Bachars, and he became the immediate landlord of the defendants before me.

On the basis of the said decree in title suit No. 16 of 1924, the plaintiff instituted the present suit and wanted to recover rent at the rate of Rs. 60-12-0 per year. The defence is (1) that the suit is not maintainable inasmuch as the heirs of Jogendra and Nagendra have not been impleaded in the suit, and (2) that the plaintiff can get a decree for rent only at the rate of Rs. 44-13-7½ per year. The last mentioned defence which raises a very important question of law, is based on the provisions of S. 29, Ben. Ten. Act. The defendants say that inasmuch as the agreement appearing in para. 8 of the petition of compromise filed in the suit of 1924 contravenes the provisions of S. 29, Ben. Ten. Act, the plaintiff is not entitled to claim the enhanced rent of Rs. 60-12-0 per year. This defence was given effect to by the Courts below. The said Courts held that S. 29 is a bar to the plaintiff's claim and that he is entitled to get rent at the rate of Rupees 44-13-7½. On a further finding which is not necessary to consider in this appeal that the tenants were entitled to claim abatement of rent on account of diminution in area the rent was fixed at Rs. 36-13-0 per year. On this basis the plaintiff has been given a decree. The plaintiff has preferred an appeal to this Court and he has contended that the conclusions of the Courts below that S. 29 is a bar to his claim, is erroneous. Mr. Sen who appears on behalf of the respondents supports the judgments of the Courts below and he raises a further point that even if the Courts below have decided this point erroneously, the plaintiff cannot maintain his suit on the basis of the agreement in title suit No. 16/24 inas-

much as all the tenants were not parties to it and the heirs of Nagendra and Jogendra were not made parties to this suit. It will not be necessary to consider this point if my decision is in his favour on the other point.

The main ground on which the appellant raises his contention is that his suit is based on a compromise decree and until that decree is set aside he is entitled to claim rent as provided for in the compromise decree. He further says that where a bona fide dispute is settled by a compromise there is no scope for the application of the provisions of S. 29, Ben. Ten. Act. The argument advanced by the learned advocate for the appellant has to be taken into two parts: first of all he says that if a bona fide dispute between a landlord and a tenant is settled by an agreement that agreement is not touched by S. 29, Ben. Ten. Act, even if the agreement is not recorded in a decree. As for instance, if there is a dispute as to the rate of rent between the landlord and tenant and the dispute is settled out of Court and if a kabuliyat only is given by the tenant undertaking to pay rent at a certain rate a suit can be successfully brought on the kabuliyat by the landlord. The second branch of his argument is that where the dispute is settled by an agreement between landlord and tenant, and if that agreement is embodied in a decree the landlord stands on a better footing, for says he, that the rights of the parties are to be regulated by the consent decree till the consent decree is set aside. If the consent decree is based by overlooking the provisions of S. 174 A, Ben. Ten. Act, the decree is not a void decree but it is to be avoided, and for that purpose he draws my attention to some of the cases decided on this point. Some of these cases have no doubt laid down that such a decree is not void, but it must be avoided. I may mention in this connexion the case in 34 C W N 887 (1).

I do agree in this contention of the learned advocate for the appellant, but the question is what was the decree which was passed or could have been passed in suit No. 16 of 1924? A petition of compromise may deal with various matters extraneous to the suit in which the parties may agree. In such a case the correct

procedure has been pointed out by Lord Buckmaster in 46 I A 240 (2). No doubt the question raised there was as to whether the provisions of S. 49, Registration Act, affected the petition of compromise filed in a suit between the Rani and Robert Wortson and Company, but the observations of Lord Buckmaster at p. 246 of the report lay down the principle in clear terms. He says that in such a case the whole of the petition of compromise and not a part thereof is to be recorded, that is to say the petition of compromise must be introduced either by way of recital in the decree or be made an annexure to the decree, but the decree itself must be confined to the subject-matter of the suit. If that be so, having regard to the scope of suit No. 16 of 1924, Cl. 8 of the petition of compromise which dealt with the question as to what rent was to be paid thereafter by the under-tenants of the Bachars to the Bachars was clearly beyond the scope of the title suit of 1924, inasmuch as there was no controversy as between the Bachars and their under-tenants who were their co-defendants in that suit, on any matter whatsoever. Cl. 8 of the petition of compromise ought not to have been made the decree of the Court, nor in my judgment has it been so made although the decree is loosely drawn up. It no doubt might have been annexed as a schedule to the decree. It has no force beyond that of an agreement between the Bachars and their under-tenants. Cl. 8 and other clauses which went beyond the scope of the suit would not have the force of a decree of the Court in the sense that the rights conferred thereby could be enforced in execution. Having regard to this view I am clearly of opinion that the contention urged by Mr. Dutt, that his client's claim ought to have been decreed in full till the said consent decree is avoided by appropriate proceedings, cannot be given effect to on the facts of this case.

Having regard to the observations made above, Cl. 8 of the petition of compromise can only be regarded as an agreement between the Bachars and defendants 5 and 6 in that suit. It is an agreement and has not got a greater force than that of an agreement.

1. Esahque Mia v. Dula Mia Patwari, 1931 Cal 87=129 I O 855=34 C W N 887.

2. Hemanta Kumari Debi v. Midnapur Zamin-dari Company, 1919 P O 79=53 I O 534=46 I A 240=47 Cal 485 (P C).

The next question is whether S. 29, Ben. Ten. Act, affects the said agreement. There has been in the past controversy as to whether the plain words of S. 29 can be modified by introducing an exception in the case of an agreement to settle bona fide disputes between the landlord and tenant as to the rate of rent. If I am aware, the question was raised for the first time before Sir Comer Petheram, C. J., and C. M. Ghose, J., in 18 Cal 333 (3) and the matter was fully argued for the landlord by Mr. Woodroffe. There the facts were these: the landlord instituted a suit against the tenant in the year 1886. The landlord claimed Bhawli rent that is produce rent.

The defence was that the tenancy was held at Nagdi rent, that is cash rent. The pleadings of the parties in the suit of 1886 did not require the adjudication as to what was the amount of cash rent annually payable. Mr. Tweedie, the learned District Judge, held that the rent was cash rent, but he went out of his way, as was pointed by the learned Chief Justice, in making an observation that the amount of cash rent was Rs. 153-1-6 a year. After the suit of 1886 the landlord and the tenant put their heads together and agreed on the amount of the cash rent. On the facts of the case as it was pointed out by Sir Comer Petheram, there was a scope of a further suit between them for the determination of the amount of the cash rent annually payable. The landlord and tenant did not however take any recourse to further litigation. With a view to avoid further litigation the tenant executed a kabuliyat in favour of the landlord by which he undertook to pay cash rent at a certain rate which was more than two annas in the rupee over the sum of Rs. 153-1-6. A suit was instituted by the landlord to recover rent on the basis of the said kabuliyat and the defence was that inasmuch as the enhancement was at the rate of more than two annas in the rupee, S. 29, Ben. Ten. Act, affected the kabuliyat and the landlord was not entitled to get rent at more than the pre-existing rent, Rs. 153-1-6. This defence of the tenant was given effect to by the lower Courts. The landlord appealed to this Court. At p. 338 of the report Sir Comer Patheram said :

It is I think apparent that the arrangement of 10th May 1885 (date of the kabuliyat) was come to, not as an enhancement of an existing rent, but as a settlement of a dispute as to the amount and character of the rent, and is not within the provisions of S. 29 at all.

Sheo Sahoy Panday's case (3) was followed in 28 Cal 90 (4). In that case some ambiguities in the judgment pronounced in the case of *Sheo Sahoy Panday* (3) was removed and the principle that was laid down was this: that an agreement embodied in a kabuliyat to pay a certain amount of rent agreed upon by the parties in settlement of a bona fide dispute regarding the rate of rent and to avoid further litigation is not an agreement in violation of the terms of S. 29, Ben. Ten. Act. In 11 C L J 106 (5) the correctness of the aforesaid decisions was sought to be challenged on the ground that those decisions introduced into S. 29 certain words which were not there. It was argued that S. 29 controls all agreements between a landlord and tenant for enhancement and there is nothing in the section that that section would not apply if the agreement has been arrived at as a result of a settlement of a bona fide dispute. But this contention was not given effect to. The matter was fully argued in 21 C L J 325 (6). Mookerji, J., examined in detail the scheme of this part of the Bengal Tenancy Act beginning from S. 27. He pointed out that S. 29 dealt with the validity of a contract for enhancement of rent and that there could not be any question of enhancement of rent unless both the parties to the contract agreed upon one point, namely that there was to be an enhancement.

It has been further pointed out that there can be a common intention to enhance rent if (1) there is no dispute as to the existing rent and (2) there can be an intention to enhance rent even if there is some dispute as to the existing rent, e. g. the landlord says that the existing rent is Rs. 5 a year, and the tenant says Rs. 4; still if they agree to pay Rs. 3 there is an intention to enhance rent although there is no agreement between the landlord and tenant as to what the existing rent previously is; in fact there was a dispute

3. *Sheo Sahoy Panday v. Ram Bachia Roy*, (1892) 18 Cal 333.

1936 C/57 & 58

4. *Nath Sing v. Damri Sing*, (1901) 28 Cal 90.

5. *Kedar Nath v. Manindra Chandra Nandi*, (1910) 11 C L J 106=5 I C 309.

6. *Bata Mandal v. Manindra Chandra Nandi*, 1915 Cal 211=25 I C 329=19 C W N 321=21 C L J 325.

between them on the point. Cases falling within the second class may give rise to difficulties, but so far as cases falling within the first class, I do not find any difficulty. The argument must be concluded by S. 29. In the present case it is admitted that the defendants who were the under tenants of the Bachars had to pay before the year 1924 rent, Rs. 44-13-7½ a year. There was no dispute between them and the Bachars as to what was the rent payable. In the suit of 1924 there was no dispute also between the Bachars and defendants 5 and 6 in that suit as to the amount of rent payable. It is only because that the Bachars had to pay to the plaintiff, as the purchaser of the ganti tenure, rent at the rate of Rs. 3 per bigha that the defendants 5 and 6 and the other under-tenants agreed to pay enhanced rent to the Bachars at the rate of Rs. 3-6-0. In fact this is expressly stated in para. 8 of the petition of compromise. Here, as Mookerji, J., pointed out, there was an intention to enhance rent both on the part of the Bachars and on the part of defendants 5 and 6 in that suit and there was an agreement between them as to the amount of enhancement.

On these facts I am clearly of opinion that S. 29, Ben. Ten. Act, hits the matter and the decisions of the Courts below are correct. In this view of the matter it is not necessary for me to consider the further point raised by Mr. Sen appearing for the respondents. The result is that I maintain the decrees of the Courts below and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 450

CUNLIFFE AND HENDERSON, JJ.

Prithi Missir—Accused—Petitioner.

v.

Harak Nath Singh — Complainant—Opposite Party.

Criminal Revn. No. 14 of 1936, Decided on 8th May 1936.

Penal Code (1860), S. 498—"Detain" must be interpreted ejusdem generis with enticement and concealment.

Word "detain" in S. 498 has to be interpreted ejusdem generis with enticement and concealment; and in order to find an accused guilty of "detaining" there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her husband: *Criminal Revision No. 618 of 1935, Ref.* [P 450 C 2]

Sudhansu Sekhar Mukerjea—for Petitioner.

Khundkar—for the Crown.

Henderson, J. — This is a rule calling upon the District Magistrate of the 24-Perganas to show cause why the conviction of the petitioner of an offence punishable under S. 498, Penal Code, should not be set aside. The case made by the complainant was one of enticement. But the Magistrate, who tried the case, was not satisfied that this had been made out; he, however, found the petitioner guilty of "detaining" the complainant's wife. This decision was affirmed on appeal by Mr. N. N. Sen, a Magistrate of the First Class vested with appellate powers under S. 407 (2), Criminal P. C.

The question that has been argued before us is the meaning of the word "detain" in S. 498, Penal Code. In support of this rule, Mr. Mukerjea contended that detention implies that the woman is being kept against her will and in support of that proposition relied upon the judgment of Lord-Williams, J., in Criminal Revision Case No. 618 of 1935. I cannot find that this decision goes to such a length. On the other hand, it is clear that some definite meaning must be attached to the word and, in my opinion, it is of ejusdem generis with enticement and concealment. There must be evidence to show that the accused did something, which had the effect of preventing the woman from returning to her husband.

The evidence in the present case is extremely scanty. In dealing with it, the learned Magistrate in the Court below has not come to any definite findings of fact. Had he done so, it would have been possible for us to determine whether on those findings the conviction is sustainable. There is, however, no finding whether the petitioner was keeping the complainant's wife as his mistress, whether they were living together or whether they were having merely casual intercourse. In these circumstances, it becomes necessary to examine the evidence in order to see whether the conviction can be supported. The only evidence bearing on the point relates to the incident when the complainant went with his father and some other persons to the house of the petitioner's father. The witnesses are unanimous that the woman ran out of the room, as soon as she saw

her husband: it is clear that the petitioner was in no way responsible for this. The only other fact proved is that the petitioner expressed a hope that there would be no disturbance and asked the husband to go to Court. The most that could be inferred from this is that he was unwilling to use force to compel the woman to return to her husband against her will. In my opinion, such conduct would not amount to "detention" within the meaning of the section. The rule must accordingly be made absolute and the conviction and sentence are set aside. The petitioner is discharged from his bail and the fine, if paid, will be refunded.

Cunliffe, J.—I agree.

V.B./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 451

CUNLIFFE AND HENDERSON, JJ.

Emperor

v.

Abul Hossain Sikdar—Accused.

Jury Ref. No. 3 of 1936, Decided on 12th May 1936.

Criminal P. C. (1898), S. 307—Power of reference should be sparingly used—Verdict of jury must not be disturbed unless verdict is perverse.

Power of making references should be sparingly used. Reliance must be placed upon the decisions of the juries and they must not be disturbed unless it can be shown beyond a peradventure that a perverse verdict has been arrived at. Where, therefore, the only ground for making reference was "giving effect to the verdict of the majority of the jury will lead to the anomalous result of letting off the principal offender who evaded a regular trial for a pretty long time ever since the alleged occurrence," it is quite insufficient and the application should be rejected. [P 451 C 2]

Khundkar and Hari Dev Chatterjee—for the Crown.

Cunliffe, J.—We cannot accept this reference which is put forward by the learned Assistant Sessions Judge of Faridpore. The learned Judge shows by the terms of his Letter of Reference that he has taken a very strong view in favour of the prosecution in this case. He asks us to consider his charge to the jury in which no doubt he brought to their notice once again the facts upon which the prosecution rested the case before him. The letter is divided into eight paragraphs; seven of these are concerned with surmises on the part of the learned Judge as to the exact view that the jury must have taken when they retired with regard to the evidence produced by the Crown.

It is, however, in para. 8 of the letter that one finds, I think, the real reason that induced the learned Judge to bring this case before us. In that paragraph he said that

Giving effect to the verdict of the majority of the jury will lead to the anomalous result of letting off the principal offender who evaded a regular trial for a pretty long time ever since the alleged occurrence,

and no doubt that state of affairs is very often produced in the District Courts in similar circumstances. Although one can appreciate the anxiety on the part of the learned Judge to have what he considers to be equal justice done with reference to all the persons concerned in this disturbance, yet this reason put forward in para. 8 is in no way a determining reason to be considered judicially by a Court of appeal. If the letter of reference was stripped of all the matter contained in the preceding 7 paragraphs, and para. 8 was alone brought before us to consider, this question would be all the more apparent as not being a consideration that we can act upon as an appellate Court. The power of making references on the part of Judges engaged in criminal work in the districts is one that should be used very sparingly. It is an artificial power which is the creature of statute only. And in my experience it is most often utilised by Judges, zealous indeed to perform their duties but usually somewhat inexperienced in the principles of criminal procedure. I repeat again what I have said on several occasions since sitting in this Court, that as long as it is the policy of the Government of this country to rely on the verdicts of juries in the district, a policy which is supported by both the profession and the public and a policy which is cherished by the accused persons who are brought up for trial, so long must reliance be placed upon the decisions of juries and they must not be disturbed unless it can be shown beyond a peradventure that a perverse verdict has been arrived at, which can be demonstrated clearly from a perusal of the proceedings of the Court. The reference therefore is rejected. The accused must be set at liberty immediately.

Henderson, J.—I agree.

D.L./R.K.

Reference rejected.

A. I. R. 1936 Calcutta 452

M. C. GHOSE, J.

Humayun Raja Chaudhury and another—Defendants—Appellants.

v.

Jyotirmoyee Debi—Plaintiff and *others*—Respondents.

Appeal No. 434 of 1933, Decided on 25th July 1935, from appellate decree of Dist. Judge, Murshidabad, D/- 31st August 1932.

(a) **Bengal Tenancy Act (1885), S. 102 (dd)**—Settlement Officer is authorised to decide disputes between two neighbouring proprietors.

A Settlement Officer has authority to decide a dispute between two neighbouring proprietors under the provisions of S. 102 (dd): 19 Cal 641, *Dissent*. [P 453 C 1]

(b) **Limitation—Assumption of title—Decision of boundary disputes under S. 40, Survey Act, amounts to civil Court decree creating rights under it—Disputants or their successors must bring suit for establishing their title within limitation period or else their rights will be extinguished.**

Where a dispute about the boundary between the two mouzas was decided in favour of one party under S. 40, Survey Act, the decision operated as a civil Court decree and created rights under it until the other party set it aside by a proper suit. But where the legal successors of the other party did not dispute the decision against them within 12 years from the date of decision and allowed limitation to run against them, their title to property would be extinguished: 1921 Pat 31, *Rel. on*. [P 453 C 1]

Bankim Chandra Mukherjee and Muktipada Chatterjee—for Appellants.

Surendra Madhab Mallick and Ramani Mohan Banerjee—for Respondents.

Judgment.—This is an appeal by the defendants in a suit for declaration of title and recovery of possession of certain lands. The plaintiff, who may be called the Rani of Pakur, is the widow of Kalidas Pandey, who died in 1928. The plaintiff is the tenure holder of Mouza Chak Purapara and the defendants are the tenure holders of Mouza Purapara. In the old days between the two Mouzahs ran the river Bhagirathi, Purapara being on the west and Chak Purapara being on the east. In course of time the river shifted over to the east or to the west and thereby threw up lands either side till the boundaries of the two villages have become difficult to ascertain. In the present case the suit lands were divided into three schedules. The Ka schedule lands which were fit for cultivation from before 1914, and the Kha schedule lands

which were sandy and not fit for cultivation in 1916 and, lastly, the Ga schedule lands which were under water in 1916 and rose above water thereafter. A Commissioner was appointed and he made a map of the locality. On consideration of all the evidence, the trial Court decreed the plaintiff's suit against the appellant (defendant) holding that the plaintiffs had proved their title to the lands as appertaining to their Mouza Chak Purapara, and that the lands being in possession of cultivating tenants, the plaintiffs would be entitled to receive rent from them. Against that judgment the defendant made an appeal unsuccessfully in the Court of the District Judge.

The tenants defendants did not appeal. Their position is more or less secure as they will hold as tenants, and it is a matter of not much importance whether they are tenants under the plaintiffs or the defendant landlords. The contest is between the plaintiffs putnidars on the one side and the defendants putnidars on the other. On the question of title, both the Courts below have found that the lands appertained to Mouza Chak Purapara and the plaintiffs are entitled to the same. That finding is not challenged in this Court. As to the Ga schedule lands which rose above the water, within less than 12 years, the learned advocate for the appellants does not press the appeal. But he has strongly urged that both as to the Ka and Kha schedule lands, the plaintiff's title has been extinguished by the law of limitation. Taking first the Ka schedule lands: These were sub-divided in the Court into Ka, Ka-1 and Ka-2, according to the possession of tenants, but it is not necessary at this stage to consider the sub-division. The Ka schedule lands consist of 22 plots in the petty settlement of village Purapara. It has been proved that the defendants Chaudhurys applied for a petty Record of Rights of their Mouza Purapara and work began in 1914 and was finished in 1916. In this petty settlement there was a dispute about the boundary between the two mouzahs, namely Purapara and Chak Purapara. The dispute was raised by the defendants Chaudhurys. It was defended by Miah Shahebs, who were the four annas co-sharers of the tenure of Chak Purapara. It was not defended by the 12 annas co-sharer tenure holder Kalidas Pandey, predecessor of the plaintiff.

Upon hearing the learned advocates it is clear that Kalidas ought to have defended the matter, but he did not choose to defend it. It appears that shortly before this he had been defeated in a suit by the Chaudhurys against him, and he did not choose to contest the matter further. The dispute was decided on 7th April 1915 by the Assistant Superintendent of Survey. He declared that these 22 plots, constituted in the Ka schedule lands, were part of Mouza Purapara and the defendants were entitled to possession of the same. This decision was made under S. 40, Survey Act.

It is urged that under S. 40, Survey Act, the decision operates as a civil Court decree and it stands good until it is set aside by a proper suit. The question is whether the plaintiff, the successor of Kalidas, is bound by the decision of 7th April 1915. It was urged on the authority of the case in 19 Cal 641 (1) that a Settlement Officer has no authority under the provision of the Bengal Tenancy Act to entertain any dispute between persons interested in neighbouring estates as to the title of any land. This proposition is incorrect as the law has been amended since 1891. At present the Settlement Officer has authority to decide a dispute between two neighbouring proprietors under the provisions of S. 102 (dd). The preparation of survey and record of rights consists of four stages. The first stage is of the survey and preparation of the map. The second stage is as to the writing of the draft record. The third is the publication of the draft record and disposal of objections. The fourth stage is the publication of the final decree. It was in the first stage that the question of boundary between the village Purapara of which the record was prepared, and the adjacent village Chak Purapara, came into question and the Assistant Superintendent of Survey had legal authority, and it was, in fact, his duty to decide the dispute. The fact that Kalidas did not appear and defend his interest in that dispute is of no avail to the plaintiff. She is clearly bound by the decision of the Superintendent of Survey and limitation will run against her from 7th April 1915 as regards this schedule lands. I am fortified in this view

by the decision in 6 Pat L J 51 (2). The suit not having been instituted within 12 years from that date, her title has been extinguished and the suit is dismissed in respect of the lands of the Ka schedule.

In respect of Kha schedule lands it has been found that they just rose above water in 1916, and were sandy and not fit for cultivation. In the Record of Rights, which was finally published on 22nd December 1916, they were recorded to be within the tenure of the defendant tenure holders. If it be held that the adverse possession commenced on 22nd December 1916, the date of publication of the final record, the suit is within time having been instituted on 22nd December 1928. It has however been urged by the learned Advocate of the defendants-appellants that the final publication did indeed finally state that these lands were within the tenure of the defendants, but this was not the first date when such a statement was publicly made. The statement had been made by the defendants and accepted by the settlement authorities long before that date and the draft Record of Rights contained the same, and must have been published at least a month before the final record. It should therefore be held that the plaintiff must have received notice of the defendants' adverse possession long before 22nd December 1916. The argument is not without force, but having regard to the circumstances of the case the Courts below were not wrong in not accepting the same. These lands were sandy lands and they were actually possessed by tenants who were indifferent as to which of the rival tenure holders claimed the rent from them. Actually these lands were not under cultivation on the date of the final record. They came under cultivation afterwards and there was a dispute between the rival tenure-holders which was decided in favour of the defendants on 15th November 1918. In the circumstances it cannot be held that the Courts below were wrong to hold that this claim is not barred by limitation. In the result the appeal is allowed in part with costs in proportion to success through-

1. Norendra Nath Roy v. Srinath Sandel, (1891) 19 Cal 641.

2. Probhu Charan Bharti v. Secretary of State, 1921 Pat 81=61 I C 46=6 Pat L J 51=2 P L T 118.

out. Leave to appeal under S. 15 of the Letters Patent is refused.

R.W./V.V.

Appeal allowed.

A. I. R. 1936 Calcutta 454

CUNLIFFE AND HENDERSON, JJ.

Khaje Habibulla and others—Plaintiffs—Appellants.

v.

Bepin Chandra Rai and others—Respondents.

Appeal No. 545 of 1932, Decided on 28th November 1935, against decree of Dist. Judge, Bakargunj, D/- 18th June 1931.

(a) Lease—Construction—Land settled at certain rental—Kabuliat providing that rent is not to be enhanced—In event of diluvion tenant not entitled to abatement of rent—No provision showing surrender by landlord of his right to additional rent in event of accretion to land—Landlord held entitled to settlement of rent on accretion.

Where certain land was settled after measurement at a certain rental and the kabuliat provided that the rent for the land was not to be enhanced and that in event of diluvion the tenants would not get any abatement in rent but it was nowhere provided that the landlord was willing to surrender his right to additional rent for any land which may subsequently form by accretion:

Held: that the landlord was entitled to settlement of fair rent for the land accreting to the tenure of the tenant and that it could not be implied that the landlord has agreed to surrender his right to additional rent for land which may subsequently form by accretion.

[P 455 C 1]

(b) Landlord and tenant—Rent—Suit for settlement of fair rent under Bengal Tenancy Act on ground of accretion—Tenants contending that at the time of passing of Bengal Tenancy Act predecessors of landlord had no right to additional rent—Burden of proof is on them to establish plea.

Where a suit is instituted under the Bengal Tenancy Act by a landlord for settlement of fair rent for certain lands on the ground of accretion to the tenure of the tenants and the tenants contend that at the time the Bengal Tenancy Act was enacted, the predecessors of the landlord had no right to additional rent, the burden of proof of establishing the plea taken by them rests on them. They must show that at the time of the passing of the Bengal Tenancy Act the predecessors of the landlords had no right to enhancement of rent. [P 455 C 2]

(c) Practice—Plea—Res judicata—Plaintiffs appealing from suit dismissed—Defendants although entitled to support order of dismissal on ground of res judicata not raising plea—They are precluded from raising it subsequently.

Where in an appeal by the plaintiffs from a suit which has been dismissed, although it is open to the defendants to support the order of dismissal on the ground of res judicata, they

do not do so and the suit is remanded to be heard on merits they are precluded from raising the plea of res judicata subsequently.

[P 455 C 2]

(d) Landlord and Tenant—Rent—Suit for—Fixing of fair rent—Opinion formed by expert revenue officer is entitled to consideration.

There can be no better material in fixing a fair rent than the opinion formed by an expert revenue officer who is actually working on the spot.

[P 456 C 1]

S. C. Basak and Bijan Kumar Mukherjee—for Appellants.

Brojolal Chakrabarty, Surendra Nath Das Gupta and Surojit Chandra Lahiry (for Deputy Registrar)—for Respondents.

Henderson, J.—The litigation which has now culminated in the present appeal has had an extremely chequered history but it will not be necessary for our present purpose to set out all the facts. Suffice it to say that the suit out of which this appeal has arisen was instituted for the purpose of settling a fair rent for certain lands which have accreted not only to the plaintiff's Zamindary, but also to the tenure of the defendants. The revenue authorities have fixed certain revenue upon it which the plaintiff is bound to pay and the plaintiff now asks that he also should be given an increase of rent from the defendants. But briefly his case is that he is entitled to it under the provisions of the Bengal Tenancy Act. The respondents resist the claim upon three main grounds. Their first contention is that they are exempted by the terms of the Patta and Kabuliat which were executed when the holding was originally created as long ago as the year 1273. In the second place they contend that they are not liable under the law, and in the third place they contend that the matter has been concluded in their favour and that the question has now become res judicata. The learned Subordinate Judge who tried the suit decided the first point in favour of the plaintiff. This decision was reversed by the learned District Judge on appeal.

The translation of the Kabuliat has been placed before us and in our opinion the learned Subordinate Judge was right on this point. It is quite clear that a certain area of land was settled after measurement at a certain rental and there can be no question that the intention of the parties was that the rent for that land was not to be enhanced. Then in the second place there was a provision that in the

event of any diluvion the defendants will not get any abatement of rent. On this point it seems desirable to stress the fact that the defendants were getting a quid pro quo. They were maintaining in fact their right to any re-formation *in situ* and any further accretion which might take place in future. There is really nothing in this provision to entitle us to say that it implies something else of a totally different character. This really disposes of the provisions in the lease. It is nowhere said that the landlord is willing to surrender his right to additional rent for any land which may subsequently form by accretion. We are not prepared to imply that any such agreement was intended. It is obvious that in such an event the landlord had before him the danger, which has actually materialized, that in the event of any accretion his revenue might be greater than the rent which he was entitled to realize. For these reasons we are of opinion that there is nothing in the lease itself which would defeat the present claim of the plaintiff.

The second point is based upon the provisions of Regulation 11 of 1825, but has ultimately to be decided upon the burden of proof. The learned Subordinate Judge did not find, and in the absence of any evidence could not find, that the plaintiff was not entitled to any enhancement under the terms of that Regulation. In fact the position is that we simply do not know whether he was or was not. What the learned Judge did was to approach the case as though the Bengal Tenancy Act had never been passed and the suit was one for enhancement of rent under the terms of the Regulation. No doubt in a suit of that character it would be necessary for the plaintiff to show that there was an established usage under which the defendants were liable to pay additional rent for any accretion to their tenure.

The present suit however was one under the Bengal Tenancy Act, and there can be no question that under the provisions of that Act the plaintiff is entitled to enhancement. The answer made by the defendants is that the plaintiff's claim is defeated by sub-s. 4, S. 2. That sub-section is in these terms: "The repeal of any enactment by this Act shall not revive any right, privilege, matter or thing not in force or existing at the com-

mencement of this Act." Put shortly the contention of the defendants is that at the time when the Bengal Tenancy Act was enacted the plaintiff's predecessor had no right to additional rent. Now we are clearly of opinion that if a defendant wants to meet a claim by a plea of this kind, the burden of establishing it clearly rests upon him. If the defendants wish to show that at the time of the passing of the Bengal Tenancy Act the plaintiff's predecessor had no right to an enhancement of rent, it is clearly for them to establish it. They made no attempt to do so and there was no evidence at all on which the question could be determined. As I have already indicated we are completely in the dark on the point, and in these circumstances it must be held that this sub-section is of no avail to the respondents.

The third point of *res judicata* is based upon the judgment of Mr. Chotzner as he then was sitting in appeal in the District Court by which he dismissed a suit for enhancement brought by the plaintiff in the year 1910. There are several reasons why this plea cannot be substantiated. In the first place, the suit in 1910 was instituted in the Court of the Munsif and not in the Court of the Subordinate Judge. In the second place the claim of the plaintiff was quite different. He was then asserting that the disputed land was part of his permanently settled estate and on such a case it would be very difficult to say that he could claim any enhancement of rent in view of the terms of the lease. In the third place the present question, i.e. the right of the plaintiff to enhancement under S. 52, was deliberately left open. In the fourth place this matter has already been before this Court on a previous occasion. The suit was dismissed. On appeal by the plaintiff the learned District Judge upheld the order of dismissal on the ground that the suit was barred by limitation. On the point of *res judicata* he held in favour of the plaintiff. The plaintiff appealed to this Court. The appeal was heard by Suhrawardy, J., and Patterson, J., and they overruled the finding of the District Judge with regard to limitation. It was then open to the defendants to support the order of dismissal on the ground of *res judicata*. They did not do so with the result that this Court, instead of dismissing

sing the suit remanded it to be heard on the merits. In view of that order it is now too late to say that the suit is barred by *res judicata*.

The result is that in our opinion the plaintiff is entitled to a decree. The present litigation has been going on for many years and we feel very strongly that it ought to be put an end to. It is therefore with the greatest reluctance that we should remand it again. In our opinion it is not necessary to do so. The plaintiff claimed rent at the rate of Rs. 627-2-0 basing his claim on what he alleged to be the prevailing rent. Before us that claim has not been pressed. It appears that when the revenue authorities, in the course of the *dearrah* operation, assessed the revenue which the plaintiff is liable to pay; they also assessed the rent of the defendants at the rate of Rs. 550-3-0. The defendants attempted to recover that rent but failed as it was held by Walmsley and B. B. Ghose, JJ. that this assessment was not of a binding character. We are not now concerned with the question whether it is binding or not. We are only concerned with the question whether it is fair. We find it difficult to imagine what better materials there could be in fixing a fair rent than the opinion formed by an expert officer who was actually working on the spot. Mr. Chakrabarty has not said anything which would lead us to suppose that that rent is in any way unfair and we therefore propose, instead of remanding the case again, putting the parties to the expense of another hearing and possibly another appeal to this Court, to fix the rent at the rate of Rs. 550-3-0.

The result is that this appeal is allowed and the decrees of both the Courts below are set aside. The plaintiff will be given a decree settling Rs. 550-3-0 as rent and a decree to recover rent at that rate for a period of three years. In this connection we may note that Dr. Basak has abandoned the claim for the year 1329. The appellant will also get his costs in all the Courts.

Cunliffe, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 456

R. C. MITTER, J.

Rai Kiran Chandra Roy Bahadur and others—Appellants.

v.

Tarak Nath Gangopadhyay and others—Respondents.

Appeal No. 1817 of 1933, Decided on 5th December 1935, against decree of Sub-Judge, Jessore, D/- 10th April 1933.

(a) Bengal Tenancy Act (8 of 1885), S. 111-A—Suit for declarations that plaintiff has status of Kaimi-Mokarari Mourasidars and that entry in Record of Rights recording them as Korfis is wrong, is one for declaration of title and is not barred by S. 111-A—Plaint in suit discloses cause of action.

If there is an entry adverse to the plaintiff he is not bound to institute a suit for a declaration that the entry is wrong. He can wait, and when an invasion on his rights is made on the basis of the entry, he can come and sue for a declaration of his title on the ground that the record is wrong, and the suit is in time if brought within six years of the threatened invasion. But he can also make the entry in the Record of Rights as the basis of his cause of action on the ground that the said entry has cast a cloud upon his title. One of the purposes of a suit for declaration is the removal of the cloud. If he makes the said entry as his cause of action he has to institute the suit within six years from the date of the final publication of the record of rights and not from the date of the certificate of the final publication.

[P 458 C 1]

A suit for a declaration that the plaintiffs have the status of Kaimi-Mokarari Mourasidars in respect of certain land, and that the entry in the Record of Rights recording them as Korfis is wrong, is one for declaration of the plaintiffs' title and is not barred by S. 111-A, Bengal Tenancy Act.

[P 457 C 2]

The plaint in such a suit discloses a cause of action as the entry in Record of Rights having recorded the status of the plaintiffs as that of Korfis, while they claim a higher status, viz. that of Kaimi-Mokarari Mourasidars, casts a cloud upon their title: 1935 Cal 801, *Foll.*; 1932 Cal 842, *Disting.*

[P 457 C 2]

(b) Evidence—Admissibility—Document—Recitals—Statement as to boundaries in *kabuliat* executed between two persons is admissible as against one of them.

A statement as regards boundaries of certain land, in a *kabuliat* executed between two persons, is admissible as against one of them, not being a recital of boundaries in a third party document.

[P 458 C 2]

(c) Bengal Cess Act (9 of 1880), S. 95—Cess return can also be used against heirs of persons filing them.

A cess return which can under S. 95 be used as against the person filing it can also be used against the heirs of the persons filing them. Evidence, if admissible for one purpose is admis-

sible as evidence for all purposes: *Higham v. Ridgway*, 2 S M L C 284, Rel. on.

[P 458 C 2; P 459 C 1]

Hemendra Chandra Sen and Surendra Nath Basu (Sr)—for Appellants.

Dr. Mukherji, Biswa Nath Naskar and Ramendra Mohan Mazumdar (for Deputy Registrar)—for Respondents.

Judgment.—The subject matter of the suit out of which this appeal arises are settlement plots Nos. 58 and 63. In the Record of Rights published in 1922 the Narail Babus, who are the appellants before me, and the contesting defendants in the lower Court, are recorded as proprietors. There is a further entry in the settlement record that defendants 1 and 2 are occupancy raiyats under the Narail Babus, and that the plaintiffs are Korfa raiyats under defendants 1 and 2. On 23rd December 1927 certain persons, whom I may call the Chakrabortties, as plaintiffs instituted the suit out of which this appeal arises. In the plaint they stated that the said two plots were their Niskar Brahmatter lands, that defendants 1 and 2 are tenure-holders under them and the plaintiffs are under-tenure-holders under defendants 1 and 2. They further stated that the settlement record in rendering the lands as the mal lands of the Narail Babus had cast a cloud upon their title and for that purpose they wanted a declaration of title and confirmation of possession through their tenants. In the suit as originally filed the present plaintiffs were pro forma defendants. Later on the Chakrabortties filed an application in Court to withdraw from the suit on the ground that they were satisfied that the said two plots were not their Niskar Brahmatter, but they were the mal lands of the Narail Babus. On that the present plaintiffs, who were then pro forma defendants, made an application for their transfer to the category of plaintiffs.

They stated that the lands in suit appertained to the Niskar of the Chakrabortties, that defendants 1 and 2 were permanent tenure-holders under the Chakrabortties and they are also permanent under-tenure-holders under defendants 1 and 2, and that the entry in the Record of Rights which had recorded them as Korfas was wrong. They wanted a declaration of their title as Kaimi under-tenure-holders in respect of the lands. The Court passed

an order by which they were transferred to the category of plaintiffs and Chakrabortties were transferred to the category of pro forma defendants being made pro forma defendants 15 to 25 and the allegations made in the application for the transfer were ordered to be made part of the plaint by way of amendment. The plaint was corrected, but all the said allegations were not embodied. After that the suit proceeded and both the Courts granted a decree in favour of the present plaintiffs. A point was raised that so far as the present plaintiffs were concerned, the plaint disclosed no cause of action. That point was considered by the learned Subordinate Judge who held that the suit was maintainable at the instance of the present plaintiffs and the plaint disclosed a cause of action. In my judgment S. 111-A, Ben. Ten. Act, is no bar to the suit, inasmuch as the suit is one for declaration of plaintiffs' title. The plaintiffs claim in the plaint that they have the status of Kaimi Mokarari Mouresidars, a status higher than that recorded in the settlement record.

The decision in the case in 40 C W N 22 (1), delivered by Mukerjee, J., fully supports the view which I am taking. The plaint in my opinion discloses a cause of action. The Record of Rights having recorded the status of the present plaintiffs as Korfas, had certainly cast a cloud upon the plaintiffs' title. The case in 36 C W N 783 (2) has been cited before me by Mr. Sen appearing on behalf of the appellants for the purpose of supporting his contention that if a plaintiff simply states that the Record of Rights is incorrect and by reason of that great obstacles in the matter of exercising plaintiff's possession will arise in future, the plaint does not disclose any cause of action. In that case however the Record of Rights was prepared more than six years before the suit, and the allegations in the plaint were that great obstacles will arise in future. A Division Bench of this Court said that the plaint did not disclose any cause of action, and if the entry in the settlement record be taken as furnishing

1. Keshab Chandra Banerjee Bahadur v. Madan Mohan Poddar, 1935 Cal 801=160 I O 96=62 Cal 969=61 C L J 519=40 C W N 22.
2. Nagendra Kishore Roy Chowdhury v. Brojendra Kishore Roy Chowdhury, 1932 Cal 842=139 I O 759=56 C L J 316=36 C W N 783.

the cause of action in the suit, it would be a serious question as to whether the suit was not then barred by limitation. In that case however the earlier cases decided by this Court were not cited. As I read the law, the position seems to be this: that if there is an entry adverse to the plaintiff he is not bound to institute a suit for declaration that the entry is wrong. He can wait, and when an invasion on his rights is made on the basis of the entry, he can come and sue for a declaration of his title on the ground that the record is wrong, and the suit is in time if brought within six years of the threatened invasion. But he can also make the entry in the Record of Rights as the basis of his cause of action on the ground that the said entry has cast a cloud upon his title. One of the purposes of a suit for declaration is the removal of the cloud. If he makes the said entry as his cause of action he has to institute the suit within six years from the date of the final publication of the Record of Rights and not from the date of the certificate of the final publication. In 40 C W N 22 (1) that position is clearly indicated and a number of cases beginning from the case in 23 C W N 883 (3) is noticed in the judgment. In my judgment, therefore, the very fact that the present plaintiffs have been recorded as Korfa raiyats, gives them a cause of action for this suit. Their case is that the entry is wrong as according to them their status is that of a Mourasi Mokararidars. For these reasons I hold that the plaint did disclose a cause of action, even after the Chakrabortties had been transferred to the category of pro forma defendants. This disposes of the main point argued before me.

In the merits Mr. Sen urges that the findings of the learned Subordinate Judge are vitiated inasmuch as he relied upon inadmissible evidence for the purpose of supporting his argument, he says that the kabuliat executed by Abhoy is inadmissible in evidence, as also the cess returns which have been filed by the predecessors of the Chakrabortties, namely pro forma defendants 15 to 25. In so far as the said kabuliat is concerned it is a kabuliat given by Abhoy in favour of Narail Babus in respect of some mal lands. The Narail Babus accepted the kabuliat. In

the southern boundary is given the land of Bhawani Prosad Chakraborty, that is to say the Niskar Brahmatter land of the Chakrabortties. The plaintiffs identified Abhoy's land to be the northern boundary of the lands in suit. Having regard to these facts, I do not see why the statement made in that kabuliat should not be admissible in evidence against the Narail Babus. It is not a case of recital of boundaries in a third party document.

Regarding the cess returns the position is this: in them the lands in suit are described as Niskar lands. It is admitted that the predecessors of the Chakrabortties had Niskar lands somewhere in the same village and the question is as to the identity of the said lands. Mr. Sen says that under the provisions of S. 95 of the Cess Act, these cess returns could not be used in evidence. He says that a person who files a cess return cannot use the statement made therein in his favour and the same disability attaches to his heirs and legal representatives of the person actually filing the same and also to persons who claim derivative title either by sale or lease from the persons filing the returns. It seems to me that there is great force in this argument, but it is not necessary for me to decide that point having regard to certain circumstances present in this case which I am going to recite just now. In the application for withdrawing the suit the Chakrabortties stated that the lands were not Niskar lands and that they were satisfied to that extent after the filing of the suit. In fact this was the reason which they gave for abandoning the suit. The present plaintiffs thereafter filed these cess returns and they wanted to show that the statement of the Chakrabortties was false, and the position they had taken at the time when they were transferred to the category of the plaintiff was a position which could not be maintained by them having regard to the admissions made in the cess returns. In my view the cess returns could be used for the said purpose, because of the express provisions of S. 95 of the Cess Act, which says that a Cess return can be used against the person filing it. If they can be used against persons filing them, certainly they can be used against the heirs of the persons filing them. If they are admissible in evidence for one purpose, then according to the principles

laid down in 2 S M L C 284 (4) (the same case appears in Campbell's Leading Cases, Vol. 11, p. 266), the cess returns will be admissible for all purposes. In fact that is how Best in his book on Evidence takes the scope of 2 S M L C 284 (4) to be. At p. 423, Edn. 12, the learned author says this: "the evidence if admissible, is admissible as evidence for all purposes." In this view of the matter I do hold that the cess returns had been properly admitted in evidence, and the contention of Mr. Sen must be overruled.

The result is that this appeal must be dismissed with costs.

The prayer for leave to appeal under S. 15, Letters Patent is refused.

R.M./R.K.

Appeal dismissed.

4. Higham v. Ridgway, 2 S M L C 284.

A. I. R. 1936 Calcutta 459

NASIM ALI AND EDGLEY, JJ.

Bengal Coal Co., Ltd.—Defendant—Appellant.

v.

Sri Sri Janaradan Kishore Lal Singh Deo and another—Plaintiffs—Respondents.

Appeals Nos. 856 and 1003 of 1933, Decided on 24th March 1936, from appellate decrees of Dist. Judge, Burdwan, D/- 7th December 1932.

(a) Bengal Cess Act (9 of 1880), S. 5—Road cess—Road cess amounts to cess imposed on mines.

The Cess Act provides for the imposition of a cess on all immoveable property situated in the province and mines are included in the definition of immoveable property. In the case of mines the road cess is assessed on the annual net profits of which the royalty receiveable by the landlord is a part. It is therefore a cess imposed on the mines: 38 Cal 372 (P C), Ref.

[P 460 C 2]

(b) Lease—Construction—Intention of parties should be ascertained from all terms in contract between parties.

The decision in the case should not turn on the magic of a particular word or words in one covenant. What matter may be reasonably supposed to be in the contemplation of the parties at the time of the contract is to be ascertained from a conspection of all the terms of the contract: *Foulger v. Arding*, (1902) 1 K B 700, Rel. on.

[P 461 C 2]

(c) Bengal Mining Settlement Act (2 of 1912), S. 10 (4)—Lease—Lessee to pay and discharge all taxes, rates, etc., "which shall be charged, assessed or imposed upon the said mines"—Obligation held could not be limited to charges on mines themselves but extended to charges imposed in respect of them on persons, viz. landlord or tenant.

The relevant clauses in a lease were these:

"All the aforesaid royalties shall be paid free from any deduction. The lessee shall pay the royalty and royalties reserved in the lease at the time and manner appointed in that behalf and shall also pay and discharge all taxes, rates, assessments and imposition whatever being in the nature of public demand which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by the authority of Government of India or the said local Government except demand of the land revenue, etc." The question was whether the burden of the obligation in the present case namely, road cess, mine cess and income-tax, which was on the landlords, had been thrown on the tenant by the operation of the covenants in the lease. The contention on behalf of the tenant was that these impositions did not come within the covenants in the lease as they were not charged upon the mines but were charged upon the landlord in respect of the mines:

Held: that though in the covenant of lease the words used were "upon the said mines" and there were no words of the type "or in respect of them," still on a consideration of all the terms of the lease, the obligation under it could not be limited to charges on the mines but extended to charges imposed in respect of them on persons, namely landlord or tenants. The tenant undertook the liability to pay all charges of a recurring nature imposed by the statutes whether they were described in the statute as imposed on the mines or on the lessor or the lessee in respect of them. [P 462 C 1]

Per *Edgley, J.*—The expression "charged, assessed, or imposed upon the said mines" conveys the idea of direct and separate assessment arising from ownership of the mines or the receipt of profits therefrom, and if the covenant be read as a whole, this was the meaning of the expression, which the parties had in contemplation at the time of the execution of the lease. Regarding income-tax, it is a personal tax. Having regard to the provisions of the Income-Tax Act with regard to assessment, it would in this particular case be impossible to separate any income-tax which might be payable upon the mine from the total amount of income-tax payable by the landlord. The amount of the income-tax payable by a person who owns mines or derives any portion of his income therefrom is not separately assessed upon the mines and the income arising therefrom but is assessed upon his total income which is determined according to certain specific directions contained in the Income-Tax Act. Hence such a tax could not be said to be a tax upon the said mines and the tenant was not liable to pay it. [P 464 C 1]

Sarat Chandra Bose, Santi Kr. Roy Chowdhury and Manmatha Nath Das Gupta—for Appellant.

S. N. Banerji, Narendra Chandra Bose, Satyendra N. Mitra and Karunamoy Ghose—for Respondents.

Nasim Ali, J.—These two appeals arise out of a suit for recovery of road cess, mine cess and income-tax charged on the royalty payable for a certain colliery

under the terms of a registered indenture of lease. The trial Judge decreed the suit. On appeal by the defendants to the lower appellate Court the learned District Judge has affirmed the decree of the trial Judge for road cess and mine cess, but has dismissed the plaintiffs' claim for income-tax. Hence these two second appeals, one (S. A. 856) by the defendants and the other (S. A. 1003) is by the plaintiffs. The point for determination in the two appeals is whether under the terms of the lease the plaintiffs are entitled to recover: (a) road cess, (b) mine cess (c) income-tax, paid by them on the royalties reserved in the lease. The relevant clauses in the lease are these:

(a) All the aforesaid royalties shall be paid free from any deduction (Cl. 1 of Part 6 of the indenture).

(b) The lessee shall pay the royalty and royalties reserved in the lease at the time and manner appointed in that behalf and shall also pay and discharge all taxes, rates, assessments and imposition whatever being in the nature of public demand which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by the authority of the Government of India or the said local Government except demand of land revenue, and shall also pay interest at the rate of 12 per cent per annum on all arrears of such royalty or royalties from the due date thereof (Cl. 1, Part 7 of the Indenture).

It is contended on behalf of the lessee that the object of the covenant to pay taxes, rates, assessments and impositions was not to throw upon the lessee the burden of the assessments payable by the lessor under the statutes but only to state the liability of the lessee to pay his share of the assessment under the Statute Laws. The words "all taxes etc." indicate that the lessee was made liable by the covenant for the whole of the impositions upon the demised mines payable by the lessor and the lessee and not simply for the portion payable by the lessee only. If the object of the covenant was to make the tenant liable for his share of the assessments only there was no necessity for inserting it in the lease because the liability was already fixed by the Statutes. The covenant was not intended to be a mere surplusage but was framed with the object of throwing on the tenant the burden of obligations which in the absence of such a covenant might have fallen on the landlord. The question is whether the burden of the obligations in the present case namely, road cess, mine cess and income-tax which was on the

plaintiffs has been thrown on the defendant by the operation of the covenants in the lease. The contention on behalf of the tenant is that these impositions do not come within the covenants in the lease as they are not charged upon the mines but are charged upon the landlord in respect of the mines. Now what is the difference between an imposition upon the mines and an imposition in respect of the mines? All impositions are ultimately charged to the landlord or the tenant or both. Mr. Bose's contention however is that when parties to a covenant use the words "imposed, assessed or charged upon the premises" the meaning of the words is the sense in which the words are used in the Statute. In support of his contention he invited our attention to the following passage in the judgment of Banks, J., in (1914) 2 K B 361 (1):

When parties to a covenant use the words "charged on premises" the meaning of "charged" includes the sense in which the word is used in the statutes.

In this passage the word "includes" has been used by the learned Judge. This word is wider than the word "means." The plaintiffs have been assessed for Road cess under the provisions of the Cess Act (Bengal Act 9 of 1880) in respect of the royalty received or receivable by them. The Cess Act provides for the imposition of a cess on all immoveable property situated in the province. For the purposes of the Act "mines etc. are included in the definition of immoveable property." In the case of mines the cess is assessed on the annual net profits of which the royalty receivable by the landlord is a part: 38 Cal 372 (2). It is therefore a cess imposed on the mines; and comes within the covenant. Mine cess is a cess imposed by the Bengal Mining Settlement Act (Bengal Act 2 of 1912). It appears from S. 10 of the Act that certain expenses incurred by the Mines Board of Health for the better sanitation of mining settlements are charged to the owner of mines and all persons who receive any royalty from such mines, and the assessment in the case of receivers of royalty are based on the road cess payable by them. In view of these provisions

1. East Wood v. McNab, (1914) 2 K B 361=83 L J K B 941=110 L T 741=12 L J R 517.
2. Manindra Chowdhury Nundy v. Secy. of State, (1911) 38 Cal 372=9 I C 311=38 I A 31 (P C).

in the Act, Mr. Bose contends on the authority of the observations of Jessel M. R., in (1882) 9 Q B 632 (3) that the mines cess is not charged or imposed upon the mines but is a personal demand on the plaintiffs who are the receivers of royalty from the mines and is therefore not within the covenant as there are no words in the covenant to the effect "or in respect of the mines" "or on the lessor in respect of the mines." The liability in (1882) 9 Q B 632 (3) arose under S. 105, Metropolis Management Act 1855, 18 & 19 Vict. Ch. 120, the relevant portion of which is as follows: "The owner of such houses forming such street (laid out or made by the Vestry or District Board under that Act) shall on demand pay to such Vestry or Board the amount of actual expenses of providing and laying such pavement." The real question for determination in that case was about the liability under the covenant not for annual charges but for payment which was to be made once for all for the permanent improvement of the property. A covenant to pay charges, etc., is "not construed to throw expenses of permanent improvement on the tenant unless there are words clearly requiring such a result": Halsbury's Law of England, Vol. 18, p. 491. In general the tenant is "liable to bear all expenses which are of a regularly recurring nature and which are incident to the occupation of the premises": Ibid. In discussing the nature of the charge in question in (1882) 9 Q B 632 (3), Jessel M. R., observed:

The charge in question was for making a new street which was a charge naturally payable by the owner. The tenant is not usually made liable to any charges for the permanent improvement of the property. But this is not conclusive. Then there is another circumstance in favour of the tenant. The other charges mentioned in the covenant are annual charges; but this is a payment which is to be made once for all and is therefore not similar to the other payments which are to be thrown on the tenant.

In (1902) 1 K B 700 (4), the charge in question was also a capital charge. The covenant in that case contained the words "or in respect of the said premises or in respect thereof on the landlord and

tenant." But the following observations in that case are instructive:

It appears to me that a lamentable waste of judicial time and power is often involved in examining decisions with regard to the meaning of words which with one context are capable of one meaning and with another context of another meaning. Underlying the whole matter is the consideration that we are dealing with a contract of demise between landlord and tenant and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract: per Collins M. R.

The authorities on the subject are in a very unsatisfactory condition. The general current of decisions has been in favour of the landlord and not in favour of restricting the meaning of such covenants: per Romer, L. J.

The general tendency of the decisions is strongly in the direction of increasing liability upon the tenant by reason of the intention now generally imputed to the covenant of enabling the landlord to receive his rent free from all deductions: Landlord and Tenant, Edn. 6, pp. 212-213.

The decision in the case should not therefore turn on the magic of a particular word or words in one covenant; what matter may be reasonably supposed to be in the contemplation of the parties at the time of the contract is to be ascertained from a conspection of all the terms of the contract. The liability for the mine cess is on both the owner and occupier. The policy of the Act is that all persons who benefit by the maintenance of the works of sanitation should bear the liability of paying the same. It is a charge of a regularly recurring nature and is incident to the occupation of the premises. It is payable in respect of the mines benefited. The covenant to pay rates, taxes, etc., in this case described these impositions as being in the nature of public demands. If the words in the covenant are to be taken as used in the same sense in which they are used in the statute, we must look to the statute which imposes the obligation on the landlord to ascertain whether it is in the nature of a public demand. S. 10, Cl. (4), Bengal Act 2 of 1912, lays down that all expenses chargeable under the section shall be recoverable as if they were arrears of land revenue. S. 3 (6) and Cl. (3) of Sch. 1, Bengal Public Demand Recovery Act (Bengal Act 3 of 1913), make these charges public demands for the purposes of that Act. The words "being in the nature of public demands" were inserted in the covenant for some purpose and some

3. Allum v. Dickinson, (1882) 9 Q B 632=52 L J Q B 190=47 L T 493=30 W R 980=47 J P 102.

4. Foulger v. Arding, (1902) 1 K B 700=71 L J K B 499=86 L T 488=50 W R 417.

meaning must be given to it. Demand of land revenue and not demands "in the nature of land revenue" are excluded from the covenant. Public demands which are not land revenue but are recoverable as if they were arrears of land revenue can be therefore reasonably supposed to have been in the contemplation of the parties. Again the covenant about the payment of royalty contains the words "free from any deductions." The words must be given some meaning. They suggest an increase in the liability of the tenant. Mr. Bose however contends that the object of the covenant was to lay down that the tenant will have to pay the minimum royalty of Rs. 2,170 per annum whether the lessee raises sufficient quantity of coal or not. But in Cl. (1), part 5 of the lease there is a distinct provision that the minimum royalty of Rs. 2,170 shall always be paid whether the quantity mentioned in that clause in fact be raised or not.

It is true that in the covenant the words used are "upon the said mines" and there are no words of the type "or in respect of them." But on a consideration of all the terms of the lease, I am of opinion that the obligation cannot be limited to charges on the mines themselves but extends to charges imposed in respect of them on persons, namely landlord or tenant, and that the tenant undertook the liability to pay all charges of a recurring nature imposed by the statutes whether they are described in the statute as imposed on the mines or on the lessor or the lessee in respect of them. The lessee paid this cess without any objection for several years before the institution of the present suit. I am therefore not prepared to say that the decision of the Courts below on the point is wrong. As regards the claim for income-tax the contention of the lessor is that it is also within the covenant. For the purposes of the decision in the case I do not express any opinion on this question as the plaintiffs' claim under this head fails for want of any materials to show what amount was imposed on them under the Income-Tax Act for the demised mines only. The amount claimed by the plaintiffs as Income-tax has not been separately assessed on them by the Income-Tax authorities under the Income-Tax Act. The amount claimed in the plaint has been laid at a certain figure by the

plaintiffs on calculation at a certain rate on their income from the mines. This rate is not the rate imposed on the plaintiffs' income from mines alone by the Income-tax authorities. It has been fixed not only with reference to the income from the mines but also with reference to their other source of income. The amount claimed under this head is not therefore the amount imposed by the Income-tax authorities under the Income-Tax Act in respect of the mines only. The result therefore is that both the appeals are dismissed. The parties are directed to bear their own costs in these two appeals.

Edgley, J.—In Appeal No. 856 of 1933 one of the main arguments addressed to us in favour of the appellant Company was to the effect that the road and public health cesses are charged not upon the mines but in respect of the mines, and this being the case, the company are not liable to pay the cesses under the terms of their lease. During the course of the argument learned counsel referred to certain English cases in order to show that a delicate distinction must be drawn between the expression "upon" and in "in respect of." A distinction of this nature appears to have been drawn in (1882) 9 Q B 632 (3), in which it was decided that the proportion of the expense of paying a new street assessed upon the demised house was not a rate payable by the tenant under the covenant. It was however, pointed out by Jessel, M. R., in that particular case that the pavement in question was one for the permanent improvement of the property and was a personal demand on the owner which might be enforced on his premises. In a subsequent case, (1897) 1 Q B 525 (5), in which the tenant was held liable to pay the plaintiff the amount expended by her in complying with a notice of the sanitary authority, the decision turned mainly upon a construction of the expression "duties imposed in respect of the premises" and it was held that this expression was wide enough to enable the plaintiff to succeed in the case in question. From the decision in these two cases on which learned counsel for the Bengal Coal Company mainly based his argument, it is difficult to deduce any

5. Brett v. Rogers, (1897) 1 Q B 525=66 L J Q B 287=76 L T 26=45 W R 334.

clear principle with reference to the precise meaning of words in covenants relating to assessments. The principal authorities were however reviewed by the Court of Appeal in 1902 in (1902) 1 K B 700 (4). In that case it was pointed out by Collins, M. R. that in dealing with a contract of demise between landlord and tenant,

The covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract.

Romer, L. J. further pointed out that the authorities on the subject were in a very unsatisfactory condition and that the general current of decision had been in favour of the landlord and not in favour of restricting the meaning of such covenants. In the case in question the decision turned mainly upon the construction to be placed upon the expression :

'Impositions charged or imposed upon or in respect of the said premises on the landlord, tenant or occupier of the same.'

And it was held that the obligation in respect of which the suit had been brought was one within the natural meaning of the terms of the covenant and clearly within the contemplation of the parties to the lease. In the lease with reference to which these appeals arise, the lessees have clearly covenanted to pay :

All taxes, rates, assessments and impositions whatsoever being in the nature of public demand, which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by authority of the Government of India or the said local Government or otherwise, except demands for land revenue.

The question therefore, arises as to what were the payments in contemplation of the parties at the time when the lease was executed. Land revenue was clearly to be paid by the lessors but other taxes in the nature of a public demand and upon the said mines were to be paid by the lessees. The only taxes with regard to which we have been asked to adjudicate in this connection are road cess, Mines Board of Health Cess, and income-tax. No question has so far arisen with regard to any other tax and it is in fact not suggested that any other tax, besides land revenue, which has been expressly excluded, has been imposed either upon or in respect of the mines covered by the lease. At the outset I may say that, having regard to what appears to have

been the intention of the parties to this lease as expressed in the language of the covenant, it would have made little practical difference even if the expression "in respect of the said mines" had been used instead of the expression "upon the said mines." The latter is the expression which appears in the covenant, but it is obvious that, although the taxes which were in contemplation of the parties might have been assessed upon the mines or upon income arising therefrom, such taxes would actually be paid in respect of the mines. The main point, therefore, seems to be whether the three taxes mentioned above are really taxes upon the mines as contemplated by the parties to the lease. The three taxes in question are all in the nature of public demands although the principles upon which they are assessed are different. To my mind, the expression "charged, assessed, or imposed upon the said mines" conveys the idea of direct and separate assessment arising from ownership of the mines or the receipt of profits therefrom and I am of opinion that, if the covenant be read as a whole, this was the meaning of the expression, which the parties had in contemplation at the time of the execution of the lease.

Learned counsel for the Bengal Coal Company admits that, in view of the preamble to the Cess Act (Bengal Act 9 of 1880) and the provisions of Ch. 5 thereof, there is some difficulty in contending that road-cess is not a tax upon the mines. The preamble clearly authorizes the levy of such a cess on immoveable property and under the provisions of Ch. 5 of the Act this tax is assessed, in the case of mines, on the average of the annual net profits thereof. Further, in the case of the Mines Board of Health Cess, it is provided in S. 10 of the Act that the cess shall be charged to the owners of mines, and to persons who receive any royalty, rent or fine, from such mines. It seems to be clear therefore that the liability to pay the road-cess and the Mines Board of Health Cess arises directly in connexion with the ownership of the mines or the receipt of income arising therefrom. These taxes are also separately assessed upon the persons concerned and they must, I think, be regarded as charges which the lessees have rendered themselves liable to pay under the terms of the covenant, and I am of opinion that

the lessors have clearly contracted themselves out of any statutory liability which they would otherwise have incurred with reference to these taxes.

Different considerations apply however in the case of income-tax. With regard to this tax I am in agreement with the learned District Judge in thinking that it is a personal tax. Further, as was pointed out by Lord McNaughten in (1901) 70 L J K B 77 (6), income-tax is a tax on income. It is not meant to "be a tax on anything else; it is one tax not a collection of taxes essentially distinct." In this connexion it is argued by learned counsel for the appellants in Appeal No. 1003 of 1933, that income-tax must also be regarded as having been contemplated by the parties to the covenant, in view of the fact that mines are property and that property is one of heads of income chargeable to income-tax under S. 6, Income-tax Act (Act 11 of 1922). It must however be remembered that income-tax is assessed under S. 23 of the Act not separately in respect of the various items mentioned in S. 6, but upon "total income" of the assessee. Under S. 2 (15) of the Act the expression "total income" means the "total amount of income, profits and gains from all sources to which this Act applied computed in the manner laid down in S. 16," which latter section relates to exemptions and exclusions in determining the total income. Having regard to the provisions of the Income-tax Act with regard to assessment, it would in this particular case be impossible to separate any income-tax which might be payable upon the mine from the total amount of income-tax payable by the party concerned. The amount of the income-tax payable by a person who owns mines or derives any portion of his income therefrom is not separately assessed upon the mines and income arising therefrom but is assessed upon his total income which is determined according to certain specific directions contained in the Income-tax Act. In my view such a tax cannot be said to be a tax upon the said mines and could not have been in contemplation of the parties when the lease was executed. I therefore agree that these two appeals must be dismissed.

R.W./R.K.

Appeals dismissed.

6. London County Council v. The Attorney-General, (1901) 70 L J K B 77.

A. I. R. 1936 Calcutta 464

GUHA AND BARTLEY, JJ.

Akhil Kanta Lahiri and another—Appellants.

v.

Aswini Kanta Bhattacharji and others—Respondents.

Appeal No. 270 of 1935, Decided on 13th January 1936, from appellate order of Dist. Judge, Rajshahi, D/- 18th April 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 148 (o)—Decree for rent—No assignment of landlord's interest—Assignee of decree cannot execute it.

It may be taken to be a settled rule, (in spite of some amount of diversity of judicial opinion, that the provision of S. 148 (o) is a complete bar to an application for execution of a decree for rent by an assignee who has not obtained assignment of the landlord's interest, even on a simple decree for money under the Code of Civil Procedure: 1933 Cal 919 and 28 C L J 33n, *Foll.* [P 465 C 1]

(b) Assignment—Assignment includes assignments by law and by deeds.

An assignment must be taken to include an assignment by deed and an assignment by operation of law, as in the case of executor. [P 465 C 2]

Atul Chandra Gupta and Baidyanath Banerji—for Appellants.

C. C. Biswas and Priyanath Bhattacharji—for Respondents.

Judgment.—This appeal has arisen out of an application for execution of decree. The application was made by three persons as executors to the estate of the late Manimukta Debya who had a life estate in certain properties. During the lifetime of Manimukta, rents due in respect of these properties which were leased out to Annada Kanta Lahiri by her, in Patni, fell in arrears, and a decree was obtained for realization of the same. A portion of the rents decreed in favour of Manimukta was realized during her lifetime, and the decretal amount which was still outstanding along with all the outstanding profits of the properties in which Manimukta had a life interest, were bequeathed to the three applicants for execution of decree with which we are concerned in this case, who were also appointed executors by the will executed by Manimukta before she died.

The application for execution as made by the legatees under the will of Manimukta, who were also the executors appointed by her will, was resisted by the sons and heirs of Annada Kanta Lahiri

on the ground that the provisions contained in S. 148 (o), Ben. Ten. Act, operated as a bar to the execution as applied for. It was asserted that an application for execution of a decree for arrears of rent obtained by a landlord was not maintainable by an assignee of the decree unless the landlord's interest in the land has become and is vested in the applicant for execution. The objection so raised was overruled by the Courts below; hence this appeal. It may be taken to be a settled rule (in spite of some amount of diversity of judicial opinion) that the provision of S. 148 (o) is a complete bar to an application for execution of a decree for rent by an assignee who has not obtained assignment of the landlord's interest, even on a simple decree for money under the Code of Civil Procedure (see in this connection the decision of this Court in 54 C L J 596 (1), in which the state of authority of decisions of this Court is fully indicated). As it has been pointed by Rankin, C. J., in 37 C W N 901 (2), it would not be safe to desert the plain and natural meaning of the language of the statute upon any theory that has to be based on the supposed policy of the legislature. The intention of the law as it now stands is however clear that the only person who could be allowed to execute a decree for rent was the person who at the execution was entitled by reason of a vested landlord's interest to demand rent: 28 C L J 33n (3).

In support of the position that the application for execution was maintainable under the law, it was contended on behalf of the respondents that the application was made by executors to the estate of Manimukta Debya, who were not assignees as contemplated by S. 148 (o), Ben. Ten. Act, but were persons on whom the interest of Manimukta had devolved by operation of law, and the execution as applied for should have been allowed to proceed on the ground that the applicants were transferees by operation of law as contemplated by O. 21, R. 16, Civil P. C. It is not possible to give

effect to this contention, inasmuch as an assignment must be taken to include an assignment by deed and an assignment by operation of law, as in the case of an executor. Furthermore, in the case before us the application for execution was by persons who are themselves the legatees under the will appointing them executors, and the position taken up that they cannot be taken to be assignees as contemplated by S. 148 (o), Ben. Ten. Act, is wholly insupportable. It was pointed out in support of the order passed by the Courts below that in the present case the landlord's interest so far as the Putni lease was concerned had altogether ceased to exist with the demise of Manimukta Debya, and had merged in the interest of the lessee Annadakanta Lahiri and his heirs, and had no separate existence, and that that interest could never be acquired by the transferees of the arrears of rent, the applicants for execution. The position thus indicated does not however afford any justification for the violation of the provisions of the law as contained in S. 148 (o), Ben. Ten. Act, that the only person who could execute a decree for rent who at the time of the execution was entitled to do so for the reason that the interest of the landlord had vested in him enabling him to demand rent. In our judgment, on the clear and definite provision of the law as contained in S. 148 (o), Ben. Ten. Act, the application for execution of decree in the case before us must be held to be not maintainable. The appeal is allowed; the decisions of the Courts below are set aside and the application for execution giving rise to this appeal is dismissed. There is no order as to costs in this appeal.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 465

M. C. GHOSE AND R. C. MITTER, JJ.
Abdul Khaleque Mondal and others—
Plaintiffs—Appellants.

v.

*Bepin Behari Bose and others—*Respondents.

Appeal No. 384 of 1934, Decided on 6th April 1936, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 6th June 1933.

(a) Practice—New case—Party cannot set up new case absolutely inconsistent with case in plaint.

It is not open to a party to ask for relief by setting up a new case which is absolutely incon-

1. *Rahimuddi Lupti v. Jogendra Kumar Sinha*, (1931) 54 C L J 596.

2. *Gopendra Prasad v. Ram Kishore*, 1933 Cal 919=37 C W N 901=60 Cal 1181=149 I C 386.

3. *Gopal Chandra Kundu v. Drastulla Sheikh*, (1918) 28 C L J 33n.

1936 O/59 & 60

sistent with the case in the plaint. The test in such cases is whether the defendant will be taken by surprise. There will be no surprise if the relief not specifically claimed is consistent with the relief specifically claimed as well as with case raised by pleadings: 1916 Cal 829 (FB), *Rel. on.* [P 468 C 1, 2]

(b) Will—Construction—Will executed by Mahomedan in favour of his wife—Apart from rule of Mahomedan law, only life-estate held conferred upon her—Her heirs held could not claim anything whether life-estate is valid or invalid under Mahomedan law.

A Mahomedan executed a will in favour of his wife, the relevant terms of which were as follows:

"You shall as owner enjoy during your life-time all the moveable and immoveable properties described in the schedule and boundaries given below lying in village Mominpur, etc. No one shall be entitled to make any claims during your life-time to the moveable and immoveable properties to which you are appointed executrix by this will or to get a share in them or to claim any profit or income arising out of them. No one except yourself shall be entitled to realise those moneys or to take them. My sons shall not get any share or income of the aforesaid moveable and immoveable properties during your life-time; they shall get immoveable properties, due shares in them, after your death according to the Mahomedan law. During your life-time they shall not be entitled to claim any property or any share in it nor shall they be entitled to realise and to appropriate any income relating to the properties. They shall live as members of the family and get their regular food and clothing. If they do not live in the family or do not live in the same mess and remove elsewhere they shall not get their food and clothing from the estate and would not be entitled to claim it. Whatever kind of income the aforesaid moveable

and immoveable properties may yield shall remain in your custody. You shall be entitled to spend the whole amount of the said income according to your will and discretion and you shall discharge the family expenses with it: no one shall be entitled to demand any account of it from you and you shall not be bound to render any account to any one and you shall not be liable for that money to any one":

Held: that on the terms of the will and apart from any rule of Mahomedan law, only a life estate was conferred upon her; [P 468 C 2]

Held further: that her heirs could not claim anything in such property for if she got a life estate which was valid according to the Mahomedan law, then heirs could not get anything as her heirs because she had not a heritable estate. If the life estate which was conferred on her by the terms of the will was an estate not recognised by the Mahomedan law then in that case the gift in favour of her was an invalid gift and the heirs' claim as her heirs could not succeed: 1929 P C 149, *Rel. on.*

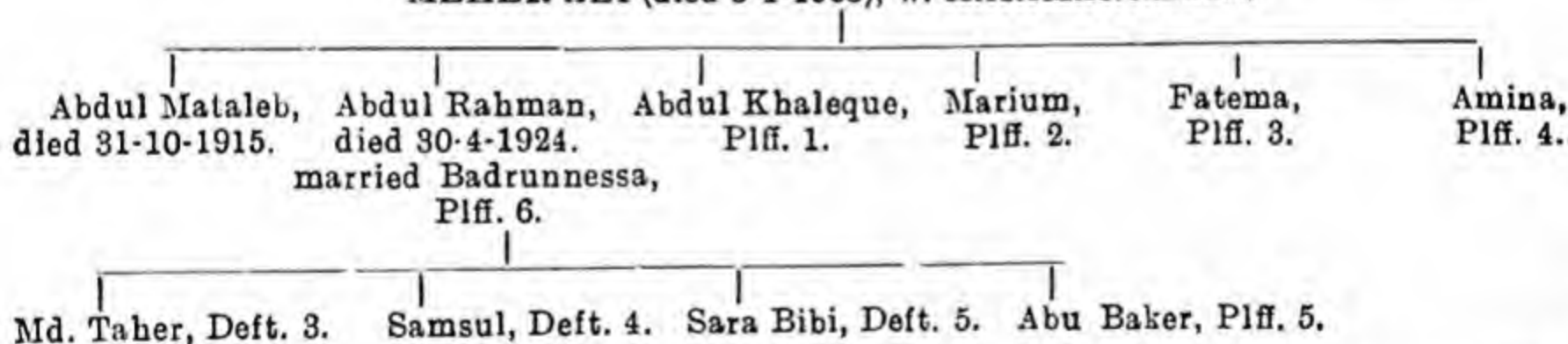
[P 468 C 2; P 469 C 1]

Gopendra Nath Das and Benoy Kumar Mukherjee—for Appellants.

Atul Chandra Gupta and Kshitindra Nath Basu—for Respondents.

R. C. Mitter, J.—This appeal is on behalf of the plaintiffs and arises out of a suit for a declaration that they are entitled to the whole of the properties in suit and that the mortgage which defendant 1 had obtained from one Abdul Mataleb and the decree obtained therein is not binding on them. For the purpose of following controversy between the parties the following genealogy is material:

MEHER ALI (died 3-4-1908), w. KARIMANNESHA.



The property belonged to Meher Ali who died on 3rd April 1908. Just before his death, that is to say on 7th March 1908, he executed a will by which he appointed his wife Karimannessa executrix to his estate. In para. 1 of the will he states that "you shall as owner enjoy during your life-time all the moveable and immoveable properties described in the schedule and boundaries given below lying in village Mominpur, etc." In para. 3 he says "no one shall be entitled to make any claims during your life-time to the moveable and immoveable properties to

which you are appointed executrix by this will or to get a share in them or to claim any profit or income arising out of them. No one except yourself shall be entitled to realise those moneys or to take them." Para. 4 of the will is in these terms:

I have at present three sons alive of whom the eldest is Abdul Mataleb Mondal, the second Abdul Rahman Mondal, and the youngest Abdul Khaleque Mondal. They shall not get any share or income of the aforesaid moveable and immoveable properties during your life-time. They shall get immoveable properties, due shares in them, after your death according to the

Mahomedan law. During your lifetime they shall not be entitled to claim any property or any share in it nor shall they be entitled to realise and to appropriate any income relating to the properties. They shall live as members of the family and get their regular food and clothing. If they do not live in the family or do not live in the same mess and remove elsewhere they shall not get their food and clothing from the estate and would not be entitled to claim it.

Then in the subsequent paragraphs the testator recites that he had three daughters and that they had given up all their claims to his properties and that they would not be entitled to any share of the properties left by him. Para. 9 of the will is as follows :

Whatever kind of income the aforesaid moveable and immoveable properties may yield shall remain in your custody. You shall be entitled to spend the whole amount of the said income according to your will and discretion and you shall discharge the family expenses with it ; no one shall be entitled to demand any account of it from you and you shall not be bound to render any account to any one and you shall not be liable for that money to any one.

Para. 10 is in these terms :

After my death you shall out of the income of the properties left by me spend such sum as you think proper for my spiritual benefit.

Para. 14 is in these terms :

If money is required for any particularly necessary business and if the income of the estate is not sufficient to meet the requirement you shall be entitled to do the business by mortgage or sale of any property included in the estate of any share thereof as you think proper, etc.;

and Para. 15 provides for the case of acquisition by the Government of any property under the provisions of the Land Acquisition Act. It says that Karimannessa would be entitled to take the compensation money that might be awarded on such acquisition. Shortly after the death of Meher Ali, Abdul Mataleb, his eldest son, borrowed money from defendant 1 mortgaging the 1/3rd share of the properties which belonged to his father Meher Ali. This was on 5th July 1910. This transaction was followed by two other mortgages executed by Abdul Mataleb in favour of defendant 1 on 29th September 1910 and 21st January 1911 respectively. Defendant 1 instituted a suit on his mortgages and has recovered a decree. It is just after this event that the present suit was instituted by Abdul Khaleque, the youngest son of Meher Ali and the heirs and legal representatives of the other son Abdul Rahaman Mondal and also by the daughters of Meher Ali. This suit was brought in the year 1930

after the death of Karimannessa which took place in the year 1922. In the plaint the plaintiffs recited the fact of the aforesaid will executed by Meher Ali and said that although the will was in favour of the heirs of Meher Ali the will was validated by the consent given by all the heirs of Meher Ali after his death. The whole of the plaint proceeds upon the footing that Meher Ali died testate and the will had effectively disposed of all his properties. Then in the plaint it is stated that according to the rules of Mahomedan law Karimannessa got by the will an absolute property in the subject-matter of the suit. It then recites the death of Karimannessa and states that the plaintiffs are the heirs of Karimannessa and it is in that character they instituted the suit. They say that Abdul Mataleb according to the will did not get any interest in the property because an absolute interest was in effect conferred upon Karimannessa by the terms of the will and they further state that by the mortgages defendant 1 had acquired nothing. On these allegations the plaintiffs instituted the suit for the declaration that the mortgages executed by Abdul Mataleb in favour of defendant 1 did not pass any title to the property and that the plaintiffs are not affected either by the mortgages or by the decree obtained thereon by defendant 1.

Both the Courts below have dismissed the suit. Mr. Dass appearing on behalf of the plaintiffs-appellants urges before us that although by the terms of the will a life estate was conferred by Meher Ali on his wife Karimannessa under the rules of Mahomedan law, Karimannessa became entitled to the estate absolutely. For the purpose of supporting this contention he says that a life estate is unknown by the Hanafi Law by which the parties in the present case are governed and if a life estate is conferred by a will or by a gift inter vivos the Hanafi Jurists consider it to be the gift of the corpus subject to a condition limiting the enjoyment for life; and says Mr. Dass that the condition is always regarded as void by the Hanafi Jurists. He accordingly says that by the aforesaid rule of Mahomedan law what is in terms the gift of a life estate is in reality an absolute estate. This is how he puts his first part of his argument. His second case is that even if it be held that the gift in favour of Karimannessa was

invalid then there was intestacy and Abdul Mataleb was entitled to 7/36 share and the mortgages and the mortgage decree which defendant 1 has obtained against the heirs of Abdul Mataleb can only operate upon 7/36th share of the properties in suit. We can at once overrule the second contention urged by Mr. Dass. This is not the case which is pleaded in the plaint. The plaint proceeds upon the footing that Meher Ali died not intestate but testate. The will is recited. Then there is a further recital that after the death of Meher Ali all the heirs of Meher Ali assented to the will, and it is stated that Karimannessa obtained under the will an absolute estate and that the title on which the plaintiffs are suing is stated to be on the footing that they are the heirs of Karimannessa and not the heirs of Meher Ali. We hold that it is not open to the plaintiffs to come in and ask for relief on the footing that Meher Ali died intestate. That would be certainly a new case which is absolutely inconsistent with the case in the plaint. The principle governing such cases are formulated by Sir Asutosh Mookerjee in 22 C L J 419 (1), at p. 451. The passage is as follows:

The only other question for consideration is whether a declaration should be granted in the suit as framed. Here, I think, the Court should be guided by well settled principles now embodied in R. 7, O. 7 of the Code of 1908. The principle is best stated in the words of Lord Erskine in (1806) 13 Ves 114 (2). The rule is that if the bill contains charges putting facts in issue that are material the plaintiff is entitled to relief which those facts will sustain under the general prayer; but he cannot desert specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief. This formulation of the rule, it may be parenthetically observed, is attributed per incuriam to Lord Eldon by Baron Parke in 2 M I A 353 (3). In the application of this salutary rule, the test is whether the defendant will be taken by surprise: 3 Russel 171 (4), and there can be no surprise, if the deficient relief not specifically claimed but supplied as the Courts think just, is consistent with the

relief specifically claimed as well as with the case raised by the pleadings: (1878) 10 Ch D 502 (5). This rule has been repeatedly recognised and approved by the Judicial Committee, 2 M I A 353 (3), 31 Cal 614 (6) and 27 All 325 (7). The decision in 35 Cal 189 (8) is not really opposed to this view, and only illustrates the position that to entitle plaintiff to judgment under the claim for general relief, different from that specifically claimed, the allegations relied upon must not only be such as to afford a ground for relief claimed, but they must have been introduced for the purpose of showing a right to relief and not to the mere purpose of corroborating the plaintiff's right to the specific relief claimed.

If the plaintiffs had put forward an alternative claim based on intestacy of Meher Ali, it would have been open to defendant 1 to meet that case by showing that the daughters of Meher Ali had relinquished their shares. It would be unjust, in our opinion, in these circumstances to rob defendant 1 of that specified defence by allowing the plaintiffs now in this Court to base their claim on the footing that there was no effective will by Meher Ali and that he died intestate. So on this ground we overrule the second contention urged before us by Mr. Dass. Regarding the first point the position seems to us to be this: By taking into consideration all the material terms in the will it seems to us that there was a gift of the income of the properties in favour of Karimannessa by Meher Ali. At least when this will came up for consideration before this Court on a previous occasion that was the view taken by this Court of this particular will. No doubt in that case the parties were not the same as in the present case, but we mention that case because our view of the terms of the will agree with that which was taken by a Division Bench of this Court. There cannot at any rate be any doubt that only a life estate was intended to be conferred upon her. In fact Mr. Dass admitted that on the terms of the will, and apart from any rule of Mahomedan law, only a life estate was conferred upon Karimannessa. If that be so Mr. Dass's clients are in a difficulty.

1. Hemendra Nath Roy v. Upendra Narain Roy, 1916 Cal 829=32 I C 437=22 O L J 419=20 C W N 446=43 Cal 743 (F B).
2. Hiren v. Mill, (1806) 13 Ves 114=33 E R 287.
3. Cockerell v. Dicken, (1837-41) 2 M I A 353=3 Moo P C 98=1 Mont D & D 45.
4. Stevens v. Guppy, (1826) 3 Russel 171=6 L J (N S) Ch 164.

5. Cargill v. Bower, (1878) 10 Ch D 502=47 L J Ch 649=38 L T 779.
6. Durga Prosad v. Bhajanlal, (1904) 31 Cal 614=31 I A 122 (P C).
7. Gopi Narain v. Banshidhar, (1905) 27 All 325=32 I A 123 (P C).
8. Wallihan v. Joggeswar, (1908) 35 Cal 189=35 I A 38 (P C).

In the case in 56 I A 213 (9), where the facts were almost similar to the facts of the present case, their Lordships of the Judicial Committee of the Privy Council put the case in an alternative form. They stated that if a life estate conferred by a will or a gift is an estate recognised by Mahomedan law then the plaintiffs claiming as heirs of the donee in that case could not claim anything because the donee had only a life estate. Their Lordships of the Judicial Committee further stated that if the life estate is not recognised by the Mahomedan law then the donee did not get anything, and the plaintiffs claiming as heirs of the donee got nothing. In that view of the matter the donee herself got nothing by the will. The facts of the present case are precisely similar, as we have stated above, to the facts of the suit before the Judicial Committee. Here the only case, which is in the plaint, that the plaintiffs are the heirs of Karimannessa, if Karimannessa got a life estate which was valid according to the Mahomedan law then the plaintiffs cannot get anything as her heirs because she had not a heritable estate. If the life estate which was conferred on Karimannessa by the terms of the will is an estate not recognised by the Mahomedan law then in that case the gift in favour of Karimannessa was an invalid gift and the plaintiffs' claim as heirs of Karimannessa cannot succeed. In this view of the matter we do not think that the plaintiffs are entitled to any relief. The result is that this appeal fails and is dismissed with costs.

M. C. Ghose, J.—I agree.

K.S./R.K.

Appeal dismissed.

9. Amjad Khan v. Ashraf Khan, 1929 P C 149 = 116 I C 405 = 56 I A 213 = 4 Luck 305 (P C).

* **A. I. R. 1936 Calcutta 469**

CUNLIFFE AND HENDERSON, JJ.

Raikhon Boro and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 978 of 1935, Decided on 19th May 1936.

* Evidence Act (1872), S. 54 — Prosecution bringing evidence of previous conduct of similar character to suggested crime — S. 54 is not infringed — Evidence pointing to directly similar conduct is admissible.

In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of similar character to the

suggested crime, before the jury, the intention of S. 54 is not infringed and evidence pointing to directly similar conduct is admissible. S. 54 refers to specific evidence of bad character not confined to acts similar to the crime, which was being investigated, which may influence the jury on the question of motive which is dealt with the same conviction. Such a motive must be the same kind of motive that in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried.

[P 470 C1]

Shudhansu Sekhar Mukherjee — for Appellant.

Khundkar and Bireswar Chatterjee — for the Crown.

Cunliffe, J.—The four appellants here were tried before the Assistant Sessions Judge of the Assam Valley Districts (Gauhati) on charges of abduction and rape. The appeals were admitted by our predecessors on this Bench. The main, I may almost say, the only argument advanced on behalf of the appellants was that the learned Judge misdirected the jury in relation to the admission of certain evidence with regard to an earlier incident in which these four appellants were concerned.

The girl, who was the victim of the attack, had been sent by her parents to work off a debt by acting as a domestic servant to appellant 1 who was a married man and before the debt was discharged under the arrangement, she ran away from appellant 1's house, as she told her parents when she arrived that appellant 1 was bothering her to marry him. She stayed in her parents' house for a short time and then appellant 1 turned up one day, accompanied by his friends appellants 2, 3 and 4, and forcibly took her away back to his house. But she was rescued by her father and some of his friends. Subsequently, another attempt was made which was more successful, because the four appellants turned up once again, dragged the wretched girl back to Budang, appellant 1's house, formally asked her to say "yes" or "no" on the question of this marriage, and when she refused to accept Budang, they took her away, according to her story, into a patch of jungle and in a very cold-blooded manner proceeded to illtreat her by means of rape. There was other evidence, e. g. the medical evidence which certainly showed that she had been interfered with. But the complaint against the summing up of the learned Judge which, I

may say once again this morning, as this is the second charge of his with which we have been dealing, was a most excellent one, is that he admitted the evidence of first carrying off of the girl; and then it is argued that if it is true that the appellant Budang with his friends came and behaved in this way, he certainly ought not to have admitted such evidence to the jury because it might have prejudiced them as it is evidence of Budang's bad character and therefore cannot be admitted under S. 54, Evidence Act. The answer to this contention seems to me to be that in cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of a similar character to the suggested crime before the jury, the intention of S. 54 is not infringed, because that section as I understand it, refers to specific evidence of bad character not confined to acts similar to the crime which was being investigated which may influence the jury on the question of motive which is dealt with in the same connexion and such a motive, of course, must be the same kind of motive that, in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried. There is no doubt that for a long time both in England and in India, and I should imagine in all parts of the British Empire where our principles of criminal jurisprudence are administered, this admission of evidence pointing to directly similar conduct has always been admitted. If it were not admitted, it is quite certain that a great many criminals would escape justice. In these circumstances, we reject these appeals, as we cannot accept this argument. We do not propose to interfere with the sentences which were imposed upon the appellants for a particularly revolting type of offence.

Henderson, J.—I agree.

R.M./R.K. *Appeals rejected.*

*** A. I. R. 1936 Calcutta 470**

R. C. MITTER, J.

Prosanna Kumari Mazumdar—Plaintiff—Petitioner.

v.

Tripura Charan Chowdhury and another—Defendants—Opposite Parties.

Civil Rule No. 186 of 1936, Decided on 14th May 1936, from decree of Sub-Divisional Munsif, Patiya, D/- 13.11.1935.

* Limitation Act (1908), Art. 64—Debt due on promissory note — Settlement of account between debtor and creditor—Endorsement to the effect that certain amount is found due signed on back of promissory note by debtor — Endorsement amounts to account stated—Suit for recovery of amount is governed by Art. 64.

Where on settlement of an account in respect of a debt on a promissory note a certain amount is found due on a particular date on calculation of interest at a reduced rate, and an endorsement to that effect made on the back of the promissory note is signed by the debtor, such an endorsement amounts to an account stated between the parties and a suit for recovery of the amount alleged to be due is governed by Art. 64. Such a suit is not one based on the promissory note and the cause of action for the suit arises on the settlement of the accounts as shown by the endorsement: 1934 P C 144 and 147, *Rel. on.* [P 472 C 2]

Narendra Kumar Das and Durgesh Prosad Das—for Petitioner.

Anil Kumar Das Gupta—for Opposite Parties.

Order.—This Rule has been obtained by the plaintiff in a suit to recover a sum of money. It has been dismissed by the Court of first instance on the ground of limitation. The suit was instituted on 17th July 1935. The plaintiff's case in the plaint is that the defendant borrowed money from him on 11th January 1932 on a promissory note executed on the said date. In the promissory note there is a stipulation to pay interest at the rate of 3 pies a day. Then the plaint recites that on 3rd July 1933 there was a settlement of accounts between the plaintiff and the defendant, and the dues of the plaintiff were calculated at a rate of interest which was not the rate of interest provided for in the promissory note. The rate of interest on which the calculation proceeded was at the rate of one anna per month. On that date the sum of Rs. 137-8-0 was found due from the defendant to the plaintiff. Rs. 100 on account of the principal and Rs. 37-8-0 on account of interest. Then the plaintiff says in his plaint that he is entitled to claim on the basis of this settled account and he added interest to the sum of Rs. 100 at the rate of one anna per month. He dates his cause of action to be this settlement of account and says expressly in his plaint that the cause of action arose on 3rd July 1933, the date of this settlement. For the purpose of supporting his case he put in the promissory note because on the back of it the following is the endorsement over the signature of the defendant :

Interest is calculated at the rate of 12 pies per month from the date of the pro-note to 3rd July, that is for one year five months and twenty-two days. Rs. 137-8-0 is found due, that is Rs. 37-8-0 for interest and Rs. 100 being the principal.

Then there is the endorsement over the signature of the defendant "that the sum of Rs. 137-8-0 remains due (बाकी रहिला)." This endorsement on the back of the promissory note was not stamped. The learned S. C. C. Judge proceeded upon the basis as if the suit was a suit on the promissory note. Then he said that the suit was filed admittedly beyond three years from the date of the promissory note and the loan, and it would be barred unless the endorsement on the back of the promissory note could be proved as an acknowledgment of liability. He said that the endorsement on the back of the note is an acknowledgment of liability within the meaning of Art. 1-A, Stamp Act, and, inasmuch as the said endorsement has not been stamped with a one anna stamp, the endorsement cannot be admitted in evidence, by virtue of the provisions of S. 35, Stamp Act. It is not necessary in this case for me to decide whether the endorsement on the back of the promissory note is an acknowledgment within the meaning of Art. 1-A, Stamp Act, for in my view the Court below in deciding the question of limitation has proceeded wholly upon a misconception of the plaintiff's case as made in the plaint. The plaintiff's suit is not based on the promissory note. The plaintiff expressly states that his cause of action arose upon the settlement account as endorsed upon the back of the promissory note over the defendants' signature, and he dates his cause of action not from the date of the promissory note but from the date of the said settlement of account, and further states that the settlement account as contained on the back of the promissory note is his cause of action, that is to say he states that he is entitled to sue upon an account stated, the said account being stated on the back of the promissory note.

It is therefore necessary to consider whether his suit as framed is barred by limitation or not. If the endorsement on the back of the promissory note brings the case within Art. 64, Lim. Act, the suit is clearly within time because the suit has been instituted within three years of 3rd July 1933. In my judgment

the case comes within Art. 64, Lim. Act, and in the view which I am taking I am supported by two recent decisions of the Judicial Committee of the Privy Council in 38 C W N 813 (1) and the case in 38 C W N 961 (2). The first case was a case instituted by the plaintiff for sums of money said to be due to him on account of his salary. The plaintiff in that case was an assistant of the defendant firm. He was employed in the year 1913 and at the time of his employment his salary was not fixed, but he withdrew moneys on his own account from time to time, during the course of 15 years, when he was in service. At the time when he ceased to be in service, Mr. Rodrigues, the managing partner of the firm, gave him a letter in which the accounts were stated, that is to say his salary was fixed and calculated and the amounts drawn by him from time to time taken into account, and it was stated in that letter that a certain amount was due to the plaintiff. This account was given to the plaintiff within three years of his suit. As has been pointed out in the latter case I have referred to, Lord Wright observed that in this case, namely the case in 38 C W N 813 (1), the figures were taken from the account books of the firm which contained entries only on one side, namely the debit side, showing different amounts drawn by the plaintiff on different occasions on his own account, but the credit side, namely that where his pay was to be included, was left blank inasmuch as his pay was not settled. In the course of his judgment Lord Atkin pointed out that there were two classes of accounts stated. The second class is a class where there are on the account book itself cross demands between the plaintiff and the defendant and the cross demands are set off against each other. That is what is usually called accounts stated and the account so stated itself furnishes a cause of action, the set off on one item against another is the consideration to pay by one party to the other the balance found on settlement of account as due from one to the other. The other class of account stated is that where there are no cross demands or set

1. *Siqueria v. Noronha*, 1934 P C 144=151 I C 90=38 C W N 813 (P C).

2. *Firm Bishnu Chand v. Girdhari Lal*, 1934 P C 147=150 I C 6=61 I A 273=38 C W N 961=56 All 376 (P C).

offs. At p. 816 of the report, Lord Atkin makes the following observation with regard to this class of account stated. He says this:

Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise.

Then he deals with the other form of account stated, which I have already referred to above. When at the settlement of account a balance is struck and signed by the debtor, and it only takes the form of what Lord Atkin calls an acknowledgment, it is still an account stated, because, as Lord Atkin puts it, it amounts to a promise to pay the amount found due on the account. It itself furnishes a cause of action and the only thing is that it would be open to any party to lead evidence by showing that in fact there was no debt. That is the only difference between the first and second form where there are cross demands, and cross demands are set off against each other. In the second of the Privy Council cases, namely the case in 38 C W N 961 (2), Lord Wright pointed out that there can be account stated within the meaning of Art. 64, Lim. Act, where there are no cross demands between the plaintiff and the defendant in the strictest sense of the term. He says that where the relationship between the parties is that of a creditor and debtor and a loan is advanced by the creditor to the debtor either in one lump or on different occasions and if there is payment from time to time by the debtor and after certain intervals, the credit side and the debit side are squared up and the amount found due is calculated by addition and subtraction and the final result is stated and the debtor signs it, it would come within the meaning of Art. 64, Lim. Act. At p. 967 of the report there are the observations which are relevant to the present case:

Indeed, the essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree to the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side pro

tanto, go on to agree that the balance only is payable.

Then there is this passage which is very important:

Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. There mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be at least, in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be a complete satisfaction on the payment of the agreed balance. Hence there is mutual consideration to support the promise on either side and to constitute the new cause of action.

Relying upon these two principles formulated by these two judgments I do hold that the plaintiff had an independent cause of action accruing in his favour on 3rd July 1933. The endorsement on the back of the promissory note must be taken as an account stated between the parties, and as the suit has been brought within three years, it is within time. I therefore overrule the decision of the lower Court on the point of limitation. Inasmuch as there has not been any trial on the merits I remand the case in order that the other points raised by the parties may be gone into. The result is that the rule is made absolute: cost one gold mohur to abide the final result.

R.M./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 472

COSTELLO AND PANCKRIDGE, JJ.

Shamlal Singh—Plaintiff—Appellant.
v.

Hiru Singh—Defendant—Respondent.

Appeal No. 93 of 1934, Decided on 20th November 1935, in Suit No. 94 of 1930.

(a) **Hindu Law—Partition—Agreement to partition pleaded—Burden of proving alteration in status lies on defendant.**

Where in a suit for partition the plaintiff's case is that the plaintiff and the defendant remained throughout a joint undivided Hindu family, till the date of the suit and the defendant pleads a previous partition by agreement but admits continuity of the joint family so far as externals are concerned right up to the date of suit, the burden of establishing that the status of parties was altered by the terms of the agreement, falls on the defendant. [P 474 C 1]

(b) **Hindu Law—Partition—Agreement to separate must clearly indicate intention to separate and hold what was joint family property till date of agreement in defined shares as separate owners.**

There is no doubt that a joint undivided Hindu family can cease to be such and members of it can become separate merely by an agreement to that effect. But any such agreement must clearly indicate on the face of it an intention to separate and to hold the property up to that time in defined shares as separate owners. If on the face of it the agreement is clear and unambiguous and it manifests the intention of the parties to separate, then nothing more is necessary to bring about an alteration of the status of the persons who are the parties to that agreement. [P 474 C 2]

(c) Deed—Construction—Agreement must be construed as whole.

Every agreement must be looked at as a whole, and for the purpose of understanding and interpreting the terms of any one clause it is right and proper that the Court should look at the rest of the provisions of the instrument and construe the agreement as a whole.

[P 474 C 2]

Sudhir Ray and S. C. Mitter—for Appellant.

S. M. Bose, B. C. Ghose and S. P. Choudhury—for Respondent.

Costello, J.—In the suit out of which this appeal arises the plaintiff, who is now the appellant before us, was seeking partition of certain properties which were family properties belonging to the plaintiff's father, Ramgopal Singh and after his death, to the plaintiff and his two brothers. The defendant is the half brother of the plaintiff and the plaintiff's case was that he and the defendant Hiru Singh together with another brother Kissen Singh formed a joint undivided Hindu family, Kissen Singh was the full brother of Hiru Singh those two being the sons of the second wife of Ramgopal. Ramgopal died on 11th June 1928, and Kissen Singh on 11th November 1928. The only point which was argued in the suit is the question whether or not the three brothers, Sham Singh, Hiru Singh and Kissen Singh, formed a joint undivided Hindu family at the time of the death of Kissen Singh, that is to say, on 11th November 1928. The plaintiff's father, Ramgopal had five brothers and in the year 1926 a suit was brought by the sons of one of these brothers against Ramgopal and his three sons for partition of what was alleged to be the family property. In that suit Kissen Singh was represented by a guardian-ad-litem as he was under age. That suit was still pending at the time when Ramgopal died on 11th June 1928. On 3rd September 1928, there was a consent decree made in that suit and that consent decree embodied certain terms of

settlement which had been arrived at between the parties to the suit of 1926. The case in the Court below and in this Court really falls to be determined by reference to the terms of settlement embodied in the consent decree of 3rd September 1928, and the matter which we have to decide is confined to a very small compass, by reason of the fact that it has been conceded on behalf of the defendant-respondent in this appeal that the family of Ramgopal including of course the plaintiff and the defendant and Kissen Singh did constitute a joint, undivided Hindu family up to the time when the consent decree was made on 3rd September 1928, and it has further been conceded on behalf of the defendant that no alteration was made after the passing of the consent decree as regards the manner and method of living of the family of Sham Singh, Hiru Singh and Kissen Singh up to the time of the death of the latter on 11th November 1928 or, indeed, as between Sham Singh and Hiru Singh upto the time when the present suit was instituted on 11th January 1930.

The plaintiff's case, therefore, as argued before us is a simple one, for he says that the family of Ramgopal was and remained throughout a joint undivided Hindu family. In those circumstances the plaintiff upon a partition as between himself and Hiru Singh is entitled to one-half of the joint family properties. It was admitted in the Court below and it has been categorically admitted before us that if the plaintiff and the defendant do constitute a joint Hindu family then the position is that each of the brothers Sham Singh and Hiru Singh is entitled to one-half of the family properties. If on the other hand, by reason of any event which has happened, Shamlal and Hiru Singh ceased to be a joint Hindu family and became separate in estate, then the plaintiff would only be entitled to one-third of the family property and the defendant Hiru Singh, as the full brother of the deceased Kissen Singh, as such, his heir, would be entitled to two-thirds of the family property. There is therefore no dispute whatever as to the effect of the decision of the Court concerning the question whether this family was joint or was not joint at the time when this suit was brought.

By reason of the admissions on the questions of fact which I have already

indicated, all we are concerned with is to consider and give our opinion as to what was the effect of the terms of settlement arrived at between the parties in the 1926 suit and embodied in the consent decree of 3rd September 1928. The only clauses in the terms of settlement which are material for our present purpose are Cls. 26 and 32. The rest of the provisions of the terms of settlement have only been referred to in an endeavour on the part of the appellant and the respondent before us to bring some light to bear upon the real meaning of Cl. 26. Having regard to the admissions which were made on behalf of the defendant-respondent concerning the continuity, so far as externals are concerned, of the joint undivided Hindu family with which we are concerned, the burden of establishing that the status of the parties was altered by the terms of the consent decree of 3rd September 1930, falls on the defendant-respondent and he has to satisfy us, on the provisions of Cl. 26, that there was manifested on the part of the sons of Ramgopal a definite, clear and unequivocal intention to change their status and to bring about what is frequently called a disruption of the joint undivided Hindu family which upto that time, they undoubtedly were. Cl. 26 reads as follows: "The sons of Ramgopal Singh are entitled to the following properties and income thereof will be divided by them equally." Then follows a list or catalogue of various properties. In Cl. 27 it is stated: "The defendant, Sham Singh, alone is entitled to the following properties." There was mention of one bigha of land with garden and pucca building near Darjipar's Lane, Gowari Krishnanagore.

It is argued on behalf of the defendant that the fact that Cl. 26 states that the income of the properties therein mentioned will be divided among the sons of Ramgopal Singh indicates that it was the intention of these three brothers thenceforward to cease to be an undivided family and to divide up the properties mentioned in Cl. 26 into three equal shares and to enjoy those properties in severalty. The appellant prays in aid the provisions of Cl. 27 as providing an antithesis as regards the properties therein mentioned and thus emphasizing and reinforcing the jointness indicated by Cl. 26. So on the one hand we have it argued on behalf of the defendant-respondent that

Cl. 26 indicates an equivocal intention of breaking up of the undivided Hindu family on behalf of the plaintiff appellant, it having been argued that reading Cl. 26 in conjunction with Cl. 27 shows that it was intended that the three brothers would still remain joint though they were to enjoy the income in separate shares.

There has been a great deal of controversy touching the law which is applicable in a matter of this kind and a great many authorities have been cited before us particularly on behalf of the plaintiff-appellant. In my opinion no difficulty whatever arises as regards the law applicable to this case. There is no doubt that a joint undivided Hindu family can cease to be such and members of it can become separate merely by an agreement to that effect. But any such agreement must clearly indicate on the face of it an intention to separate and to hold the property which was joint family property up to that time in defined shares as separate owners. If on the face of it the agreement is clear and unambiguous and it manifests the intention of the parties to separate, then nothing more is necessary to bring about an alteration of the status of the persons who are the parties to that agreement. The defendant-respondent in these proceedings would have us accept his contention that the language of Cl. 26 is such as to manifest a definite intention on the part of the sons of Ramgopal Singh to cease to be joint and thenceforward to become separate, and in support of that contention we have been referred to the provisions of Cl. 32 of the terms of settlement.

Mr. S. M. Bose has urged that an agreement of this character like every other agreement must be looked at as a whole, and for the purpose of understanding and interpreting the terms of any one clause it is right and proper that we should look at the rest of the provisions of the instrument and construe the agreement as a whole. No exception can be taken to that statement as a proposition of law. Mr. Bose has argued on behalf of the defendant-respondent that the scheme set up by the terms of settlement was broadly speaking of this nature. By Cls. 2 and 3 it was agreed that the sons of Hargopal Singh who were the opposite parties in the suit of 1926 should divide up certain properties mentioned in Cl. 2 and they should become separate and

cease to form a joint undivided Hindu family, and a similar provision as regards the sons of Ramgopal is contained in Cl. 26. Then following upon that broad differentiation between the sons of Har-gopal on the one hand and the sons of Ramgopal on the other, there was a general provision in Cl. 32, which was applicable to both sides. Accordingly, says Mr. Bose, we find that there is a provision in Cl. 32 for the destination of the title deeds of the lands which would be allocated to each party in severalty and there are provisions relating to the custody of the title deeds, in case some of the properties would remain joint.

Mr. Bose then goes on to say that the word 'joint' as used in Cl. 32 had no reference to the estate of a Mitakshara undivided Hindu family, but merely had reference to a state of things which would exist if for the purposes of their own or for mutual convenience, any member of either branch of those families chose to enjoy the properties allotted to them, jointly in fact if not jointly in law. This interpretation is indicated, says Mr. Bose, by the last sentence of Cl. 32 which says:

If such oldest member sells his share in the said property to which the said title deeds will relate he will make over the title deeds to the oldest of the remaining joint members.

Mr. Bose says that that cannot have any application to a condition of jointness under the Mitakshara Law, because no member of a Mitakshara joint family can sell his share in law, and therefore it can only have application to a situation where there was jointness in fact. Therefore says Mr. Bose, Cl. 32, so far as it indicates anything at all for our present purpose, certainly sheds light on the meaning of Cl. 26, and indicates that it was the intention of the sons of Ramgopal to cease to be joint in legal sense, even though they might for their own purposes decide to remain joint in fact. We have however come to the conclusion that the provisions of Cl. 26 are not such as to enable us to say that there is a clear, unequivocal and definite manifestation of intention on the part of the sons of Ramgopal to put an end to the condition of jointness in law which admittedly existed up to 3rd September 1923, the date on which the agreement was presented. We are more-over of opinion that the provisions contained in Cl. 32 are not sufficiently explicit and unambiguous, or not so free from

ambiguity as to enable us to say that they were of any material assistance to the Court in construing Cl. 26. In these circumstances, it being admitted by the defendant-respondent that the whole of this case rests upon the contention that the plaintiff and his brothers ceased to be joint by reason of the terms of Cl. 26, we must come to the conclusion that this appeal should be allowed. We are unable, with all respect to the learned Judge, to accept the view which he took that there was a sufficient indication that these parties by agreement had changed their status from that of a joint undivided Hindu family to that of individuals holding family properties in severalty.

The appeal is allowed with costs, and the decision of the Court below will be varied in the manner following, namely that part of it which declares that there will be a decree for partition by metes and bounds of the immoveable properties, i. e., the properties referred to in para. 26 of the terms of settlement will stand, but in place of the declaration of the share of the defendant as two-thirds and of the plaintiff one-third, there will be a declaration by this Court that the share of the defendant is one-half and that of the plaintiff one-half. There will be a declaration that the share of the defendant in those properties is one-half and of the plaintiff one-half and also in the property mentioned in Cl. 17 of the plaint which will be included in the partition. It is further declared as stated in the judgment of the learned Judge at p. 167 of the paper book that there will be an enquiry as to the moveable property of the family which was not included in the consent decree and that there will be an enquiry as to the rents and profits realised by the defendant up to the time of the decree of this suit. The enquiry should apply to all other properties of the family. The costs of the enquiry will abide the result of it. We think that it will be reasonable and fair to say that the plaintiff will get one day's costs of the suit from the defendant and the costs for three days of the trial will come out of the estate. The plaintiff will be entitled to get costs of this appeal from the defendant.

Panckridge, J.—I agree. It is common ground that the sons of Ramgopal Singh continued to be members of a joint Mitakshara family upto 3rd September 1928.

Accordingly it was for the defendant to satisfy the Court that that state of things was put an end to by the terms of settlement put in on that day. We have had the advantage of exhaustive argument on the subject of the proper construction of those terms and, in my opinion, the highest, at which the defendant's case can be put, is that the terms are ambiguous. That being so, it is permissible to scrutinise the conduct of the parties to see if such conduct throws any light upon the true character of the agreement at which they arrived. It is admitted that after the consent decree, the three sons continued to live exactly in the same fashion as they had done prior to the decree when they were admittedly members of a joint Mitakshara Hindu family. It is pointed out that Kissen Singh only survived for 2½ months after the making of the decree. Having regard to this, and having regard to the fact that he was a minor, it would not be reasonable to expect any conduct on his part which would support the defendant's contention. That is true. But it must not be forgotten that the defendant himself did not alter his way of life for a considerable period after the consent decree. It is no one's case that the arrangement was that Kissen Singh should leave the joint family and that his half brother and full brother should continue as joint members of it. In these circumstances it appears to me that the behaviour of Hiru Singh upto the date of the initiation of this suit is a matter which must be taken into consideration and that it is inconsistent with the case of separation in September 1928.

With regard to Cl. 32 of the terms of settlement, upon which considerable reliance has been placed by the learned counsel for the respondent, the position appears to me to be as follows: The clause contemplates two classes of property, firstly, property which under the terms of settlement is to be physically partitioned as soon as possible, and secondly, the property which although it has ceased to be part of a joint Mitakshara estate, is, none the less to be possessed by the owners as tenants-in-common. Among the properties which by the consent decree are allotted to the sons of Hargopal there are properties which answer to each of these descriptions. I know of no canon of construction, nor do I find anything in the terms of settlement,

which compels me to hold that all the properties covered by the terms of settlement must fall into one or other of the two clauses which I have mentioned. In my opinion, Cl. 32 is not inconsistent with an intention on the part of the sons of Ramgopal that they should remain joint as Mitakshara owners of the properties allotted to them by the terms of the settlement.

I have no more to say on the merits of the suit. But there is one aspect of the matter upon which I desire to make some observations. This appeal furnishes an example of what frequently happens on the Original Side of this Court, namely of terms of settlement being put in which are so carelessly and so ambiguously drafted that in fact they settle nothing, but merely give rise to fresh disputes and further expense. I have little doubt that if the terms of settlement had been properly and regularly submitted to learned counsel on both sides for settlement by them jointly, the result would have been a document which would have expressed the intention of the sons of Ramgopal and Hargopal beyond all possible doubt. The very phraseology which was employed in the terms of settlement and the mistakes in grammar contained in it, indicate that attention was not bestowed on that document. I have no more to add except to say that I agree with my lord in the decree and the order passed.

V.B./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 476

MCNAIR, J.

Surput Sing and others—Plaintiffs.

v.

Maharaj Bahadur Sing—Defendant.

Suit No. 1533 of 1935, Decided on 15th November 1935.

Civil P. C. (1908), O. 37, Rr. 2 and 3—Suit on promissory note—Jewellery pledged as security for loan—Leave under O. 2, R. 2 to reserve rights as pledgees sought by plaintiff—Defence re-payment—Leave to defend suit allowed on furnishing security for costs.

In a suit on a promissory note the plaintiff referred to the pledges in respect of the jewellery for payment of money due in respect of the promissory note but asked leave under O. 2, R. 2 to reserve his right as such pledgee. The defendant applied for leave to defend on the ground that since the execution of the promissory note various amounts had been paid in satisfaction and that upon proper account being taken it would be found that the amount claimed was in excess of the amount due:

Held: that leave to defend be granted on the defendant giving securities for costs only: *Abrey v. Cruz*, (1870) 5 C P 37 and 1928 Cal 123, *Disting.* [P 477 C 2]

N. C. Chatterjee and S. R. Bachwat—for Plaintiffs.

S. R. Das Gupta—for Defendant.

Order.—In this suit the defendant applies for leave to defend. The suit was filed on 12th August of this year under O. 37, Civil P. C. The plaintiffs' claim is based on two promissory notes dated respectively 24th August 1934 and 27th August 1934, and the amount due on those two notes is said to be nearly Rs. 3,15,000. In para. 3 of their plaint the plaintiffs further state that they are pledgees in respect of certain articles of jewellery for payment of the money due in respect of the said notes and they ask for leave under O. 2, R. 2, Civil P. C., to reserve their rights as such pledgees. It is not denied that these two promissory notes were executed on the cancellation of the two promissory notes which had been made in 1931. There is no doubt that jewellery was pledged sometime in 1931 with the father of the plaintiffs, and it also appears quite clear that that jewellery was given as security for the loan for which the promissory notes were also executed. On behalf of the plaintiffs Mr. Chatterjee has referred to the case in 5 C P 37 (1) and contends that the defence which the defendant now seeks to put forward attempts to alter or limit his liability as it appears on the face of the promissory notes, namely to pay the amount there shown on demand. He also refers to the judgment of this Court in 32 C W N 125 (2) where the Court decided, "that where a triable issue was not of fact but one of law only which was decided against the defendant it was justified in passing summary judgment." In my opinion, this case is distinguishable from the case in 5 C P 37 (1) inasmuch as this is not merely a simple suit on promissory notes, but it does definitely refer to the pledges which have been made and the plaintiff asks for leave to reserve his rights with regard to the jewellery which has been pledged.

The defendant also states that since the execution of the promissory notes

various sums of money have been paid in satisfaction of the amount due and that upon a proper account being taken it will be found that the amount claimed is in excess of the amount due. No particulars have been given, but there is a definite allegation in the petition which has been verified by the defendant himself. For the defendant an offer has been made to give any security for costs which the Court may direct. There is no question, it is contended, of giving security for the amount of the claim because that is secured already by the jewellery. The defendant states that the jewellery is worth over 6 lakhs, and there is no definite traverse of that statement. On giving security for Rs. 600 within ten days the defendant will have leave to defend, and will file his written statement within a week thereafter, and the costs of this application will be costs in the cause. In default of security being furnished within the time allowed this application will stand dismissed with costs.

V.B./R.K.

Leave granted.

A. I. R. 1936 Calcutta 477

JACK, J.

Burmah Shell Oil Storage and Distributing Co. of India, Ltd.—Petitioner.

v.

Sudhansu Bhushan Chatterjee—Opposite Party.

Criminal Revn. No. 101 of 1936, Decided on 10th March 1936.

Calcutta Municipal Act (3 of 1923 as extended to Howrah), Ss. 175 and 492—Company carrying on trade in Shell Oil receiving oil from various places and storing it at Howrah—Oil distributed to customers from Howrah—Headquarters of company at Calcutta—Transactions negotiated there and profits collected there—Company carries on trade both in Howrah and Calcutta within meaning of S. 175—They are liable to take license in each Municipality.

The word "trade" in S. 175 is used in its ordinary sense, and means exchange of goods for money or goods for goods with the object of making profits. The words in S. 175 should be taken in their ordinary meaning instead of putting an unusual construction on them in accordance with a special meaning given to the word "trade" in reference to income-tax charges on firms having international business. [P 479 C 2; P 480 C 2]

Where a company carrying on trade in Shell Oil receives oil from various places and stores it in their godown at Howrah and distributes it to their customers from Howrah, the transactions being negotiated at Calcutta, they must be said to be carrying on their trade both in Howrah and Calcutta within the meaning of

1. *Abrey v. Cruz*, (1870) 5 C P 37=39 L J O P 9=21 L T 377.

2. *Shyam Sunder Chakravarti v. Tittaghar Paper Mills Co., Ltd.*, 1928 Cal 123=106 I C 848=32 C W N 125.

S. 175, although their headquarters are at Calcutta and delivery orders are sent from and the profits are collected at Calcutta. The trade of the company being carried on partly in one and partly in another Municipality they are liable to take a separate license in each Municipality and on failure to do so they are liable under S. 492 : *Sully v. Attorney-General*, (1860) 29 L J Ex 464 ; *Grainger & Son v. William Law Gough*, (1896) A C 325 and 1928 Cal 531, *Disting.* [P 479 C 1,2]

N. K. Basu, Jitendra Nath Roy and Sudhansu Sekhor Kar—for Petitioners.

Santosh Kumar Bose and Debabrata Mukherjee—for Opposite Party.

Order.—This rule was issued on the District Magistrate of Howrah and the opposite party to show cause why the conviction of the petitioners, namely the Burmah Shell Oil Storage and Distributing Co. of India, Ltd. under S. 492, Calcutta Municipal Act (Act 3 of 1923 as extended to Howrah), and the order sentencing the company to pay a fine of Rs. 375, should not be set aside on the ground that the learned Judge was wrong in holding that the petitioners carried on trade at Howrah because goods were delivered from their storage godown at Howrah. The complaint was made by the License Inspector of the Howrah Municipality to the effect that the accused company was carrying on trade in engine oil, lubricating oil and other kinds of oil at 97/1, Foreshore Road, Howrah, for which they were required to take out a license under S. 175, Municipal Act, for such purpose. They were assessed by the Howrah Municipality as liable to pay an annual fee of Rs. 250 in terms of Sch. 6 of the Act. A demand notice was sent to the company but they failed to take out a license. They are, therefore, liable under S. 492, Municipal Act.

The defence of the company is that they do not carry on trade in Howrah and hence they are not bound to take out any license. The only question for decision is whether the company was actually carrying on trade in Howrah so as to be liable to take out a license. S. 175 is as follows :

Every person who exercises or carries on in Calcutta, either by himself or by an agent or representative, any of the professions, trade or callings indicated in Sch. 6, shall annually take out a license and pay from the same such fee as is mentioned in that behalf in the said schedule.

According to the terms of the schedule any company or association whose paid-up capital is equivalent to 20 lacs of

rupees or upwards exercising any trade must take out a license. In the absence of evidence to the contrary we must take it that the word "trade" is used in its ordinary sense in the section, that is to say exchange of goods for money or goods for goods with the object of making a profit. It is admitted that the company has a capital of not less than 20 lacs and that they receive oil from various places, and store it in their Howrah premises and distribute it to their customers from there, the transactions being negotiated in Calcutta. Undoubtedly, in the ordinary sense of the term, they must be said to be carrying on their trade both in Howrah and in Calcutta and although their Headquarters are in Calcutta and although it is in Calcutta that the business is arranged the evidence being that deliveries are made from Howrah on delivery orders which are sent from the Calcutta office. But as all the business arrangements are made in Calcutta it is urged that it should be held that they were exercising their trade in Calcutta only. In support of this, reference is made to some English cases, in particular to the case in (1860) 29 L J Ex 464 (1). In this case, Cockburn, C. J., states:

It is perfectly true that where a merchant is established the details of his trade must necessarily extend over various places. He buys in one country and sells in another ; but he has one given place of business in which he may be said to trade, and where his profits always come home to him. He carries on his trade where he is established as in his principal place of business. That I take to be the place where he exercises his trade, within the true meaning of the expression exercising trade in this Act of Parliament.

In that case, a firm of merchants had their principal establishment at New York and had also branch establishments in England and other countries, carrying on the business of buying goods in America, England and other European countries and selling them at a profit in New York. In that case the defendant was a partner resident in England in charge of the branch establishment there. It was held that the firm was not liable to be assessed to income-tax in respect of the profits earned by the firm from the purchase of goods in England as it was considered that the firm did not exercise trade in that country within the meaning of the Income-tax

1. *Sully v. Attorney-General*, (1860) 29 L J Ex 464 = 5 H & N 711 = 6 Jur (N S) 1018 = 2 L T 439 = 8 W R 472.

Acts, but in America where the profits were received and the principal place of business was situated. In arguing the case counsel urged that income-tax is a tax on profits and is not a tax on the carrying on of a trade or on exporting goods, that if no profits are derived no tax is due. It is only if the same thing applies in the case of taking out a municipal license that we can apply the dictum from this income-tax case. The question is whether the taking out a license is meant to be a tax on the profits made by the firm or whether it is intended to control the carrying on of a trade. I think that in the absence of any authority to the contrary (and there appears to be no ruling directly in point) the words of the section must be taken as they stand and, if (as appears to be the case) the company was carrying on trade in Howrah, whether they were collecting their profits in Howrah or not, and though negotiating the transactions elsewhere, it should be held that they were liable to take out a license. The other cases referred to on behalf of the petitioners are also income-tax cases. One of these cases is (1896) A C 325 (2). In that case it was held that :

The place where the contracts were made was the essence in deciding whether the trade was being carried on there or not.

In that case it was held that a foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income-tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. This case is distinguishable inasmuch as there not only all contracts for sale were made outside the United Kingdom but all deliveries to customers were made in foreign countries. In the present case, although the contracts were made outside Howrah, deliveries were made to customers within Howrah. The only case referred to which is not an income-tax case is 48 C L J 54 (3), where it was held that a firm which had its place of business in Calcutta but

supplies goods to the Howrah Municipality without having any place of business in Howrah cannot be said to exercise a trade or carry on business in Howrah and as such no trade license need be taken from the Howrah Municipality. That case is, of course, distinguishable as there was no place of business of the company in Howrah. A firm does not, of course, necessarily carry on business at the places to which it sends goods sold or where its customers reside.

On the other hand, it is pointed out that in the present case storage was an essential part of the business of the company, their business being to store oil at convenient centres for supply to the public. Taking the word "trade" in its ordinary meaning I think that it can hardly be said that the company does not carry on trade in Howrah merely because the contracts for sale of their goods are made in Calcutta. It is suggested for the petitioners that the storage and delivery of the goods in Howrah are merely auxiliary to their business in Calcutta in the sense referred to in Sch. 6, S. 5 of the Act which provides that separate licenses shall not be required in respect of any business carried on in adjacent premises which form one place of business or in any yards, godowns or factories which are auxiliary to any place of business. This appears to indicate that even where the trade is carried on at different premises within one municipality more than one licenses will not be required within that municipality. But it is different where the trade of a company is carried on partly in one and partly in another municipality. In that case it would appear that separate licenses will be required in each municipality. In this case, no claim on behalf of the company is pressed on the ground of hardship.

A license is required merely because some part of the trade of the company is carried on within the municipality. It is not suggested that the tax is levied because the municipality has to make special arrangements for big business, and it seems probable that the tax merely means that the municipality is taking advantage of their position to levy a tax on a big company. Even so the income-tax cases where the tax is levied on profits are not quite analogous and I think the words of the section should be taken in their ordinary meaning instead of put-

2. Grainger and Son v. William Law Gough, (1896) A C 325=65 L J Q B 410=74 L T 435=44 W R 561=60 J P 692.

3. S. N. Banerjee v. Bengal Paint and Varnish Co., 1928 Cal 531=111 I C 114=29 Or L J 786=48 C L J 54.

ting an unusual construction on them in accordance with a special meaning given to the word "trade" in reference to Income-tax charges on firms having international business. The rule is accordingly discharged.

R M./R.K.

*Rule discharged.***A. I. R. 1936 Calcutta 480**

D. N. MITTER AND PATTERSON, JJ.

Commissioner of Wakfs, Bengal—Petitioner.

v.

Mahmuda Bibi and others—Opposite Parties.

Appeals Nos. 36 of 1933, 239 of 1935, and 25 and 26 of 1936, Decided on 23rd April 1936, from original decrees.

Bengal Wakf Act (13 of 1934), S. 70 (4)—"Suit or proceeding" in Ss. 69 and 70 does not include appeal.

Words "suit or proceeding" in Ss. 69 and 70 of the Act do not include appeal. Where, therefore the High Court had made prior to promulgation of this Act orders of consent of parties for the appointment of a receiver in appeal, the Commissioner of Wakfs, Bengal, cannot apply to the High Court under S. 70 (4) of the Act for vacating the orders: 23 Cal 415 and 1925 Bom 241, *Foll.*; 1914 Cal 614 and 62 Cal 1132, *Not Foll.* [P 480 C 2]

S. H. Suhrawardy and Abul Hussain—for Petitioner.

D. P. Chatterji and Ranjit K. Banerjee—for Receiver.

Charu Chunder Biswas, Narendra Nath Mitter, I. P. Mukherjee, Khetra Mohan Chatterjee, Khitis Chandra Chakaravarti, Provash Chandra Basu and Rakhal Chandra Dutt—for Opposite Parties.

D. N. Mitter, J.—This is an application by the Commissioner of Wakfs, Bengal, who has been appointed under the Bengal Wakf Act (Bengal Act 13 of 1934). The application purports to be under S. 70 (4) of the said Act. It appears that two appeals are pending in this Court in which the question in controversy is as to the accuracy of the findings of the Subordinate Judge with regard to certain properties being wakf properties. In these two appeals by consent a receiver was appointed during the pendency of these two appeals. The application for appointment of a receiver was made on the 2nd March this year, a day after the Act in question came into force. The present application is for vacating the orders made by this Court on consent in

those two appeals for the appointment of a receiver. By that order Mr. P. N. Tagore was appointed a receiver of rents, issues and profits of all the properties comprised in the Estate found to be the Wakf Estate of Prince Kamar Kader Mirza Bahadur excepting as regards premises No. 4, Kailassarak Road and certain other properties, the details of which it is not necessary to enter into. It appears that the application, as has already been stated, is one under S. 70 (4) of the Act. The questions which have to be considered with reference to the maintainability of this application really turn on the construction of the two sections of the Bengal Wakf Act, namely Ss. 69 and 70. S. 69 is in these terms:

"No suit or proceeding by or against a Mutwalli as such in any Court shall be compromised without the sanction of the trying Court." S. 70 (1) enacts that notice must be given to the Commissioner of Wakfs in every suit or proceeding excepting certain suits for rent, etc., at the cost of the party instituting such proceedings. S. 70, Cl. (4) enacts that in the absence of a notice under sub-s. (1) any decree or order passed in the suit or proceedings would be void if the Commissioner applies to the Court within one month of his knowledge. It is contended that the words "suit or proceedings" would include an "appeal" and as the proceedings for the appointment of the receiver were initiated in the appeal, it must be regarded as a suit or proceedings within the meaning of S. 69 or S. 70. We are unable to accede to this contention. The words 'suit or proceeding' must be regarded in its ordinary sense and cannot be held to include 'appeal.' A reference to Ss. 11 and 15, Civil P. C., 1908, would show that a suit does not include an appeal. With reference to *res judicata* (S. 13 of 1882) it has been held that a suit does not include an appeal, see 23 Cal 415 (1). See also 49 Bom 442 (2), at p. 449. Our attention has been drawn by Mr. Suhrawardy to a decision of this Court to which I was a party, and the language used there is to the effect that an appeal is really a continuation of the suit. Something of that kind is also said in the decision of the

1. *Bharasela Choudhury v. Sartchandra*, (1896) 23 Cal 415.

2. *Amarsangji Dunderji v. Dipsingji Jhala*, 1925 Bom 241=87 I C 588=49 Bom 442=27 Bom L R 345.

case in 19 C W N 359 (3). The decision to which I was a party is reported in 39 C W N 951 (4).

It is a decision of *Faizunnessa Bibi v. Gholam Rabbani* (4). The state of facts in those cases are entirely different and those cases are no authority for the proposition that the word 'suit' must be taken to include an 'appeal.' Besides, if one looks to the policy underlying the provisions of Ss. 69 and 70 there can be no doubt that the legislature intended that the Commissioner of Wakfs can intervene where the suit or proceeding initiated is pending at the time when the provision of the Act regarding Commissioner of Wakfs came into force. Besides, it will be noticed under S. 83 (a) and (b) there are certain saving clauses. In our opinion Ss. 83 (a) and 83 (b) furnish a complete answer to the contention of the applicant. The suit was instituted long before the promulgation of the Act of 1936, and any right or rights, which were acquired at the time of the institution of the suit or even after the passing of the decree which was long before the promulgation of the Act in 1936, cannot be affected by the provisions of the latter Act. It was open to the parties before the promulgation of the Act to settle their dispute in a suit by or against a Mutwalli without reference to the officer who had not come into existence then. That right cannot be said to have been taken away by anything which was done without any reference to or notice to the officer appointed long after. We are of opinion that Ss. 83 (a) and 83 (b) are intended to cover a case of this kind. The word 'suit' or 'proceeding' in S. 70 (1) have the same meaning as the said words in S. 69.

We therefore hold that this application of the Commissioner is incompetent and must be rejected. The receiver will pay his own costs and also the costs of the different parties who have appeared to oppose this application. The hearing for Mr. Biswas's clients is assessed at three gold mohurs and that for the other parties at two gold mohurs.

Patterson, J.—I agree.

D.L./R.K. *Application rejected.*

A. I. R. 1936 Calcutta 481

NASIM ALI AND EDGLEY, JJ.

Ananda Lal Chakravarty and others—
Pro forma defendants—Appellants.

v.

Narayan Chandra Bhattacharji —
Plaintiff and others—Respondents.

Appeal No. 110 of 1934, Decided on 13th May 1936, from appellate decree of Sub-Judge, Second Court (Special Judge), 24 Parganas, D/- 18th September 1933.

Bengal Tenancy Act (8 of 1885). Ss. 106, 50 (2)—Suit under S. 106, by occupancy raiyat claiming certain jamas to be Maurashi Mekarari for correction of Record of Rights—Plaintiff entitled to presumption under S. 50 (2)—Defendant landlords relying on collection papers, in rebutting presumption—Absence of entries relating to jamas, in collection papers is evidence in case—Court excluding from consideration collection papers commits error of law.

Where in a suit under S. 106 by a person recorded as an occupancy raiyat, in respect of certain jamas, claiming them to be Maurashi Mekarari and praying correction of the Record of Rights accordingly, the plaintiff is entitled to the benefit of the presumption, under S. 50 (2), by reason of his having been paying a uniform rent for a period over 20 years before the institution of the suit, and the defendant landlords in rebutting the presumption rely upon their collection papers, the absence of entries relating to the jamas in the collection papers is evidence in the case, although its evidentiary value depends upon other facts disclosed in the case. The collection papers are admissible in evidence and are relevant to the question whether the jamas came into existence after the permanent settlement. If the Court excludes from consideration the collection papers and finds that the landlords have failed to rebut the presumption under S. 50 (2) its finding is vitiated by an error of law. [P 482 C 1]

Sarat Chandra Roy Choudhury and Radhika Charan Chatterjee—for Appellants.

Sitaram Banerjee and Prokash Chandra Ghose—for Respondents.

Judgment.—This appeal arises out of a suit under S. 106, Ben. Ten. Act. The plaintiff's predecessor-in-interest Purna Chandra Dutta was recorded as an occupancy raiyat in respect of certain Jamas in the finally published Record of Rights. The plaintiff's case is that these Jamas are Maurashi Mekarari. He therefore prays for the correction of the Record of Rights. The defendants who are the landlords under whom these Jamas are held, contested the plaintiff's claim on the ground that these holdings were merely occupancy holdings and that the Record of Rights was correct. The Revenue

3. Samed Sheikh v. Naba Gopal Ghose, 1914 Cal 614=23 I C 12=19 C W N 359.

4. Faizunnessa Bibi v. Gholam Rabbani, (1935) 62 Cal 1192=61 C L J 469=39 C W N 951.

Officer came to the conclusion that the disputed holdings were occupancy holdings and in that view dismissed the suit. On appeal by the plaintiff to the lower appellate Court the learned Special Judge has come to the conclusion that the holdings are Mokarari holdings. He has accordingly reversed the decision of the Revenue Officer and has decreed the plaintiff's suit. Hence this Second Appeal by the defendant landlords.

It appears that the plaintiff and his predecessors in interest had been paying rent at an uniform rate for more than 20 years before the institution of the present suit. The plaintiff is therefore entitled to the benefit of the presumption under S. 50 (2), Ben. Ten. Act. The question is whether the landlords have succeeded in rebutting this presumption. In order to rebut this presumption the landlords rely upon their collection papers of the year 1271, 1277, 1278, 1298. They also rely upon the admission of the plaintiff's predecessor-in-interest, Purna Chandra Dutta, to the effect that these holdings were non-transferable occupancy holdings in certain rent suits instituted by the landlords against the original raiyats from whom the plaintiff's predecessor-in-interest, Purna Chandra Dutta, purchased these jamas. From the collection papers of 1271, 1277, 1278 it appears that the disputed Jamas are not mentioned therein. The learned Special Judge was of opinion that the absence of any entry relating to these Jamas in these collection papers is no evidence against the tenant. We are unable to agree with the learned Judge in this view of the matter. Absence of entries relating to these Jamas in these collection papers is evidence in the case but its evidentiary value would depend upon the other facts disclosed in the case. The learned Judge's finding that the landlords failed to rebut the presumption under S. 50 (2) is therefore vitiated by an error of law, inasmuch as he excluded from his consideration these collection papers which are admissible in evidence and are relevant to the question whether these Jamas came into existence after the permanent settlement. As the evidence on the record is sufficient for the determination of the question we now proceed to determine it, because we are of opinion that no useful purpose would be served by remanding the case to the lower appellate Court.

We have already pointed out that in collection papers of 1271, 1277, 1278 and 1298 these disputed Jamas are not mentioned. Only five of these Jamas are mentioned in the collection papers of 1298. The learned advocate for the appellant contends that these Jamas must have come into existence sometime after 1278 B. S. and consequently the presumption under S. 50 (2) is rebutted by these collection papers. The learned advocate for the respondent however contended in view of certain decisions of this Court that the absence of any entry in the collection papers was not conclusive and did not prove that these Jamas were not in existence before 1278. It appears however that in 1926 the landlords instituted certain rent suits against their recorded tenants, that is, the persons from whom the plaintiff's predecessor-in-interest, Purna Chandra Dutta, purchased these holdings. They did not recognise the transfer in favour of Purna Chandra Dutta by the recorded raiyats. Ultimately however Purna Chandra appeared and filed a petition stating that he was the purchaser of these holdings which were not transferable by law or by custom and that his transfer was recognised by the landlords on receipt of Selami. On the basis of this application the purchase by Purna Chandra Dutta was recognised by the landlords and he was impleaded as a defendant in the rent suits. This admission of Purna Chandra indicates that in 1926 these holdings were admitted to be not Mokarari. It is not the plaintiff's case that the holdings were created by any Mokarari grant.

The only ground on which the plaintiff now claims Mokarari rights to these Jamas is under S. 50 (1), Ben. Ten. Act, namely, that the rent of these holdings remained unchanged from the time of the permanent settlement. In order to substantiate this ground he relies upon the presumption under S. 50 (2), Ben. Ten. Act. In 1926 Purna was entitled to the benefit of this presumption and if really these holdings were in existence from the time of the permanent settlement, Purna would not have made the admission then that the holdings were not Mokarari. His admission consequently indicates that these holdings are in existence from the time of the permanent settlement. The admission of Purna therefore corroborates the appel-

lants' case that these holdings came into existence after 1278. We are therefore of opinion that the collection papers of 1271, 1277, 1278 and the aforesaid admission of the plaintiff's predecessor-in-interest, Purna Chandra Dutta, in 1926 rebut the presumption which arises in favour of the plaintiff under S. 50 (2), Ben. Ten Act. The result therefore is this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and those of the Revenue Officer are restored with costs in the lower appellate as well as in this Court.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Calcutta 483

M. C. GHOSE AND R. C. MITTER, JJ.

Ananda Lal Chakravarty and others—
Plaintiffs—Appellants.

v.

Girindra Nath Chatterjee and others—
Plaintiffs—Defendants—Pro forma Respondents.

Appeals Nos. 206 to 214 of 1934, Decided on 26th March 1936, against decree of Dist. (Special) Judge, 24-Parganas, D/- 13th September 1933.

Bengal Tenancy Act (8 of 1885), S. 105—
Suit for assessment of rent in respect of land recorded as liable to rent—Assertion of claim of Niskar not made to knowledge of landlord 12 years before suit—Suit is not barred.

Before the landlord's right to assess rent in respect of land which has been recorded as liable to rent, can be barred, it is necessary that the assertion of a claim of Niskar must be made to the knowledge of the landlord 12 years before the proceedings for assessment of rent: 39 Cal 453 and 1931 Cal 25, *Rel. on*; 15 I C 64, *Expl.* [P 484 C 1]

*Sarat Chandra Roy and Radhika Charan Chatterjee—*for Appellants.

*Gopendra Nath Das, Ramendra Mohan Majumdar, Khemendra Nath Tagore and Upendra Kumar Roy (for Deputy Registrar)—*for Respondents.

R. C. Mitter, J.—The lands which are the subject matter of these appeals are in two touzies, namely Touzi No. 51 and Touzi No. 47 of the Alipore Collectorate. The appellants before us are the owners of Touzi No. 51 and the plaintiffs-respondents in these appeals are the owners of Touzi No. 47 having purchased the said Touzi at a revenue sale within 12 years of the suit. In the year 1911, there was a petty settlement and all the lands except the lands of Khatian No. 959 and plot No. 1050 of Khatian No. 1024 were

recorded in the possession of the defendants as not paying rent but liable to pay rent. The lands of Khatian No. 959 and plot No. 1050 of Khatian No. 1024 however were recorded in the petty settlement as Niskar lands in the possession of the defendants. The finding of the Assistant Settlement Officer in these cases is that the proprietors of Touzi Nos. 51 and 47 knew of the entries made in the petty settlement of 1911. After the petty settlement there was a regular settlement under Ch. 10 Bengal Tenancy Act. The Record of Rights was finally published in the year 1931. The lands which are the subject matter of all these nine appeals were recorded in the possession of the defendants with an entry that no rent was being paid but the persons in possession were liable to pay rent. After the final publication in the year 1931 the proprietors of Touzi Nos. 47 and 51 within whose estates the lands so recorded lie instituted proceedings under S. 105 Bengal Tenancy Act. The defendant raised an issue under S. 105-A that the lands are Niskar.

The findings of both the Courts below are that the lands are not Niskar, that is to say, the defence raised, namely, that the lands were in fact valid Niskar grants have been negatived as we read the judgments by both the Courts below. The claim however of the appellants before us, who are the proprietors of Touzi No. 51, have been rejected on the ground that they cannot at the date of the suit apply for assessment of rent. We will deal with the grounds given by the learned Special Judge and by the Assistant Settlement Officer in detail hereafter. But the claim of the proprietors of Touzi No. 47 to assess rent has been allowed, the Court holding that they being the revenue purchasers at a revenue sale within 12 years of the suit their claim cannot be defeated on the ground of delay. The position therefore is this that the lands are all joint lands of the aforesaid two Touzies. The proprietors of Touzi No. 47 have got decrees for assessment of rent on the basis that they are not Niskar lands, but the claims of the proprietors of Touzi No. 51 have been dismissed. The learned Assistant Settlement Officer said in his judgment that in the year 1911 the proprietors of Touzi No. 51 knew of the entries made in the Record of Rights in the petty settlement and inasmuch as they had not made any attempt to assess

the rent within 12 years of the publication of the Record of Rights of the petty settlement, the defendants who were in possession without payment of rent so long have by adverse assertion acquired the right to hold the land rent free for ever as against them. This argument, says the Assistant Settlement Officer and the Special Judge cannot prevail against the proprietors of Touzi No. 47 because they are recent revenue purchasers.

The finding of the Assistant Settlement Officer appears to us to mean that it were the entries in the petty settlement record which really affected the proprietors of Touzi No. 51. The Special Judge however does not discuss any question of fact. He simply noted certain rulings, amongst them being the case in 16 C W N 929 (1), 39 Cal 453 (2) and the judgment of the late Chief Justice in 57 Cal 796 (3). He also notes another case, namely, 22 C W N 685 (4). He seems to think that there is a conflict of authorities on the point he had to decide, and was of opinion that he was constrained to follow the latest case, meaning thereby 57 Cal 796 (3). He accordingly held that the right of the proprietors of Touzi No. 51 has been barred by limitation. There is no doubt that there is some conflict between the case in 16 C W N 929 (1) and the cases in 39 Cal 453 (2) and 57 Cal 796 (3) referred to above. But that conflict is not at all material for the purpose of the present case.

The cases are agreed and lay down the proposition that in order that the landlord's right to assess rent might be barred, it is necessary that there must be (a) an assertion by the man in possession to hold that lands rent free, (b) that the said assertion must be made to the knowledge of the landlord and (c) that the said assertion must be made to the knowledge of the landlord beyond 12 years of the institution of the proceedings for assessment. That is 39 Cal 453 (2) and series of cases of the Maharaja of Tippierrah to be found in 22 C L J. That is a principle from which the late Chief Justice did not depart from in 57 Cal 796 (3). In 16

C W N 929 (1) however the position adopted is this: There was an assertion in the preparatory stage of the Settlement Khatian by the man in possession to the knowledge of the landlord that he had a rent free title, but in spite of that assertion the entry which was made in the finally published Record of Rights was that the man was an occupancy raiyat liable to pay rent. An interval of some years elapsed between the dates of assertion by the man in possession in the presence of the landlord's agent in the preparatory stage of the Record of Rights and the final publication of the said record and the question arose as to whether 12 years' limitation should run from the date of the first adverse assertion at the preparatory stage of the Record of Rights or from the date of the final publication. In that case it was held that the effect of the previous adverse assertion by the man in possession at the preparatory stage of the record was washed out by the entry being made in the Record of Rights that lands were liable to rent and the suit for assessment was in time as it was filed within 12 years of the final publication of the Record of Rights.

It is on this proposition, namely that the entry in that manner would wash out the effect of the previous adverse assertion on the part of the man in possession claiming Niskar right, that doubts were cast in the later cases, specially in 57 Cal 796 (3), decided by the late Chief Justice. But as we have said above no doubt has been cast upon the rule that before the landlord's right to assess rent in respect of lands, which have been recorded as liable to rent be barred, the assertion of a claim of Niskar must be made to the knowledge of the landlord 12 years before the proceedings for assessment of rent. In the present case there is no finding of the learned Special Judge that the person in possession had made that hostile assertion to the knowledge of the landlords beyond 12 years of the dates of the applications under S. 105, Ben. Ten. Act. Prima facie therefore the proprietors of Touzi No. 51 are entitled to assess rent and their claim has neither been barred by limitation nor has been taken away or affected by any adverse assertion for the requisite period. In two cases however, namely with regard to Appeal No. 208 which relates to Khatian No. 959 and to plot No. 1050 of the Khatian No. 1024

1. Aman Gazi v. Birendra Kishore, (1912) 16 C W N 929=15 I C 64.

2. Birendra Kishore v. Roshan Ali, (1912) 39 Cal 453=13 I C 518=16 C W N 931.

3. Jnanendra Narayan v. Sarada Sundari, 1931 Cal 25=129 I C 355=57 Cal 796.

4. Dhananjay Manjhi v. Upendra Nath Deb, 1919 Cal 989=46 I C 428=22 C W N 685.

which is the subject-matter of Appeal No. 206, the position stands in a different way. Although there is no finding of the learned Special Judge with regard to the date of assertions made to the knowledge of the landlord in these two cases at all, it is quite clear from the findings of the learned Assistant Settlement Officer that the landlords, namely the proprietors of Touzi No. 51 did know that the persons in possession of the lands recorded in Khatian No. 959 and of plot No. 1050 of Khatian No. 1024 had been claiming Niskar right since 1911, because the entry in the petty settlement with regard to these lands was that they were rent free lands.

We accordingly hold that the proprietors of Touzi No. 51 cannot now have the rent assessed in respect of the lands in Khatian No. 959 and in respect of plot No. 1050 of Khatian No. 1024, but with regard to the lands recorded in other Khatians which are the subject-matter of the remaining appeals and of Appeal No. 206 also the landlords are entitled to assess rent. The net result therefore is that Appeal No. 208 is dismissed with costs. Appeals Nos. 207 and 209 to 214 are decreed with costs against the defendants respondents in all the Courts. The appellants in these appeals would get a decree for assessment of rent at the same rate at which the rent had been assessed in favour of the proprietors of Touzi No. 47 in respect of the Khatians relating to these appeals. Appeal No. 206 is decreed in part. The plaintiffs-appellants claim in this appeal to assess rent on plot No. 1050 of Khatian No. 1024 is dismissed. But they would be entitled to have the rent assessed in respect of the remaining plots of the said Khatian. As rent has not been assessed separately for these plots this case must be remanded to the Court of first instance in order that the rent in the share of the plaintiffs-appellants may be assessed in respect of the plots of Khatian No. 1024, save and except plot No. 1050. In this appeal the plaintiffs-appellants will be entitled to their costs in proportion throughout against the defendants-respondents. The proportion would depend upon the final result after the decision by the Court of first instance, and would be determined by that Court.

M. C. Ghose, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 485

R. C. MITTER, J.

Mohendra Chandra Dutta Roy—Decree-holder—Petitioner.

v.

Basiruddin and others—Judgment-debtors—Opposite Parties.

Civil Rule No. 689 of 1935, Decided on 6th May 1936, from order of Sub-Judge, Mymensingh, D/- 23rd February 1935.

Civil P. C. (1908), O. 43, R. 1, Cl. (d), O. 9, R. 13—Case is "not open to appeal" when no appeal lies against decree under any circumstance—Rent suit valued at less than Rs. 50 per cent decreed ex parte by Munsif having final jurisdiction under S. 153 (b), Ben. Ten. Act—Application for setting aside ex parte decree rejected by another Munsif not having final jurisdiction—Order rejecting application is appealable.

The words "in a case open to appeal" in O. 43, R. 1 (d) are general words and have no reference to the appeal against the decree actually passed. A case is not open to appeal within the meaning of O. 43, R. 1, Cl. (d) when no appeal would lie against the decree under any circumstance.

An appeal against a decree in a simple rent suit (i. e. when the proviso to S. 153, Ben. Ten. Act, does not come into play) valued at Rs. 50 or less does not lie only under one circumstance, namely when the Munsif has been vested with final jurisdiction, and would lie under all other circumstances. Where, therefore, a rent suit valued at less than Rs. 50 is decreed ex parte by a Munsif vested with final jurisdiction, and an application for setting aside the ex parte decree is subsequently rejected by another Munsif not vested with final jurisdiction an appeal lies under O. 43, R. 1, Cl. (d) against the order rejecting the application: 1916 *All* 51 and 1928 *Mad* 969, *Rel. on*; 1932 *Cal* 687; 27 *Cal* 484; 1914 *Cal* 614 and 1924 *Pat* 603, *Disting.*

[P 488 C 1]

Birendra Kumar De, Upendra Kumar Roy for Nani Gopal Das—for Petitioner.

Jatis Chandra Banerjee, Kali Kinkar Chakravarty and *Ramendra Mohan Muzumdar* (for Deputy Registrar)—for Opposite Parties.

Order.—The petitioner before me instituted a rent suit against the opposite parties in respect of an agricultural holding. The suit was valued at less than Rs. 50. None of the opposite parties appeared, so the said suit was decreed ex parte by the learned Munsif, Mr. S. C. Bose, who had been vested with final jurisdiction under S. 153 (b), Ben. Ten. Act. None of the questions coming within the proviso to that section was decided. Accordingly an appeal against his decree would not have been maintainable. Some of the defendants, namely opposite parties

Nos. 1 to 15, applied to set aside the said ex parte decree by an application made under O. 9, R. 13 of the Code. The said application was heard by another learned Munsif, Mr. A. B. Ganguly, who had no final jurisdiction under S. 153 (b), Ben. Ten. Act. He dismissed it holding that the summons of the suit had been served on all the defendants and that it was time-barred. An appeal was taken against this order to the Court of the learned District Judge. The said appeal was heard by the learned Subordinate Judge who allowed it, he holding that the application under O. 9, R. 13, was not time-barred and that no summons had been served on opposite parties Nos. 1 to 15. He set aside the ex parte decree in its entirety. It is against this order that the plaintiff petitioner has obtained this rule. Two points have been taken before me in support of the rule namely: (i) that the appeal to the lower appellate Court was incompetent, (ii) and that the ex parte decree, at any rate, ought not to have been disturbed so far as the other defendants, namely opposite parties Nos. 16 to 19 were concerned. I do not consider the second ground to be substantial. Having regard to the defence which will be taken by the opposite parties Nos. 1 to 15, if the ex parte decree be set aside, of which defence there are indications in the orders of the Munsif by which he refused to set aside the ex parte decree, the ex parte decree, if it has to be set aside, must be set aside in its entirety.

The first point urged before me however raises, so far as I am aware, a question of first impression in this Court, and depends upon the interpretation to be put on O. 43, R. (1), Cl. (d), Civil P. C. There cannot be any doubt that the right of appeal is a creature of statute and when no such right is expressly conferred by the statute there is no such right. The right of appeal against decrees and orders passed in rent suits for agricultural lands has been conferred by the provisions of the Civil Procedure Code; See S. 143 (2), Ben. Ten. Act, and S. 153, Ben. Ten. Act restricts that right so conferred by the Code in certain cases. To establish the right to appeal to the lower appellate Court against the order passed in this case, the opposite parties must show in the first instance that they come within the provisions of O. 43, R. (1), Cl. (d),

Civil P. C., and in the second instance that S. 153, para. 1, Tenancy Act, does not affect him. O. 43, R. 1, Cl. (d) of the Code runs thus :

An appeal shall lie from the following orders under the provisions of S. 104, namely,

(d) an order under R. 13, O. 9 rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte.

The controversy in the case before me is as to the meaning to be attached to the words "in a case open to appeal." S. 153, Bengal Tenancy Act, by itself does not bar the appeal in the case before me as Mr. A. B. Ganguly had no final jurisdiction, and it is for this reason that I consider that the case in 56 C L J 145 (1) does not touch the point which I have to consider. There the order refusing to set aside the ex parte decree in the rent suit valued at less than Rs. 50 was passed by a Munsif who had final jurisdiction under S. 153 (b), Tenancy Act. All that was decided there was that such an order was an order passed in a suit, and so came within the provisions of para. 1, S. 153 which took away the right of appeal. Nor do I consider the cases in 27 Cal 484 (2) and 19 C W N 359 (3) relevant to the point in controversy before me. The first case decided that an order passed in a proceeding for execution of a rent decree passed under the provisions of the Tenancy Act is an order passed in a suit, the word 'suit' used in S. 153, Tenancy Act, being not used in a limited sense of a proceeding in the Court of first instance before the decree. It accordingly held that there was no second appeal against an order passed in appeal in execution proceedings by a Subordinate Judge in a rent suit valued at Rs. 100 or less. The second of these cases also related to the interpretation of the word "suit" as used in S. 153. It was held that an order refusing to set aside an ex parte decree passed in appeal by a Subordinate Judge in a rent suit valued at Rs. 100 or less was not appealable as it was an order by such an officer passed in a rent suit. All the above mentioned three cases hold that the right of appeal which the ag-

1. Badiur Rahman v. Mokram Ali, 1932 Cal 687 = 139 I C 502 = 36 C W N 540 = 56 C L J 145.

2. Shyama Charan v. Debendra Nath, (1900) 27 Cal 484 = 4 C W N 269.

3. Samed Sheikh v. Nabanepal Ghosh, 1914 Cal 614 = 23 I C 12 = 19 C W N 359 = 19 C L J 310.

grieved party had under the provisions of the Code of Civil Procedure had been taken away by S. 153, Bengal Tenancy Act. In the case before me the order refusing to set aside the ex parte decree was passed by a Munsif who had not been vested with final jurisdiction by the Local Government under S. 153 (b). Here in the case before me the question is whether the Civil Procedure Code has given the opposite parties the right to appeal.

The learned advocate for the petitioner has argued before me that the words "in a case open to appeal," occurring in O. 43, R. 1, Cl. (d) mean that if there is no appeal against the ex parte decree actually passed in the suit there is no appeal against the order refusing to set it aside. He says that S. 153 barred the appeal against decree passed by Mr. S. C. Bose, as that officer had been vested with final jurisdiction under S. 153 (b), and there is accordingly no appeal against the order of Mr. A. B. Ganguly, although the latter had no such final jurisdiction. In support of this proposition he has referred to the observations made in 3 Pat 839 (4). There a reference to arbitration was made through the intervention of Court and an award was made. The defendant filed an objection to the award, but at the date of the final hearing of his objection did not appear in Court with the result that the Court passed a decree on the award. The defendant's application under O. 9, R. 13 was dismissed and it was against this order of dismissal that the appeal was preferred to the High Court at Patna. Dass, J. pointed out that it was not a case of an ex parte decree being passed but was really a case of dismissal of the defendant's petition of objection to the award. The correctness of this view of the matter need not be considered in this case. But the other point that was raised has a material bearing on the point which I have to decide. On the assumption that the decree was an ex parte decree it was contended successfully by the respondent in the Patna High Court that the appeal was incompetent. Dass, J., at p. 841 of the report said thus :

Two questions however arise : first, was the case open to appeal ? and secondly, was the decree passed ex parte ? It is clear to my mind that an order under O. 9, R. 13 is appealable

only when the decree sought to be set aside is appealable.

Having regard to the provisions of para. 16 (2), Sch. 2 of the Code the decree actually passed in that case was not appealable, the decree being in accordance with the award made with the intervention of the Court. The case has been explained and distinguished, and the correctness of the proposition so laid down by Dass, J., has been doubted. As for instance when an ex parte decree in accordance with the award made without the intervention of the Court had been made, and an application made to set aside the said decree was refused by an order, it has been held that an appeal against the said order was competent although the decree actually passed being in accordance with the award was not appealable under para. 21 (2), Sch. 2 of the Code. In my judgment the words "in a case open to appeal" are general words and have no reference to the appeal against the decree actually passed. If there could be no appeal under any circumstances against a decree that could be passed in the suit or proceeding, there would be no appeal against an order to set aside the ex parte decree passed in such a suit or proceeding by virtue of the limiting words of O. 43, R. 1, Clause (d). It has been pointed out that an appeal lies against a decree when the decree is in excess of the award and a view has been expressed that on that footing an appeal would lie against an order refusing an application under O. 9, R. 9 in a proceeding under Sch. 2 of the Code. In my judgment the correct principle has been laid down by Piggott, J., in 38 All 297 (5) and by Ramesam, J., in 1928 Mad 969 (6). The observations of Piggott, J. are as follows:

The words in O. 43, R. 1, Clause (d) are perfectly general; they are in a case open to appeal: Now the case between the parties in the Court below was whether or not an award made without the intervention of the Court should be filed as a decree of the Court. In that case an appeal lay under S. 104 (1) (f) from any order which a Court might pass, filing or refusing to file the award. It was therefore a case open to appeal. Moreover an appeal might lie from the decree itself on certain grounds and to this extent the decree itself was open to appeal. The fact that no appeal has been brought from the decree is irrelevant because the question

5. Nehal Singh v. Khushlal Singh, 1916 All 51 = 33 I O 80 = 38 All 297 = 14 A L J 332.

6. Selvarayan Samsan v. Amalorpavanadan, 1928 Mad 969 = 112 I O 691 = 55 M L J 262.

4. Roshan Lal v. Bridhi Chan, 1924 Pat 603 = 88 I O 26 = 6 P L T 212 = 3 Pat 839.

before us is whether the decree was open to appeal. Nor is it relevant to ask us to consider whether the decree is or is not in fact in accordance with the award, because that only amounts to arguing that any appeal brought against the decree, would be bound to fail. The question for determination is not whether an appeal could have been successfully prosecuted against the decree but whether it was 'open to appeal'. It seems obvious it was.

There the decree sought to be set aside by an application under O. 9, R. 13 was a decree in accordance with the award.

Ramesam, J. agreed with this interpretation put by Piggott, J., when he said that a case is to be regarded as "open to appeal" when though an appeal against the decree would not lie under certain circumstances, it will lie under "certain other circumstances". In my judgment a case is not open to appeal within the meaning of O. 43 (1) (d) when no appeal would lie against a decree under any circumstances. An appeal against a decree in a simple rent suit (i. e. when the proviso to S. 153 does not come into play) valued at Rs. 50 or less would not lie under only one circumstance, namely, when the Munsif has been vested with final jurisdiction and would lie under all other circumstances.

I accordingly hold that the appeal to the lower appellate Court was competent and discharge the Rule with costs, hearing fee one gold mohur.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Calcutta 488

CUNLIFFE AND HENDERSON, JJ.

Ashutosh Das — Complainant — Petitioner.

v.

Keshab Chandra Ghosh — Accused — Opposite Party.

Criminal Revn. No. 195 of 1936, Decided on 29th May 1936.

Trade mark—Dispute over trade mark and commercial designs—Jurisdiction—Civil and criminal Courts — Criminal Courts should try dispute only in simple and clear cut cases requiring speedy relief.

In deciding whether a dispute between the parties over trade marks and commercial designs should be brought in a civil or a criminal Court, the real practical test is that the Criminal Procedure is only to be used in simple and clear cut cases where a speedy relief is required by the prosecution. In all cases where complicated matters of registration, abandonment of user and so on are concerned, it is desirable that the dispute should be decided in a civil Court. [P 489 C 1]

Santosh K. Basu and Debatrata Mukherjee—for Petitioner.

D. N. Bhattacharjee — for Opposite Party.

Cunliffe, J. — The opposite party in this case was convicted and fined in the Magistrate's Court under S. 483, I. P. C. for counterfeiting a trade mark. When the matter came on appeal to the Sessions Judge of Howrah, for the reasons which commended themselves to him, he ordered the acquittal of the opposite party and reversed the conviction and the sentence. The learned Sessions Judge took the view that the dispute between the parties (the complainant and the accused) was in reality a civil dispute and not a criminal one.

The facts revealed in the trial Court were somewhat curious. The complainant, it appears, inherited a business from his father, a concern of manufacturing weights and measures with a special trade mark stamped on the various articles of weights and measures with the father's name incorporated in the design. It appears that the complainant carried on the business for a short while and then he abandoned it owing to extreme competition. The trade mark on the weights and measures had been registered as far back as 1897. The learned Sessions Judge found that the abandonment by the son of the business persisted for about 20 years, but after that lapse of time he recommenced the business in weights and measures only to find that the accused was carrying on trade, having adopted his father's on trade-mark stamped upon the weights and measures.

There is some evidence to show that there were other traders who had done the same thing. One of the tests which is always applied as to whether a dispute between the parties over trade-marks and commercial designs should be allotted on the one hand to a civil Court, on the other hand to a criminal Court is the question of diligence in bringing the action. It has been held in number of cases that if the criminal Courts observe that there has been a delay in asserting proprietary rights in designs, they will not entertain prosecution of that kind. From this point of view, I think it can be said that the laying by on the part of the complainant ought ordinarily to have driven him from the criminal Court into the civil Court.

Another point which has to be considered is, of course, the question of abandonment of user. Abandonment of user for such a lengthy period would militate very much against the success of the plaintiff in a civil Court from obtaining damages or injunction. I do not say that it would be an insuperable obstacle to obtaining such relief, because it might be shown that there were stocks in existence of the articles which were still on the market in the hands of other people, but ordinarily it would be so. The real practical test, in my opinion, as to the difference controlling prosecutions with regard to statutory crimes of this character in civil actions is this, that the Criminal Procedure Code is only to be used in simple and clear cut cases where a very speedy relief is required by the prosecution. In all cases where complicated matters of registration, abandonment of user and so on are concerned, it is very much better that the dispute should be given to the civil Courts. Consequently, this Rule must be discharged.

Henderson, J. — In my opinion, it would be against the long and settled practice of this Court to interfere in revision in a matter of this kind. I therefore agree that this Rule should be discharged.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Calcutta 489

CUNLIFFE, J.

Panchi Cowri Sadhu Khan—Plaintiff.
v.

Satya Dhenu Ghosal—Defendant.

Suit No. 321 of 1934, Decided on 30th January 1936.

Negotiable Instruments Act (26 of 1881), S. 76 (d)—Promissory note in hands of drawee—No hardship resulting to drawer—He cannot contend that he would suffer damage for want of presentation.

Where no hardship is shown in the case of a note which has not passed into other hands but is still in the hands of the drawee, it is not open to the drawer to contend that he would suffer damage for want of presentation especially when drawer admits execution of the note, and acknowledges that the money has passed. [P 489 C 2]

S. N. Bose—for Plaintiff.

S. R. Das and P. K. Sen—for Defendant.

Judgment.—This is a simple case upon a promissory note, in which I have the advantage of having a considerable argu-

ment on an earlier occasion from Mr. Das who appeared for the defendant. On the last occasion I expressed a wish that the case should be definitely disposed of to-day, but on being called on Mr. Das asked for a further adjournment on the ground that one of his witnesses was not available, or rather his client was not here. But I refused his application to adjourn. This suit is on a promissory note and there appears to be very little defence upon the pleadings. The execution is admitted, and it is also admitted, that payments upon the contract had been made from time to time in the past. At the last hearing an exceedingly interesting argument was developed, however of a technical nature, which amounted to a plea in bar by way of demurrer. It was contended that this note was never presented, as it should have been within the language of the note at Calcutta the place in which payment was to be made, or at all, and reliance was placed upon various sections in the Negotiable Instruments Act which deal with the question of presentation.

The answer to that which was made by Mr. Bose for the plaintiff is, I think, sound in law. He argued that the particular facts of this case brought it well within the ambit of sub-s. (d) to S. 76, Negotiable Instruments Act, and that subsection indicates that where no hardship is shown in the case of a note which has not passed into other hands but is still in the hands of the drawer, the drawer cannot possibly say to any body that he is going to suffer any damage for want of presentation. Now, this seems to me to be exactly this case. It is acknowledged that the note was properly executed. It is acknowledged also that the money passed, as I have said, and here we find too that from time to time the drawer showed that he recognized his indebtedness by making various payments. In these circumstances it seems to me that there is no defence to the action at all, and I shall give judgment for the plaintiff for the amount claimed with a deduction of Rs. 910 being an amount which is not mentioned in the plaint. The costs will follow the event. The plaintiff will also be entitled to interim interest.

R.M./R.K.

Claim decreed.

A. I. R. 1936 Calcutta 490

R. C. MITTER, J.

Mukti Devi—Transferee—Petitioner.

v.

Monorama Mitra and others—Opposite Parties.

Civil Rule No. 1004 of 1935, Decided on 20th May 1936, from order of Munsif, Third Court, Narail, D/. 29th April 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 26-F—Application for pre-emption—Benamidar of co-sharer landlords made party—Application is not defective—Benamidar represents co-sharer landlords—Co-sharer landlords can at any time be substituted in place of benamidar.

A benamidar fully represents in a suit or proceeding, the beneficial owner. Where therefore in an application for pre-emption under S. 26-F of the Act, the benamidar of certain co-sharer landlords is made a party, the application is not defective by reason of failure to implead the co-sharer landlords. The benamidar represents the co-sharer landlords and the co-sharer landlords can at any time be added as parties in place of the benamidar, in case they want to come in and represent themselves instead of their benamidar representing them: 1918 P C 140, *Ref.* [P 491 C 2]

(b) Bengal Tenancy Act (8 of 1885), Ss. 26-F and 188—Application for pre-emption—One of opposite parties impleaded is minor—Application is not defective—Minor should be deemed party for purposes of S. 188—Subsequent proceedings without appointment of guardian are however irregular—Order of pre-emption is liable to be set aside—Minor is entitled to apply to be made co-applicant, although period of limitation for such application is over.

An application for pre-emption under S. 26-F is not defective merely because one of the opposite parties impleaded in it is a minor and no guardian is appointed to act for him. The minor must be taken to have been made a party for purposes of S. 188. The subsequent proceedings are however irregular if the Court fails to appoint a guardian to act for the minor and the order for pre-emption passed therein is liable to be discharged and the case remitted to the lower Court in order that the proceedings may be continued after appointment of a guardian of the minor. If after the appointment of the guardian, the minor wants to be made a co-applicant, his application is competent, although made after the period of limitation for making it is over, provided it is made promptly. The minor should not be allowed to suffer by reason of the failure of the Court to discharge its duty: 1936 Cal 343, *Ref.* [P 492 C 1]

(c) Bengal Tenancy Act (8 of 1885), Section 26-F (1)—Application under S. 26-F (1) by co-sharer landlord—Applicant added as co-applicant in another application by other co-sharer landlords—Latter application dismissed as being defective—Applicant is not debarred from continuing his own application.

Where a co-sharer landlord making an application for pre-emption under S. 26-F is added as a co-applicant, on his request, in another application by his co-sharer landlords and the latter application is dismissed by reason of certain defects, he is not debarred from continuing his own application. Each of the co-sharer landlords has an independent right to make an independent application under Section 26-F (1) and he is not entitled to exercise his right of pre-emption only by becoming a co-applicant in other co-sharer's pending application for pre-emption. Two applications for pre-emption can go on simultaneously. [P 492 C 2]

Amiruddin Ahmed for *Syed Nausher Ali*—for Petitioner.

Hemendra Chandra Sen, Rajendra Bhusan Bakshi, Suresh Chandra Sen and Surajit Chandra Lahiry (for Dy. Registrar)—for Opposite Parties.

Order.—This case raises interesting points of law and some of them are points of first impression. The matter has been very ably and fairly argued by Mr. Ahmed appearing on behalf of the petitioner, and although I am in substance holding against him it must not be taken that I have not taken into consideration the arguments he has advanced. Three points have been raised before me which I will state hereafter after setting out the relevant facts which are as follows: Abdul Malek Molla held an occupancy holding under a large number of co-sharer landlords. He sold a portion thereof by a registered instrument to the petitioner before me, Mukti Devi. The notice of transfer was duly served and within two months of the service of the said notice two sets of co-sharer landlords made two independent applications for pre-emption under S. 26-F, Ben. Ten. Act. The first of these applications was filed on 20th November 1934 by three of the co-sharer landlords, Sudhir Kanta Ghose, Kamakhya Prosad Ghose and Haridas Ghose. Most of the remaining co-sharer landlords, including one Monorama Mitra, was made opposite parties to this application, but this application was, as has been ultimately found by the Court, defective because one co-sharer landlord had not been made a party to this application. On 23rd November 1934 another application was made under S. 26-F by Monorama Debi to whom two of the co-sharer landlords joined later on. In this application all the remaining co-sharer landlords or their benamidars were made parties. The first application was numbered Misc. Case No. 203 and the second Misc. Case No. 207 of 1934.

On 8th December 1934 Monorama who was a co-applicant on Misc. Case No. 207 made an application in Misc. Case No. 203 for joining as a co-applicant with the applicants of that case and this application of hers was granted on 8th December 1934. Case No. 203 then proceeded, but that case was ultimately dismissed by the Court on the ground that one of the co-sharer landlords had not been made a party to the application and therefore the application was not maintainable in view of the provisions of S. 188, Ben. Ten. Act. After the dismissal of the said application the application which was numbered 207 was proceeded with. The lower Court has allowed that the application, and it is against the order of the lower Court passed in that case, the present Rule has been granted.

It is necessary to state two other facts in connexion with Misc. Case No. 207 for the purpose of following the three points which have been raised by Mr. Ahmed. In that application Haridas, a co-sharer landlord, was made an opposite party. He was described as a minor, but no guardian was ever proposed or appointed. Later on an application was made on his behalf, unrepresented by any guardian, to become a co-applicant and that application was granted, and ultimately Haridas, described as a minor, but not in fact represented by a guardian or a next friend, continued on the record. One of the opposite parties to this application was Lalan Chandra Ghose. Later on two persons, Nirode Gopal Ghose and Nani Gopal Ghose, filed an application on 19th December 1934 to become co-applicants along with Monorama. They made their case that their benamidar was Lalan who had been named as an opposite party in Monorama's original application. They were allowed on that date to become co-applicants in Misc. Case No. 207.

Mr. Ahmed raises three points: (i) that S. 188, Ben. Ten. Act, has not been complied with inasmuch as Haridas cannot be deemed to be a party to the proceedings at all, because being a minor he was not represented by a guardian. The application which is the subject-matter of Misc. Case No. 207, he says, must be considered to be an application in which one co-sharer has been left out namely Haridas (ii) that Monorama could not continue the application which is the subject matter of Misc. Case 207, inas-

much as she became a co-applicant later on in Misc. Case 203 which has ultimately been dismissed on account of defect of parties and (iii) that the Court could not add Nirode and Nani parties to Misc. Case 207 after the period of limitation provided for under S. 26-F. With regard to the third point the Court has remarked that there is no defect in the original application for pre-emption, inasmuch as Lalan, the benamidar of Nirode and Nani, was on the record from the very beginning, the application therefore if it is not otherwise bad by reason of the defect regarding Haridas, was a good application. In my judgment this view of the Court below is sound because a benamidar represents in a suit or proceeding fully, the beneficial owner. The fact is that Lalan made a party to these proceedings from the very beginning, represented Nirode and Nani as their benamidar. This principle has been laid down in 46 I A 1 (1). This is a case where the beneficial owners wanted to come in and represent themselves instead of their benamidar representing them. There is on this score no difficulty as regards the application, which is the subject matter of Misc. Case No. 207 and I, accordingly, overrule the third point.

With regard to the first point there can be no doubt that if Haridas was, in fact, a minor the proceedings which have been continued in the Court below, and which have terminated with the order of pre-emption were irregular proceedings. Evidence was led on behalf of the applicants for pre-emption, that Haridas was an adult at the date when Monorama filed an application of 23rd November 1934. Evidence to that effect that Haridas was a minor then and is still a minor, has been led on behalf of the purchaser, but the Court below has not recorded any finding on the question of minority of Haridas at the material point of time. In my judgment, the Court below ought to have recorded a finding on this point, and if it came to the conclusion that Haridas was a minor it was under the duty to appoint a guardian for him, under the provisions of O. 32, R. (3), Civil P. C. I have examined the evidence myself: No relation of Haridas has been examined to prove his age. The only witness examined is a neighbour of Haridas. His evidence goes

1. Gur Narayan v. Sheo Lal Singh, 1918 P C 140=49 I O 1=46 I A 1=49 Cal 566 (P C).

counter to the statement made in Monorama's petition where he was described as a minor. I cannot rely on this evidence adduced on behalf of the applicants for pre-emption, that Haridas was aged 22 years in the year 1934. His school register has been proved by the purchaser and it shows that at that date he was a little over 15 years. In this state of the evidence I must record a finding that Haridas was a minor at the date of the application and is still a minor.

Mr. Ahmed said that inasmuch as Haridas was a minor at the date when the application was made, and no guardian was appointed he cannot be considered to be a party to those proceedings at all, and so S. 188 has not been complied with. I do not see how I can give effect to that contention. If the provisions of O. 32, R. 3 be examined it leads to this that the appointment of the guardian of a minor defendant is to be made after the institution of the suit or proceedings against him, the duty of making the appointment of a proper person as guardian of a minor is on the Court and there must be, having regard to the procedure that has to be followed by the Court in selecting a guardian for a defendant or opposite party, an appreciable interval, it may be short it may be long, between the filing of the suit against the minor or the filing of the application for pre-emption with a minor as opposite party, and the selection and appointment of his guardian. An application for pre-emption, or a suit, cannot be instituted with a guardian of a minor defendant or opposite party already appointed. I, accordingly, hold that Haridas must be taken to be made a party to the application for pre-emption at the time when that application was presented, but the subsequent proceedings are irregular because the Court has not discharged its duty in appointing a guardian of a person whose name appeared in the proceedings with the description that he was a minor. The application filed on behalf of Haridas purporting to act himself to become a co-applicant was also an irregular application and the order thereon is an irregular order. On this point, as I have said already, S. 188 does not hit the application for pre-emption and the proper order which must be passed, having regard to these defects, is to discharge the order for pre-emption which has been passed and to remit the case to the lower Court in

order that the proceedings may be continued after the Court has appointed a proper person as guardian of Haridas.

Unless there is some substance in the second point (it has not, for the reasons which I shall hereafter state) I may mention, at this stage, that the order which I propose to pass is the order which I have indicated above. This leads me to the second point. Before the Misc. Case No. 207 was actually taken up for hearing the Court had made an order by which Nirode and Nani became co-applicants with Monorama, and they continued as co-applicants. At the stage when Misc. Case No. 207 was heard the position is this that there were at least two other co-applicants with Monorama. It is said that Monorama could not prosecute two applications for pre-emption passed on the self same transfer, namely the application in case 203 in which she had become a co-applicant by reason of the order of the Court dated 8th December 1934 and Misc. Case No. 207 in which she was alone the original applicant but later on had two other applicants with her. It is quite clear from a comparison of S. 148-A (9), Ben. Ten. Act, with the provisions of S. 26-F, that a co-sharer landlord is not bound to exercise his right of pre-emption by becoming a co-applicant in his or her co-sharer's application for pre-emption filed under S. 26-F (1). There is no provision corresponding to S. 148-A (9), in that part of the Bengal Tenancy Act which deals with the co-sharers' right of pre-emption. In fact the provisions of S. 26-F (4) (a), indicate that co-sharer landlords have independent rights to make independent applications under sub-s. 1 of S. 26-F and they are not bound to exercise their rights of pre-emption only by becoming co-applicants in their co-sharers pending application. The applications in Misc. Cases Nos. 207 and 203 could accordingly, go on simultaneously and the second application for pre-emption which was the subject matter of Misc. Case No. 207 was not incompetent by reason of the filing of the earlier application by other co-sharer landlords which was numbered Misc. Case No. 203. I go further, that Monorama when she had ultimately two other co-applicants with her could not in law withdraw from her application by an express application without the consent of her co-applicants. Here the position was that of a co-plaintiff and it is a principle of law, as has

been held by Swinfen Eady, J., in (1905) 2 Ch 460 (2), that "where there are co-plaintiffs one cannot sever as of right."

If Monorama could not sever, as of right, from her application for pre-emption by an express act I do not see on what principle it can be said that she cannot maintain her application for pre-emption along with her co-applicants because of her act in connection with Misc. Case No. 203 which can at most lead to an inference that she wanted to withdraw from her own application, and wanted to pursue her remedy for pre-emption as a co-applicant in Misc. Case No. 203. On this principle I overrule also the second point. There remains only another point to be considered. As I have said above that the proceedings of the Court below have been irregular by reason of the non-appointment of the guardian of Haridas, the order complained of must be discharged and the proceedings must be remanded to the lower Court, in order that they may be continued after the Court appoints a proper person as his guardian, but it is necessary to guard against the interest of Haridas, when he would be so represented by a proper guardian if Haridas, represented by a guardian wants to become a co-applicant for pre-emption. The application for pre-emption has been filed, as I have said, on 23rd November 1934. In accordance with the provisions of S. 26-F (4) (a), a co-sharer landlord opposite party has to make his application for becoming a co-applicant within two months from the date of the service of the notice of the transfer on him, or within one month from the date of the filing of his co-sharer's application for pre-emption. These periods have long expired. If the Court had done its duty and had promptly appointed a guardian for Haridas, that guardian would have had time to make an application for joining as a co-applicant within the period mentioned in sub-s. 4 (a) of S. 26-F. The fact that the Court overlooked that Haridas was a minor, a fact which appeared on the face of the application for pre-emption, is a fact which must be considered.

In 40 C W N 680 (3), I have held that where by reason of some act or omission

2. In re Mathews Oates v. Mooney, (1905) 2 Ch 460=74 L J Ch 656=93 L T 158 = 54 W R 75.

3. Gadadhar Sarkel v. Gopal Chandra Das, 1936 Cal 343=40 C W N 680.

on the part of the Court or its officers an injury has been done, it is the duty of the Court to relieve parties against the injustice caused by its own acts or defaults or the acts or defaults of its officers. That was a case of pre-emption under S. 26-F and was a case where by reason of a sad omission on the part of the Court to look to the records of the case, a co-sharer opposite party could not come in and make his application for becoming a co-applicant within the time limited in sub s 4 (a), of S. 26-F, Ben Ten. Act. In my judgment, the principle which I have laid down in that case governs the present case and my direction is that after a proper guardian has been appointed for Haridas, the Court would entertain an application on behalf of Haridas, made by such guardian for becoming a co-applicant, if that application is made promptly, that is to say, as soon as the person so appointed assumes his office as guardian of the minor. The rule is made absolute in these terms, the case is sent back to the lower Court in order that the directions given above may be carried out. So far as the costs of this Court are concerned the parties do bear their own costs. Let the affidavits filed be kept with the record.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 493

LORT-WILLIAMS, J.

Calico Printers Association, Ltd.—
Plaintiffs.

v.

D. N. Mukerjea—Defendant.

Suit No. 1707 of 1935, Decided on 12th February 1936.

(a) Evidence Act (1872), Ss. 101, 106, 114—Suit under S. 53 (2), Patents and Designs Act, for damages and injunction restraining defendant from infringing plaintiff's copyright—Onus of proving knowledge of plaintiff's right on part of defendant lies on plaintiff—S. 106 does not apply—Presumption under S. 114 does not arise.

In a suit under S. 53 (2), Patents and Designs Act, for damages and for injunction restraining the defendant from infringing the plaintiff's copyright in respect of certain designs, the onus of proving that the defendant had knowledge of the plaintiff's right in the said design lies on the plaintiff and S. 106, Evidence Act, has no application to such a case nor does a presumption under S. 114, Evidence Act, arise in such a case. [P 496 C 1]

(b) Patents and Designs Act (2 of 1911), S. 53 (2)—Suit under S. 53 (2) for damages and injunction restraining defendant from infringing plaintiff's copyright — Costs—

Plaintiff unable to prove claim for damages—Defendant giving unconditional undertaking not to infringe copyright—Plaintiff should ask for judgment in form of order embodying undertaking—Plaintiff failing to do is not entitled to costs subsequently incurred.

Where, in a suit under S. 53, Patents and Designs Act, for damages and for an injunction restraining the defendant from infringing the plaintiff's copyright in respect of certain designs, the plaintiff is unable to prove his claim for damages and the defendant gives an unconditional undertaking to the plaintiff and to the Court not to infringe the plaintiff's copyright so long as it subsists, the plaintiff should ask for judgment in the form of an order embodying the undertaking. If he fails to do so and goes on with the suit, he is not entitled to the costs incurred by him subsequently but is, on the contrary, liable to pay to the defendant the costs incurred by him subsequent to the undertaking: *Winkle & Co., Ltd. v. Gent & Sons*, (1914) 31 R P C 473, Ref. [P 496 C 2]

B. N. Dutt Roy—for Plaintiffs.

S. Chaudhuri and *D. R. Das*—for Defendant.

Judgment.—This is a suit asking for a perpetual injunction restraining the defendant, his servants and agent from importing, printing, offering and exposing for sale and selling, or in any way dealing with cotton materials not being those of the plaintiffs, with any or all the designs printed thereon, and from otherwise infringing the copyright of the plaintiffs' designs, and for an order for inspection of the books of account and stock of the defendant, and ordering him to deliver up to the plaintiffs for destruction all the stocks in his possession of the infringing cotton materials, and for damages and costs.

The plaintiffs in their plaint stated, inter alia, that they were the proprietors of three new and original designs relating to cotton goods which were duly registered and the copyright in them duly extended by the Controller of Patents, which copyright is still in existence. Further they alleged that on 27th August 1935 it came to their knowledge that the defendant, with the knowledge that certain designs were imitations of the plaintiffs' designs, had imported into Calcutta and stored and exposed for sale cotton materials manufactured in Japan not being the goods of the plaintiffs or manufactured by them, with the plaintiffs' designs on them or close imitations thereof, and that thereby the defendant had infringed the copyright of the plaintiffs. Further they charged the defendant with

applying or causing to be applied thereto fraudulent or obvious imitations of the plaintiff's designs for the purpose of selling his goods, without obtaining any license or consent from the plaintiffs. Further that he had knowingly applied or caused to be applied the said designs or fraudulent or obvious imitations thereof to the goods imported by him with the object of defrauding the public into the belief that they were purchasing the plaintiffs' goods.

The defendant by his written statement denied the originality or novelty of the designs and stated that any such copyright, registration or protection obtained was invalid. He admitted selling certain cotton goods manufactured in Japan with designs similar to the plaintiffs' designs, but he denied that he sold the goods with the knowledge that the designs were similar to or imitations of the plaintiffs' designs or that he had imported such goods into Calcutta, and he denied that he had infringed the plaintiffs' copyright. Further he denied that for the purpose of sale or at all he had applied or caused to be applied to his cotton goods fraudulent or obvious imitations of the plaintiffs' designs, or with knowledge of the plaintiffs' claim to any such copyright he had applied or caused to be applied the said designs or with such knowledge had exposed them for sale or had defrauded the public as alleged. Further he stated that the goods sold by him were offered and sold in ignorance of the rights of the plaintiffs, if any, in the alleged designs, and denied that he had imported any such goods, or that the plaintiffs had suffered any damages. In conclusion he said that he had been and still was ready and willing to undertake to the plaintiffs and to the Court not to deal with any goods printed with the plaintiffs' designs aforesaid or any obvious imitations thereof in case and for such period as the plaintiffs established their copyright in the said designs.

Prior to the delivery of pleadings, on 28th August 1935, the solicitors acting for the plaintiffs had addressed a letter to the defendant alleging the infringement and asking him forthwith for a written undertaking in a form enclosed, and stating that the undertaking, if given was not to prejudice the plaintiffs' full legal rights including their right to take

proceedings. If the defendant gave the undertaking then the plaintiffs would require a further undertaking to be given (to the Court if their clients so required) to deliver up all goods bearing the copyright and designs of the plaintiffs and an account of all goods sold which infringed their registered designs, and payment of damages. In answer to that letter the defendant wrote saying that without admitting the plaintiffs' right to the designs claimed by them he had not caused any alleged infringements nor had he any goods bearing such infringed designs in his possession, the question of giving a written undertaking therefore did not arise. The result was that notice of motion was given to ask for an order for an interlocutory injunction against the defendant.

In answer to that the defendant swore an affidavit reiterating that he had no knowledge of and did not admit the novelty and originality of the designs claimed by the plaintiffs, and explaining that he was the selling agent of a Japanese firm which had sent him the goods for sale in Calcutta and other places in India, and denying that he had imported or indented for or sold any other goods than those mentioned in his affidavit and that he did not intend to deal any further in such goods in any manner whatsoever. Further he denied that he knowingly or at all applied or caused to be applied to any cotton goods any imitations of the plaintiffs' registered designs, or that he had imported or sold any goods with such designs with knowledge that they could be claimed to be imitations. Further he said as follows :

I state that I sold as aforesaid the aforesaid goods with the said designs in complete ignorance of the plaintiffs' claim to or rights in them and of the fact of their registration, and as agent of my said Japanese principals and for and on behalf of them. Since I came to know that the plaintiffs were claiming rights in them I have been willing and am still willing to undertake not to sell, publish for sale or otherwise deal in any piecegoods with the aforesaid designs or any obvious imitations thereof for so long as plaintiffs' copyright in such designs subsists and am further willing to give such undertaking to this Court.

The motion was not heard because the defendant agreed to be bound by an interim injunction in terms of the notice. That was the position when the suit was called on for hearing. Thereupon counsel for the plaintiffs stated that plaintiffs

abandoned any claim to damages, and counsel for the defendant stated that he abandoned his plea of want of originality, that is to say, he admitted the plaintiffs' copyright in these registered designs. The only issues submitted were :

(1) Did the defendant sell or expose for sale goods with the designs contained in Exs. D, E and F to the plaintiff knowing that they were imitations of the designs contained in Exs. A, B and C to the plaintiff? (2) Has the defendant applied or caused to be applied to the said goods fraudulent imitations of the aforesaid registered designs of the plaintiffs? (3) To what relief, if any, are the plaintiffs entitled?

Section 53, Patents and Designs Act, (II of 1911) provides that :

During the existence of copyright in any design, it shall not be lawful for any person (a) for the purpose of sale to apply or cause to be applied to any article in any class of goods in which the design is registered, the design or any fraudulent or obvious imitation thereof except with the license or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied, or (b) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale, that article.

Sub-s. (2) provides that:

If any person acts in contravention of this section, he shall be liable for every contravention, (b) if the proprietor elects to bring a suit for recovery of damages for any such contravention and for an injunction against repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly.

Counsel for the defendant submitted that the only real question left in issue was whether the defendant had applied or caused to be applied to his goods the plaintiffs' design, or had exposed for sale such articles knowing that the design or any fraudulent or obvious imitation of it had been applied to any such articles. Counsel for the plaintiffs then stated that he did not propose to call any witness but would rely upon the documents to prove these facts. He further argued that as such facts were peculiarly within the knowledge of the defendant, the onus of proving them lay upon him under S. 106, Evidence Act, and he referred to a number of documents such as invoices, sale notes, telegram and copies of indents. These went to show that the defendant might have been the seller of the goods in Calcutta instead of being merely the agent of the Japanese importer. But even

upon this point they were inconclusive, and they wholly failed to establish the facts which were essential in this case, namely, that the defendant had knowledge of the plaintiffs' rights in these registered designs, or that he had applied or caused to be applied such designs to the articles which he had sold. There can be no doubt that the onus of proving knowledge on the part of the defendant lay upon the plaintiffs, and that S. 106, Evidence Act has no application. Counsel for the plaintiffs, as a last resort, asked me to draw a presumption under S. 114, Evidence Act, but no such presumption arose nor could arise upon the facts of this case and the evidence which was tendered.

These being the facts, the question remains to what, if any, relief are the plaintiffs entitled, and whether they are entitled to any, and if so what, costs. At first sight it would appear that the plaintiffs have failed to prove their case, and that the defendant is entitled to judgment, but in my opinion that is not the real position. As the pleadings stood when the case was called on, the defendant had stated therein that he had been and was still ready and willing to give an undertaking to the plaintiffs and to the Court, for such period as the plaintiffs were able to establish their copyright. That was a conditional offer of an undertaking, and the plaintiffs were not bound to accept it upon such term. But, as I have already stated, counsel for the defendant, abandoned his denial of the plaintiffs' rights. Thereupon the undertaking became an unconditional undertaking.

This should have been accepted by the learned counsel for the plaintiffs and he should have asked for judgment in the form of an order embodying the undertaking. I am willing however to treat his further argument in this case as being in fact an application for judgment upon the terms which were then offered. It is clear that he could not be entitled to a perpetual injunction as asked for in the plaint, because the period of copyright granted by the comptroller is only for five years, with possibly two further extensions of five years each. The result would have been that the plaintiffs were entitled to a judgment or order in the form of the undertaking offered, and costs up to the

date when the condition was withdrawn, namely, the date upon which this case came on for hearing. But in considering the question of costs one must have regard to the date when first the plaintiffs could have obtained the relief which such an order would give them. If they failed to ask for relief at a time when they could have obtained it, and went on with the suit, they ought not to get the costs incurred by so doing. On the contrary they ought to pay such costs to the defendant. Now in my opinion the time when the plaintiffs could have obtained the relief which they are asking for to-day was upon 5th September 1935, when the defendant swore the affidavit to which I have referred, and offered unconditionally to give an undertaking for so long as the copyright in the plaintiffs' designs subsisted. That is the most which the plaintiffs can ask for in any case. Applying to this case by analogy the case in 31 R P C 473 (1), the proper course for the plaintiffs to have pursued was to have asked the Court hearing the motion, to make an order in the terms of the undertaking offered by the defendant. In this way the plaintiffs' would have secured all the relief to which they were entitled, or which they required.

All the costs incurred subsequent to that date were unnecessary. For these reasons I give judgment for the plaintiffs with costs up to and including the costs incurred with reference to the notice of motion and all costs incidental thereto including the costs of the affidavits sworn in connexion therewith, and including the costs of briefing counsel on the motion. There will be an injunction restraining the defendants in terms of the prayer of the plaint, except that it will be limited to the period during which the plaintiffs' copyright in the designs subsists, that is to say, so long as it is extended by the comptroller. Costs from the date to which I have referred, onwards to date, must be paid by the plaintiffs to the defendant.

R.M./R.K.

Suit decreed.

1. Winkle & Co., Ltd. v. Gent & Sons, (1914)
31 R P C 473.

* A. I. R. 1936 Calcutta 497

FULL BENCH

M. N. MUKERJI, JACK, D. N. MITTER,

S. K. GHOSE AND PATTERSON, JJ.

Bejoy Kumar Addya and others —
Defendants—Petitioners.

v.

Nagendra Nath Palit — Plaintiff —
Opposite Party.

Full Bench Ref. No. 1 of 1935, Decided
on 1st May 1936, from reference of Nasim
Ali and Henderson, JJ., D/- 6th August
1935.

* (a) Provincial Small Cause Courts Act
(1887), Sch. 2, Cl. 8—Powers need not be
conferred by name of Judge: 19 C W N 1236
=22 C L J 249=1916 Cal 574=31 I C 177,
Overruled.

In a notification under Cl. (8) of the second
Schedule it is not necessary to confer powers
by reference to the name of a particular Judge
of a Court of Small Causes in order to enable
him to try suits for the recovery of rent of
homestead land under the Small Cause Court
procedure.

The words "the Judge of the Court of Small
Causes" are not used to emphasize any distinc-
tion between those words and "Court of Small
Causes," but are used only as a compendious
form of expression which include not only
Court of Small Causes as defined in S. 4, but also
officers invested with Small Cause Court's
powers under S. 25 of the Bengal, N. W. P. and
Assam Civil Courts Act; nor is there anything
in the words used in the clause which can
legitimately form the foundation for the view
that in vesting the Judge with authority to
exercise special jurisdiction under that clause
it is necessary to confer such authority by
reference to the name of a particular Judge:
19 C W N 1236=22 C L J 249=1916 Cal 574=
31 I C 177, *Overruled*; 1916 Cal 574, *Approved*;
85 Cal 677; 1916 Bom 106; 1928 Bom 265 and
28 Mad 547, *Ref.* [P 500 C 1]

(b) Provincial Small Cause Courts Act
(1887), S. 25—Scope.

A finding on pure question of fact supported
by documentary evidence cannot be assailed in
revision under S. 25. [P 503 C 2]

(c) Limitation — Plea, can be raised before
High Court.

A plea of limitation can be raised for the first
time before the High Court. [P 503 C 2]

*Anilendra Nath Roy Chowdhury, Gour
Mohan Dutt and Jnanendra Nath Baksi*
—for Petitioners.

*Amarendra Nath Bose and Hemanta
Kumar Bose*—for Opposite Party.

M. N. Mukerji, J.—The plaintiff institu-
ted this suit to recover arrears of rent with
damages in respect of a piece of homestead
land. The claim was for a period of four

years. The suit was tried and decreed
by Mr. Sharuddin Ahammed, Munsif, 3rd
Court, at Alipore, District 24-Parganas,
exercising the powers of a Court of Small
Causes. The defendants moved this Court
for revision of the decision, and on their
application a rule was issued to show
cause why it should not be set aside. One
of the contentions urged on behalf of the
defendants at the hearing of the rule
before the Division Bench was that
Mr. Ahammed had no jurisdiction to try
the suit. In having to deal with this
contention, the Division Bench came to
be of opinion that there was a conflict of
judicial opinion bearing upon the ques-
tion. Hence this reference. The rele-
vant facts are the following: The second
Schedule to the Provincial Small Cause
Courts Act (9 of 1887), in its different
clauses, enumerates the classes of suits,
of which Courts of Small Causes are pre-
cluded from taking cognizance. Cl. (8)
of that Schedule runs in these words:

A suit for recovery of rent other than house
rent, unless the Judge of the Court of Small
Causes has been expressly invested by the
Local Government with authority to exercise
jurisdiction with respect thereto.

Mr. Ahammed is the Munsif of the 3rd
Court at Alipore. It is not disputed that,
as provided in S. 25 of the Bengal,
N. W. P. and Assam Civil Courts Act (12
of 1887), the Local Government has, by a
Notification in the Official Gazette con-
ferred upon him the jurisdiction of a
Judge of a Court of Small Causes for the
trial of suits up to the value of Rs. 50
cognizable by such Courts and that conse-
quently he had jurisdiction, pecuniary as
well as territorial, to entertain the pre-
sent suit. But Mr. Ahammed, admittedly,
has never been personally invested by the
Local Government with authority to exer-
cise jurisdiction with respect to suits for
recovery of rent, as required by Cl. (8)
aforesaid. And as conferring on him the
authority to try this suit—his jurisdiction
having been questioned at the trial—he
has relied upon a Notification of the Gov-
ernment of Bengal, dated 21st June 1904,
which was issued in these words:

It is hereby notified that the Munsifs of Ali-
pore and Sealdah in the District of the 24-Par-
ganas are vested under Cl. (8) of the second
Schedule of the Provincial Small Cause Courts
Act (Act 9 of 1887) with power to try under the
Small Cause Court Procedure suits for the
recovery of rent of homestead land within
their respective jurisdiction when the value
does not exceed Rs. 50.

The Division Bench were of opinion that a Notification such as this, which conferred jurisdiction upon the Court and not upon the Judge, is not a proper Notification under Cl. (8). This was the view taken by Mookerjee and Beachcroft, JJ., of this very Notification in 19 C W N 1236 (1), with which the Division Bench were inclined to agree. They referred to two other decisions as supporting the contrary view: 35 Cal 677 (2); and 19 C W N 1238 (F N) (3). They have formulated the following question for the decision of the Full Bench:

Whether in a Notification under Cl. (8) of the second Schedule of the Provincial Small Cause Courts Act, it is necessary to confer powers by reference to the name of a particular Judge of a Court of Small Causes in order to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court Procedure.

And, as the question has arisen in a civil revision case, the whole case also has been referred to the Full Bench for final decision. Now the foundation for the view that it is necessary to invest the particular officer by name rests upon two arguments: One is that in Cl. (8) the words 'the Judge of the Court of Small Causes' are used; and the other is that the Act makes a distinction between 'Court of Small Causes' and 'Judge of the Court of Small Causes.' On both these grounds it is sought to be maintained that a general notification, by which all presiding officers of such a Court are once for all invested, would not be sufficient for the purposes of the clause. So far as the first of these arguments is concerned it does not seem to me strong enough to support the contention, because I do not see how the use of the words 'the Judge' suggests that the investing of the authority should be by name any more than by reference to the designation. It is quite true that there may be a point in requiring the notification to be made in respect of only such Judges of the Courts of Small Causes as may happen to have special merit deserving the conferment of special authority, as a means of ensuring a proper standard of efficiency in the Court. But at the same time, it is not

unreasonable to assume that the Court itself, by reason of the volume of litigation of the particular type arising within the area covered by its territorial jurisdiction, may be considered deserving of being armed with such special power. And in the latter case the efficiency of the Court will be equally maintained if only the authorities concerned will be careful in their selection of the officer who is to take charge of it. As regards the second argument I am unable to agree that any such distinction as is supposed in it is intended by the Act. To begin with S. 4, that section says:

..... Court of Small Causes means a Court of Small Causes constituted under this Act and includes any person exercising jurisdiction under this Act in any such Court.

The distinction between the Court as an institution and the person who is the presiding officer of the Court—a Judge appointed under S. 6, an additional Judge appointed under S. 8, a Bench of two Judges appointed under S. 10, and the Registrar authorized under S. 12—is not kept in view in this definition. Then, there is a group of Ss. 32 to 35, which speak of "Courts invested with the jurisdiction of a Court of Small Causes," meaning thereby Courts presided over by Subordinate Judges or Munsifs who are invested with Small Cause Court jurisdiction under S. 25, Bengal, N. W. P. and Assam Civil Courts Act (12 of 1887). If the wordings of the said sections of the two enactments, viz. Ss. 32 to 35, Provl. Small Cause Courts Act (9 of 1887), and S. 25, Bengal, N. W. P., and Assam Civil Courts Act (12 of 1887), both of which Acts came into force on 1st July 1887, be compared, it will be seen that, while the former Act describes the Court as being invested with the jurisdiction of the Court of Small Causes, under the latter Act, it is the presiding officer, that is to say Subordinate Judge or the Munsif, who is so invested. So far, therefore, there was no distinction intended by the legislature. But the argument is that Cl. (8), Sch. 2 to the Provincial Small Cause Courts Act should be interpreted on the footing that the legislature means such a distinction. The referring Judges, in agreement with the decision in 19 C W N 1236 (1), have expressed the view that the argument is well founded. Now, in 19 C W N 1236 (1), it has been observed:

1. *Safar Ali Mandal v. Golam Mandal*, 1916 Cal 574=31 I C 177=19 C W N 1236=22 C L J 249.

2. *Akshoy Kumar v. Hiraram*, (1908) 35 Cal 677=7 C L J 407.

3. *Mathur Hazra v. Paban Hazra*, (1914) 19 C W N 1238 (F N).

Clause 8 of the Schedule must be read along with sub-s. 1, S. 15, and when they are so read, it becomes obvious that a distinction is drawn by the legislature between "a Court of Small Causes" and "the Judge of the Court of Small Causes." Cl. 8 requires that the Judge should have been expressly invested with authority to exercise jurisdiction and not that jurisdiction should have been conferred upon the Court. The distinction between the Court as an institution in which the Judge exercises judicial function and the particular individual who presides in that Court is fundamental and well recognized: see for instance S. 6, Small Cause Courts Act.

It is true that there is always a distinction between the Court as an institution and the Judge as the presiding officer of the Court. That is a natural distinction that is to be found in the enactment contained in S. 6 of the Act, and also in various other enactments referred to in 19 C W N 1236 (1). All that S. 6 shows is that when a Court of Small Causes has been established the Local Government shall appoint a Judge of the Court and that the same Judge may be Judge of one such Court or more. And a comparison of sub-s. (1), S. 15 with Cl. (8), Sch. 3, only brings out this difference: that while under the former provision suits of certain classes are excepted from the jurisdiction of all such Courts, suits for recovery of rent, other than house-rent, will not be excepted from the jurisdiction of any particular Court of which the presiding officer, the Judge, has been expressly invested with authority to exercise jurisdiction with respect thereto. The question is whether, when the legislature says, as it does in Cl. (8), Sch. 2, "unless the Judge has been invested," it means that the particular officer who is the Judge at the time should be invested by name and that an investing of the Judge by reference to his office as Judge of the Court will not be sufficient. With all deference I am unable to see that the kind of distinction that is noticeable in the provisions aforesaid would justify us in answering this question in the affirmative.

In 35 Cal 677 (2), it was held by this Court that the expression "the Judge of the Court of Small Causes" in Cl. (8) must be taken to apply either to a Court of Small Causes constituted under the Act or to a Court invested with the jurisdiction of a Court of Small Causes. The authority of this decision has not been, as indeed it cannot be, disputed. This very notification was the one on the

strength of which in that case the Munsif who had not been personally invested, exercised jurisdiction; but the validity or otherwise of the notification on the ground that it did not purport to invest the particular officer by name with the special power was not considered in that case the question was not touched by the reference which this Court was dealing with. In the judgment in 19 C W N 1236 (1), there is a reference to the decision of this Court in 19 C W N 1030 (4). In that case N. R. Chatterjee, J. in the course of his judgment, referred to a general notification issued by the Madras Government under Cl. (8), Sch. 2 to the Act investing all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their Small Cause Court side all suits for rent falling within the pecuniary limits of their special jurisdiction. Beachcroft, J., who, as already stated, was a party to the decision in 19 C W N 1236 (1), far from disapproving of a general notification of the present character, observed thus

But the local Government has authority to vest Judges of Small Cause Courts with powers to try rent suits. No notification has been made vesting Small Cause Court Judges in Bengal in general, nor the Judge of first instance in this particular case, with such powers.

The notification that we are now considering came in for consideration before Jenkins, C. J. and N. R. Chatterjee, J., in 19 C W N 1238 (F N) (3). On the question of its validity the learned Chief Justice observed thus:

The notification is not happily worded and I can appreciate there are difficulties in the way of applying it to this case; still it seems to have been understood in a sense which makes it applicable to this case and we therefore feel that we ought not to interfere and disturb the jurisdiction which apparently has been exercised without question for a considerable number of years.

The facts of the case last cited are not set out in the report. As regards the wording of the notification it is certainly not happy, for it purports to confer powers on all the officers mentioned in it without stating that they would be competent to exercise such powers only in the event of their being posted as Judges of Courts of Small Causes established under S. 5, Provincial Small Cause Courts Act (9 of 1887), or vested with Small Cause Court jurisdiction under S. 25, Ben-

4. Sahodra Mudlali v. Sarbosabha Dasi, 1915 Cal 302=27 I O 258=42 Cal 638=19 C W N 1030.

gal, N. W. P. and Assam Civil Courts Act (12 of 1887). Conceivably, there may be other difficulties as well in the way of applying the notification. But whatever difficulties may arise in other cases, there is none in the application of the notification to cases of the present nature, to which it has been applied ever since 1904. In such circumstances it would not, in my opinion, be right to read it too strictly and declare it invalid. I think I ought to mention here that it does appear that in the course of the arguments in 19 C W N 1238 (F N) (3), the decision in 19 C W N 1236 (1), was cited before the Court: see 18 C W N (Journal) ccxxii.

In my judgment the words "the Judge of the Court of Small Causes," and not the expression "the Court of Small Causes;" were used in Cl. (8), not for emphasizing a distinction of the character suggested in 19 C W N 1236 (1), or in the order of reference, but only as a compendious form of expression which would include not merely Courts of Small Causes as defined in S. 4 but also officers invested with Small Cause Court powers under S. 25, Bengal, N. W. P. and Assam Civil Courts Act (12 of 1887). I am also of opinion that upon the words used in the clause there is nothing which can legitimately form the foundation for the view that in vesting a Judge with authority to exercise special jurisdiction under that clause, it is necessary to confer such authority by reference to the name of the particular Judge. It has been argued before us on behalf of the petitioners that the word "expressly" means that the conferment should be by name. I do not find any authority for this view; and in my opinion the word has been used in contradistinction to "impliedly" and to provide that no conferment of authority by implication will be sufficient. If the legislature intended a conferment of authority by name, such intention could have been easily expressed as, it has been in other enactments; as for instance, in S. 36 (1), Bengal, N. W. P. and Assam Civil Courts Act (12 of 1887), S. 39, Criminal P. C. (5 of 1898), etc. There is authority for the view that no vesting by name is necessary under Cl. (8): 30 Bom L R 741 (5).

My answer to the question formulated for our decision therefore is in the nega-

tive; and the petitioners' contention on the question of jurisdiction should, in my opinion, fail. It has been argued before us in support of the Rule that the plaintiff has not been successful in making out his title to the rents, because he has failed to establish that the jama in suit is included in the share of mauzah Mayapur which the plaintiff has purchased. This contention is sufficiently negated by the very clear findings which the Munsif has arrived at and recorded in his decision. The learned Munsif has observed that though it does not appear very conclusively that the jama lies within mouzah Mayapur, still there is ample documentary evidence satisfactorily establishing that a jama corresponding to the one in suit has been, from ancient times, held by the defendants' predecessors under the plaintiff's predecessors; that there is not a scrap of documentary evidence in support of the lakheraj title which the defendants set up; and that the relationship of landlord and tenants as between the plaintiff and the defendants has been established. A plea of limitation has also been urged. It is conceded that the plea is well founded. That plea succeeding, the plaintiff can get a decree in respect of his claim for three years only and not four. The decree will have to be modified accordingly. The Rule should be made absolute to the extent indicated above. No order for costs in this Court.

Jack, J.—The question referred to this Bench for decision is:

Whether in a notification under Cl. 8, Sch. 2, Provincial Small Cause Courts Act, it is necessary to confer powers by reference to the name of a particular Judge of a Court of Small Causes in order to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court Procedure.

It arises out of the trial of a suit for recovery of rent of homestead land for the years 1337 to 1340 B. S. in the Court of the third Munsif of Alipore in which one of the defences raised by the defendants was that the suit was not triable under the Small Cause Court Procedure because the Munsif had not been expressly vested with powers to try such suits under that procedure. Under Art. 8, Sch. 2, Small Cause Courts Act, a suit for the recovery of rent other than house rent is excepted from the cognizance of a Court of Small Causes unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority

to exercise jurisdiction with respect thereto. In the present case the third Munsif of Alipore, Mr. Ahmed, has been invested by the Local Government under S. 25, Act 12 of 1887, with the powers of a Court of Small Causes for the trial of suits cognizable by such Courts up to the value of Rs. 50, but he has not been personally invested with powers to try suits for the recovery of rent other than house rent. He is exercising this jurisdiction only by virtue of a notification of the Government of Bengal dated 21st June 1904 as follows :

It is hereby notified that the Munsifs of Alipore and Sealdah in the district of the 24-Parganas are vested under Cl. (8), Sch. 2, Provincial Small Cause Courts Act (Act 9 of 1887) with power to try under the Small Cause Court Procedure suits for the recovery of homestead land within their jurisdictions when the value does not exceed Rs. 50.

The question then is whether as a Munsif of the third Court, Alipore, the Munsif can be said to have been expressly invested by the Local Government with jurisdiction to try the suit for recovery of the rent of homestead land, clearly he has been expressly invested with this jurisdiction by his appointment as Munsif of Alipore which, under the notification, includes the jurisdiction. In 19 C W N 1236 (1) a contrary view was taken on the ground that the notification merely invested the Court of the Munsif with jurisdiction, but this is clearly not correct for the notification expressly invested the Munsifs of Alipore with the jurisdiction and not merely the Courts at Alipore. This was recognized in 19 C W N 1238 (F N) (3), Civil Rule 500 of 1914, in which their Lordships Jenkins, C. J. and N. R. Chatterji, J., remark that the notification seems to have been understood in a sense which makes it applicable, and they therefore feel they ought not to disturb the jurisdiction which apparently had been exercised without question for a considerable number of years. This was in 1914 (13th July), 10 years after the notification, and there seems to have been no doubt that the notification conferred jurisdiction until the judgment of their Lordships Mukerji and Beachcroft nine days later (21st July 1914) based, I think, with all due respect, on a misreading of the terms of the notification which invests with jurisdiction not the Alipore Court but the Munsifs who preside in those Courts. The objection

was clearly not to the general form of the notification because one of the learned Judges Beachcroft, J. in another case, 19 C W N 1030 (4) referred to in the judgment, suggests that the Bengal Government might have made a notification vesting Small Cause Court Judges in general in Bengal with such powers. I, therefore, agree with my learned brother Mukerji, J. that the question referred to the Bench should accordingly be answered in the negative. On the merits of the case since it has been found on the evidence that relationship of landlord and tenant exists, and that the rent is due, there is no ground for interference with the decree except as regards the rent of the 1st year which is admittedly barred by limitation and I agree that the decree must be modified accordingly.

D. N. Mitter, J.—The question which has been referred to the Full Bench for decision is framed in the following terms:

Whether in a notification under Cl. (8), Sch. 2, Provincial Small Cause Courts Act, it is necessary to confer powers by reference to the name of a particular Judge of a Court of Small Causes in order to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court Procedure.

This reference has arisen in a rule obtained by the defendant under S. 25, Provincial Small Cause Courts Act (Act 9 of 1887), for the revision of a decree of Mr. Ahmed, the third Munsif of Alipore exercising the powers of a Court of Small Causes. It appears that Nagendra Nath Palit brought a suit valued at about Rs. 13 odd for recovery of arrears of rent with respect to homestead land for the years 1337 to 1340 B. S. in the Court of the said Munsif. Two defences were taken by defendant (1) that the Court has no jurisdiction to try the suit as Mr. Ahmed was not personally invested with powers to try suits for rent of homestead lands of the value of Rs. 50 or under, (2) that there is no relationship of landlord and tenant between the parties. The Munsif exercising the powers of the Court of Small Causes rejected both the defences and decreed the plaintiff's suit. The defendant obtained a rule on several grounds including the ground of want of jurisdiction of the trying Court to entertain the suit and including a further ground which was not raised in the Court below viz., that a portion of the plaintiff's claim was barred by limitation. As there was a conflict of opinion regarding the

question of jurisdiction and as this question arises in a civil revision case the whole case is referred for the final decision of the Full Bench under Cl. 4, Ch. 7, Appellate Side Rules. The question of jurisdiction referred to the Full Bench depends on the construction of the provision of S. 15, Small Cause Courts Act, read with Cl. 8, Sch. 2. Under S. 15 a Court of Small Causes shall not take cognizance of the suits specified in Sch. 2 as suits excepted from the cognizance of a Court of Small Causes, and it is further enacted by Cl. (2) of that section that :

Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

Under Cl. (8), Sch. 2 :

A suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto,

has been exempted from the jurisdiction of the Small Cause Court. The defendant contends that the Munsif who is the Judge of the Court of Small Causes in this case has not been expressly invested by the Local Government with authority to exercise jurisdiction in the matter of suits for the recovery of the rent of homestead lands and that, therefore, he has no jurisdiction to try the suit. The plaintiff on the other hand contends that the said Munsif with powers to try under Small Cause Court Procedure has been expressly invested to try such suits for the recovery of rent of homestead lands under Rs. 50 under the notification of 21st June 1904 although Mr. Ahmed, the trying Munsif, has not been personally invested with such jurisdiction. The Notification of the Government of Bengal, dated 21st June 1904, is in these terms :

It is hereby notified that Munsifs of Alipur and Sealdah in the district of 24-Perganas are vested under Cl. 8, Sch. 2 Provincial Small Cause Courts Act (9 of 1887), with power to try under the Small Cause Court Procedure, suits for the recovery of rent of homestead lands within their respective jurisdictions, when the value does not exceed Rs. 50.

The defendant replies that this notification is of no avail for the special authorization contemplated by Cl. 8 is entirely personal to the presiding Judge and he relies on the case in 19 C W N 1236 (1), in support of this view. 19 C W N 1236 (1) undoubtedly supports the con-

tention of the defendant-petitioner. On the other hand the plaintiff opposite party relies on a decision of Sir Lawrence Jenkins, C J., and N. R. Chatterji, J., in 19 C W N 1238 (F N) (3), where the learned Chief Justice observed as follows with regard to the effect of this notification :

The Notification is not happily worded and I can appreciate there are difficulties in the way of applying it to this case ; still it seems to have been understood in a sense which makes it applicable to this case and we therefore feel that we ought not to interfere and disturb the jurisdiction which apparently has been exercised without question for a considerable number of years.

On the other hand the reasoning of Mukerji and Beachcroft, JJ., in 19 C W N 1236 (1), is expressed in the following language:

Clause 8 of the schedule must be read along with sub-s. 1 of S. 15 and when they are so read, it becomes obvious that a distinction is drawn by the Legislature between 'a Court of Small Causes' and 'the Judge of the Court of Small Causes.' Cl 8 requires that the Judge should have been expressly invested with authority to exercise jurisdiction, and not that jurisdiction should have been conferred upon the Court. The distinction between the Court as an institution in which the Judge exercises judicial function and the particular individual who presides in that Court is fundamental and well recognised;

and again the learned Judges proceed :

It is clear upon a clear reading of Cl. 8 and assigning to the term its natural meaning, that the Legislature intended that suits for the recovery of rent should be tried under the Small Cause Court Procedure, only by such Judges as had been expressly authorised to exercise jurisdiction in that behalf, it was not intended that jurisdiction should be conferred by a general order on a particular Small Cause Court irrespective of the qualifications by the individual officer who may preside therein.

It has been said that in some of the provisions of the Small Cause Courts Act a distinction is drawn between a Court of Small Causes and a Judge of a Court of Small Causes, and we were referred to S. 6, Provincial Small Cause Courts Act. S. 4 comes before S. 6 of the Act and under S. 4 which is the definition section, unless there is something repugnant in the subject or context "Court of Small Causes" means a Court of Small Causes constituted under this Act and includes any person exercising jurisdiction under this Act in any such Court.

The distinction between the Court as an institution and the person who is the presiding officer of the Court which runs through S. 6, S. 8, S. 10 and S. 12 is not observed in S. 4. Under S. 4 the Munsif of Alipore would be a person exercising jurisdiction under this Act in any such

Court for under Cl. 8, Sch. 2, all Munsifs of Alipur exercising Small Cause Court powers have been expressly invested by the Local Government under the Notification of June 1904. The word "expressly invested" is used in contradistinction to the word "impliedly" or "inferentially". The word "expressly" in Webster's dictionary is stated to mean "in the express, direct or pointed manner, in direct terms, plainly" and the word 'Express' means according to Webster "directly stated; not implied or left to inference; distinctly or pointedly given, made unambiguous by special intention." In Chamber's Dictionary the word 'Express' means "pressed or clearly brought out, exactly representing, directly stated, explicit, clear, intended or sent for a particular purpose". In construing an Indian Statute as an English Act of Parliament the ordinary sense of the words must be looked into and Dictionaries have to be consulted. As Lord Coleridge, C. J. observed in 16 Q B D 636 (6) at p. 641:

I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of Courts of law that words should be taken to be used in their ordinary sense and we therefore sent for instruction to these books.

The word "expressly invested" is not equivalent to "invested by name". This view has been adopted in Bombay in a recent case with reference to Cl. 8 and it has been held that it is not necessary to invest the powers by a reference to the name of a particular Judge: See 1928 Bom 265 (5). The view I am taking receives considerable support from a Full Bench of the Madras Court in 23 Mad 547 (7), where Sir Arnold White, C. J. observed as follows with reference to a Notification much more general in terms than the Notification of 21st June 1904:

Amongst excepted suits specified in the Schedule are suits for the recovery of rent other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto (article 8). By a Notification dated 24th January 1888, the Madras Government has invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their small cause side all suits for rent falling within the pecuniary limits of their special jurisdiction.

The effect of Art. 8 and the notification read together is to give a Judge jurisdiction to entertain a suit for rent as a small cause suit provided (i) he is a Judge of a class to whom the notification applies, and (ii) the amount claimed is not beyond the pecuniary limits of his special jurisdiction.

I am of opinion that the Notification of June 1904 although not very happily expressed is in substantial compliance with the provision of Cl. 8, Schedule 2, of the Small Cause Courts Act; that it is in accordance with the Notification under Cl. 82 in Madras—Notification which was issued so far back as 1888—that it is consistent with the notification issued under the same clause in Bombay—Notification which has been enforced since September 1911: see 41 Bom 367 (8), and has been acted upon in Bengal since 1904 notwithstanding the decision of Mookerji and Beachcroft, JJ. in 19 C W N 1236 (1). It seems to me that the intention of the Legislature was that if the Judge of the Court of Small Causes was an officer invested with jurisdiction to try Small Cause Court suits up to a certain limit, viz. whether a Munsif or a Subordinate Judge of a particular district, and if such officers were expressly invested by reference to a class of such officers with powers to try suits for rent of homestead lands by a Notification of the Local Government, such a notification would not be ultra vires of the statute but would be in substantial compliance with it.

For the aforesaid reasons I would answer the question referred to the Full Bench in the negative. The next point argued before us is that the Small Cause Court Judge has committed an error in law in coming to the conclusion that the relationship of a landlord and tenant exists between the parties. This is a pure question of fact and is supported by documentary evidence filed on behalf of the plaintiff. This finding cannot be assailed in revision under S. 25 of the Act. A plea of limitation has been raised for the first time before the High Court. Such a plea is permissible under S. 3, Limitation Act. It appears that the suit has been brought for four years' rent; as the case is not governed by the Bengal Tenancy Act it has been conceded on behalf of the opposite parties that the claim for rent beyond three years of the date of

6. Queen v. Peters, (1886) 16 Q B D 636=55 L J Mc 173=54 L T 545=34 W R 399=16 Cox C C 86.

7. Soundaram Ayyar v. Sennia Naicken, (1900) 23 Mad 547=10 M L J 329 (F B).

8. Ram Krishna Yeswant v. The President Vengurla Municipality, 1916 Bom 106=38 I C 881=41 Bom 867=19 Bom L R 83.

the institution of the suit is barred by limitation. The plaintiff's claim for the year 1337 B. S. must be dismissed. The decree of the Small Cause Court Judge will be varied accordingly.

S. K. Ghose, J.—The question referred to the Full Bench is:

Whether in a notification under Cl. (8) of Sch. 2, Provincial Small Cause Courts Act, it is necessary to confer powers by reference to the name of a particular Judge of a Court of Small Causes in order to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court Procedure.

The reference arises out of an application made by the defendants under S. 25, Provincial Small Cause Courts Act, against a decree in a suit for recovery of arrears of rent of homestead land situated within a Municipality. The suit was tried by Mr. S. Ahmed, Munsif of the Third Court at Alipore, under the Small Cause Court Procedure and one of the defences was that this procedure was not applicable. It appears that under S. 25, Bengal, Agra, and Assam Civil Courts Act 12 of 1887 the Local Government had by notification conferred upon Mr. Ahmed personally the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 for the trial of suits cognizable by such Courts up to the value of Rs. 50. There is also a notification issued by the Local Government on 21st June 1904 which runs thus:

It is hereby notified that the Munsifs of Alipore and Sealdah in the district of the 24-Parganas are vested under Cl. (8) of Sch. 2, Provincial Small Cause Courts Act (Act 9 of 1887), with power to try under the Small Cause Court Procedure suits for the recovery of homestead land within their respective jurisdiction when the value does not exceed Rs. 50.

The point is whether this notification is sufficient to confer upon Munsifs of Alipore and Sealdah in general and upon Mr. Ahmed in particular jurisdiction to try a suit for recovery of rent, other than house rent, under the Small Cause Court Procedure. The answer would be in the affirmative, it is contended, in accordance with the decisions in 35 Cal 677 (2), and 19 C W N 1238 (F N) (3); but it would be in the negative in accordance with the decision in 19 C W N 1236 (1). In the referring judgment Nasim Ali, J. states that he is inclined to take the latter view. Now, sub-s. (1) of S. 15, Provincial Small Cause Courts Act 9 of 1887, runs thus:

A Court of Small Causes shall not take cognizance of the suits specified in Sch. 2 as suits

excepted from the cognizance of a Court of Small Causes.

Schedule 2 is headed "suits excepted from the cognizance of a Court of Small Causes," and Cl. (8) runs thus:

A suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto.

That there is a distinction made between a "Court" and a "Judge of the Court" is quite clear and it is borne out by the other provisions of the Act. Under S. 4:

"Court of Small Causes" means a Court of Small Causes constituted under this Act and includes any person exercising jurisdiction under this Act in any such Court.

Therefore, the expression "Court of Small Causes" under the Act would include the Judge presiding in the Court; in other words "unless there is something repugnant in the subject or context," a provision in the Act relating to a Court of Small Causes would apply also to the Judge. On the other hand "Judge" is not defined and "the Judge of the Court of Small Causes" (to use the expression in Cl. 8) is not necessarily an officer appointed under S. 6 of this Act, but may be an officer invested with powers under S. 25, Civil Courts Act 12 of 1887. In this connexion it may be noted that the natural distinction between a Court and a Judge as a person is recognized and maintained in the Provincial Small Cause Courts Act as a glance at Chap. II will show. Thus under S. 5 the Court may be established; under S. 6, the Judge may be appointed and he may be Judge of more than one Court; under S. 9, the Judge is liable to suspension or dismissal; and so on. S. 31 provides that a Judge of a Court of Small Causes may be appointed to some other office. Mr. Bose for the plaintiff opposite party has contended that the distinction is lost sight of in Ss. 32 and 33, but these two sections deal with the Court only and indeed the argument does not help Mr. Bose. So in the material Cl. (8), Sch. 2 it is the Judge that is the presiding officer of the Court who must be "expressly invested," with the necessary authority.

The next point is, what is a Munsif? Is he a Court or is he a person? Here again the provisions of Act 12 of 1887, which came into force on the same date as Act 9 viz., on 1st July 1887 preserve the natural distinction between an officer and the holder

of the office. See for instance, Chap. 2 of the Act. S. 3 gives the four classes of Courts and S. 4 provides for the number of Judges and Munsifs. The succeeding sections deal with the different classes of officers, Ss. 7 and 12 in particular deal with Munsifs. S. 13 provides for the local limits of the jurisdiction of Courts while S. 19 deals with the jurisdiction of a Munsif. Chap. V deals with misfeasance which is purely personal to the officers concerned. The same distinction is seen in S. 38 which speaks of the presiding officer and S. 39. So far as the material S. 25 is concerned, its terms ensure that a particular Subordinate Judge or Munsif shall be given the necessary jurisdiction. But in Cl. (8), Sch. 2, Provincial Small Cause Courts Act, the terms require that the Judge of the Court shall be invested. Where a Munsif of Alipore is the Judge, and a notification like the one of 21st June 1904 invests such a Munsif with the necessary jurisdiction, it would seem to be sufficient compliance with the law. The case in 35 Cal 677 (2) did not touch the point at issue now. It merely held that Cl. (8), Sch. 2, would apply either to a Court of Small Causes constituted under the Act or to a Court invested with the jurisdiction of a Court of Small Causes. On the other hand, in C. R. 500 of 1914, 19 C W N 1238 (F N) (3) the material question came up expressly before Jenkins, C.J., and N. R. Chatterjea, J. The learned Judge said :

The notification (of 21st June 1904) is not happily worded and I can appreciate there are difficulties in the way of applying it to this case; still it seems to have been understood in a sense which makes it applicable to this case, and we therefore feel that we ought not to interfere and disturb the jurisdiction which apparently has been exercised without question for a considerable number of years.

What is stated here is almost a principle of *factum valet*, though not quite. On the other side is the decision in the case in 19 C W N 1236 (1), which the referring Judges are inclined to follow. In that case the judgment proceeded by first pointing out that a distinction is drawn by the legislature between a "Court of Small Causes" and a "Judge of the Court of Small Causes," and next that Cl. (8) requires that the Judge should have been expressly invested with authority to exercise jurisdiction. The judgment proceeds :

It is clear upon a clear reading of Cl. (8) and assigning to the term its natural meaning, that

the legislature intended that suits for the recovery of rent should be tried under the Small Cause Court Procedure, only by such Judges as had been expressly authorised to exercise jurisdiction in that behalf, it was not intended that jurisdiction should be conferred by a general order on a particular Small Cause Court, irrespective of the qualification of the individual officer who may preside therein.

The judgment however did not go further and discuss the question whether a Munsif is a Court or an officer, in other words a Judge of the Court. Undoubtedly the notification of 21st June 1904 is not happily worded as pointed out by Jenkins, C. J. and N. R. Chatterjea, J. It also overlooks the question of the qualifications of the individual officer as pointed out by Mookerjea and Beachcroft, JJ. Still the notification confers the authority on the Judge when the latter belongs to a particular class of Munsifs. Therefore it complies with the terms of Cl. (8). It has been sought to be argued that the word "expressly" means "by name." There is no authority cited beyond the fact that in some cases Government have invested the officer by name. On the other hand, Government have also invested officers with powers *ex officio*. See for instance the list given at p. 588 of the Bengal Civil List up to 1st January 1936 showing various investments of powers *ex officio* in the case of certain Judicial Officers of the 24-Perganas, e. g. the Judge of the 24-Perganas is *ex officio* special Judge in that district under S. 115 (c), B. T. Act, which enacts that "the Local Government shall appoint one or more persons to be special Judge, etc." In such cases, to quote the language of Jenkins, C. J. "it seems to have been understood in a sense which makes it applicable to such particular case. On the other hand, the word "express" is defined thus in Wharton's Law Lexicon : "that which is not left to implication as express promise, express covenant." This is not dissimilar to the ordinary dictionary meaning (Oxford Dictionary) "definitely stated, not merely implied." This was the view taken by Patkar and Baker, JJ. in 30 Bom 741 (6) relying on 35 Cal 677 (2). Thus a notification investing the Judge of a particular Court of Small Causes in a particular district would be express enough to satisfy clause (8), though the name of the Judge is not mentioned. Yet the notification of 21st June 1904 is really not different from that. There are also such provisions as Section 36 of Bengal Act XII of 1887, where.

by the " Local Government may invest with the powers of any Civil Court under this Act by name or in virtue of office" etc. In my judgment, the question referred to the Full Bench for decision should be answered as follows: "In a notification under Cl. (8), Sch. 2, Provincial Small Cause Courts Act it is not necessary to confer powers by reference to the name of a particular Judge of a Court of Small Causes in order to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court Procedure." On the merits of the case, it is conceded that one year's rent is barred by limitation and the decree must be modified accordingly. In other respects there is no case for interference.

Patterson, J.—I concur in the judgment of my learned brother Mukerji, J., and have nothing to add.

V.B./R.K. *Reference answered in negative.*

*** A. I. R. 1936 Calcutta 506**
FULL BENCH

M. N. MUKERJI, JACK, D. N. MITTER,
S. K. GHOSE AND PATTERSON, JJ.

Nirode Chandra Mukherjee and others
—Plaintiffs—Appellants.

v.

Chairman of Commissioners of Kamarhati Municipality—Defendants—Respondents.

Full Bench Ref. No. 1 of 1936. Decided on 1st May 1936, from appellate decree of Addl. Dist. Judge, 24 Parganas, D/- 12th June 1933, in A. F. A. D. No. 1621 of 1933.

* (a) Bengal Municipal Act (3 of 1884 as amended by Act 4 of 1894), Ss. 30 and 22—Inserting words "including the subsoil and all" do not disjoin "not being private property etc." by which "all roads" is governed: 9 I C 562 and 62 Cal 692=163 I C 109: Overruled.

By inserting the words "including the subsoil and all" between the words "roads and bridges" in the opening sentence of S. 30 the legislature did not intend to disjoin the clause "not being private property, etc.", by which the words "all roads" had been governed all along since 1864. All that the legislature intended to do by the enactment was to include the vesting of the soil along with the surface of the road on the resting that takes place under S. 30 of the Act: 33 Cal 1290, *Foll.*; 1917 Cal 629, *Ref.*; 9 I C 562 and 62 Cal 692=163 I C 109, *Overruled*; *English cases referred.*

[P 510 C 1, 2]

(b) Bengal Municipal Act (15 of 1932), S. 95—S. 95 does not make any substantial

change in rights of Municipality in such pathway as Act 3 of 1884 deals with.

Section 95, Bengal Municipal Act, 15 of 1932, has not, beyond doing away with the definition of 'road' as contained in the Act of 1884 which led to some confusion and difference of opinion and introducing two definitions of 'private street' and 'public street' S. 3, Cl. (43) and S. 3 Cl. (44), which more precisely define the owners of the land concerned, has not made any substantial change in the rights of the Municipality in such pathways as the Act purports to deal with. [P 512 C 2]

(c) Interpretation of Statutes—Grammatical construction producing inconsistent results—Construction applying more consistently to Act in all parts is to be preferred.

A grammatical construction, which is open to so many objections and produces results which are unsatisfactory, can hardly be preferred to a construction, which though not strictly grammatical, applies more consistently to the Act, in all its parts: *Easter Counties & Cos. v. Marriage*, (1860) 9 H L C 32, *Ref.*

[P 512 C 1]

(d) Bengal Municipal Act (4 of 1884 as amended by Act 4 of 1894), S. 30—Road over which public have right of way vest in Municipality under S. 30.

Roads over which the public have a right of way, if they are not private property, vest in the Municipality under S. 30 of Act 3 of 1884, as amended by Act 4 of 1894: *Case law discussed.* [P 513 C 1]

Panchanan Ghose, Rama Prosad Mukhopadhyay, Sourindra Narain Ghose and Paresh Nath Mukherjee—for Appellants.

Bijan Kumar Mukherjee, Benoyendra Prosad Bagchi and Sourindra Kumar Ghose Chowdhury—for Respondents.

M. N. Mukerji, J.—The suit in connexion with which this reference has been made was in respect of a strip of land, said to be about 616 sq. ft. in area. The strip is in continuation of a public road known as the Pithuri Ghat Road, and is bounded on the east by an admittedly public road and on the west, by a pucca bathing ghat. In the plaint it is stated that there is a burning ghat adjoining the bathing ghat. On the north and south of the strip of land are admittedly lands belonging to the plaintiffs. It is also stated in the plaint that the said strip of land and the two ghats are private properties of the plaintiffs, belonging solely to them in rent-free right. The cause of action for the suit was described in the plaint as follows:

" The defendant Municipality has of late been trying to convert the plaintiffs' land into a Municipal road, and with that fraudulent object in view, is about to open up the disputed land so

that 'solings' (i. e., bricks) and khoa (i. e., brick-bats) may be spread for making the same into a part of Pithuri Ghat Road."

The substantial prayers in the plaint were: that the plaintiffs' title to the strip of land be declared and that it be also declared that the defendant Municipality has no right, title or interest in the same or to open any road through the same, and also that an injunction might issue restraining the defendant Municipality from interfering with or disturbing the plaintiffs' possession of the said strip of land and from opening any road or passage through the same. The defendant Municipality in their written statement, besides taking other defences, denied the plaintiffs' title to and possession in the said strip of land and alleged in substance, that the same was a part and parcel of the Pithuri Ghat Road which belongs to the Municipality. It was further alleged that the ghats were public ghats and that the said strip of land is a road and is the only access to the bathing ghat and has all along been maintained by the Municipality.

The Munsif dismissed the suit, holding that the plaintiffs had failed to establish their title to the suit land and that the same was a part of the public road named the Pithuri Ghat Road and as such had vested in the defendant Municipality. The Additional District Judge, on appeal by the plaintiffs, held that the plaintiffs' title was made out. He held however that the strip of land was a public road or a public street, the evidence making it clear that:

The public in general and not the residents of the neighbourhood only have a right of way over the strip of land in question, and there is no instance of any member of the public having been disallowed the use of the strip of land as road.

On this finding he held that under S. 95, Bengal Municipal Act of 1932, which came into force on 1st December 1932, the strip of land, being admittedly a "public street" as defined in the Act, had become the property of the Municipality under S. 95 of the Act. He observed that even if it be held that the land, being private property, had not vested in the Municipality under S. 30, Bengal Municipal Act of 1894, and a declaration to that effect be made in favour of the plaintiffs the Municipality would be able to get rid of the declaration by

instituting a separate suit for that purpose and relying on S. 95, Bengal Municipal Act of 1932. On this view of the matter the learned Judge affirmed the decision of the trial Court, dismissing the suit. The plaintiffs then preferred a second appeal to this Court. The Division Bench which heard the appeal has referred it to the Full Bench with the following order:

As we dissent from the decision pronounced by a Division Bench in 43 Cal 130 (1), under R. 2, Ch. 5 of the Appellate Side Rules we refer the appeal for the decision of the Full Bench and frame the following questions for decision: (1) Do roads over which the public have a right of way in a Municipal area vest in the Municipal Commissioners? (2) Was 43 Cal 130 (1) correctly decided?

The learned referring Judges in the order of reference have observed thus:

Our view is that under S. 30, Act 3 of 1884, as amended in 1894 a road including the subsoil vests in the Municipal Commissioners if the pathway is one over which the public have a right to pass. The phrase "not being private property" in that section, in our opinion, qualifies the words "bridges, tanks," etc., only. In our judgment, this is the grammatical interpretation of the section as amended, and if any other interpretation were given we should find it impossible to attach any meaning to the words "and all." This was pointed out by Coxe, J. in 9 I C 562 (2), which decision was followed by Nasim Ali, J. in 62 Cal 692 (3). We are however pressed by the decision of a Division Bench in 43 Cal 130 (1), where Fletcher and Richardson, JJ. following an obiter dictum made in 33 Cal 1290 (4), have held otherwise. We are of opinion, for the reasons stated above, that the said case has been wrongly decided and consider that Cl. (a), S. 95, Act 15 of 1932, has made no change in the law but it is of a declaratory nature, and that the decision of the Courts below is correct.

To deal with this reference I propose first of all to examine some of the provisions of the Bengal Municipal Act 3 of 1884. S. 6, Cl. (13) of the Act, in defining the word "road," says:

In this Act, unless there be something repugnant in the subject or context, "road" means any road, street, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of way.

Paragraph 1, S. 30 of the Act, prior to its amendment by Act 4 of 1894, ran thus:

1. Chairman, Howrah Municipality v. Hari Das Dutt, 1917 Cal 629=33 I C 271=43 Cal 130=20 C W N 613.
2. Kumud Bandhu Das Gupta v. Kishori Lal Goswami, (1911) 9 I C 562.
3. Beer Bikram Kishore Manikya v. Chairman, Comilla Municipality, (1935) 62 Cal 692 = 163 I C 109.
4. Chairman, Howrah Municipality v. Kshetra, Krishna Mitter, (1906) 33 Cal 1290=10 C W N 1044=4 C L J 349.

All roads, bridges, tanks, ghats, wells, channels and drains in any Municipality (not being private property and not being maintained by Government or at the public expense), now existing or which shall hereafter be made, and the pavements, stones and other materials thereof, and all the erections, materials, implements and other things provided therefor, shall vest in, and belong to, the Commissioners.

And S. 31 of the Act was in these words :

The Commissioners at a meeting may agree with the person in whom the property in any road, bridge, tank, ghat, well, channel or drain is vested to take over the property therein or the control thereof, and after such agreement may declare by notice in writing put up thereon or near thereto that such road, bridge, tank, ghat, well, channel or drain has been transferred to the Commissioners. Thereupon the property therein or the control thereof (as the case may be) shall vest in the Commissioners, and such road, bridge, tank, ghat, well, channel or drain shall thenceforth be repaired and maintained out of the Municipal fund.

On a plain reading of the three provisions just quoted it seems to me clear that 'roads' as defined in the Act, that is to say, roads over which the public have a right of way [S. 6, Cl. (13)], prior to Act 4 of 1894, could be either not private property (S. 30) or property vested in some person (S. 31). The words

not being private property and not being maintained by Government or at the public expense have been explained by this Court, and in my opinion rightly, in 33 Cal 1290 (4) thus:

The phrases connected by the conjunction 'and' must be taken distributively.

Giving this meaning to the words, there can be no question that S. 30, as it stood before Act 4 of 1894, meant that all roads over which the public have a right of way shall vest in the Commissioners, but roads being private property shall not so vest and roads maintained by Government or at the public expense shall also not vest. It is also clear that under S. 31 roads over which the public have a right of way but the property in which is vested in some person, or, in other words, which are private property, may be dealt with by agreement between such person and the Commissioners with the result that the property therein or the control thereof, as the case may be, may be taken over by the Commissioners. It is quite true that the Legislature was not particularly careful in drafting some of the sections of the Act, e. g. S. 217 in Cl. (1) of which the expression 'public road' issued, as the word 'public' therein would be redundant

if the definition of 'road' as given in the Act is remembered, while in Cl. (5) thereof the word 'road' only is used. But it seems fairly clear that the legislature, while enacting Ss. 30 and 31, was dealing with two classes of roads in the Act, in both of which the public had a right of way, and one of which was private property and the other not private property. If that was so, the only meaning that can reasonably be attributed to the word 'public' in the definition of 'road' in section 6 (13) is that the word must have been used by the legislature not in its strict sense as meaning the public in general, but only in a loose sense, including in its category sections of the general public or strangers or outsiders, that is to say, persons other than the owner of the land on which the road runs. The Act, in my opinion, purported to deal with roads over which any of such bodies had a right of way, and left untouched such roads which were private pathways over which the owners thereof and none else had any right of way.

In such roads as the Act brought within its purview, the owner of the land itself might have his rights of ownership subject to the right of the land itself, might have lost his rights of ownership therein to the extent that it was a road, in which case it was not a private property. In the latter case the road vested in the Commissioners under S. 30 of the Act; and in the former case the Commissioners could, by way of agreement, take over the property in the road qua road or its control under S. 31 of the Act. That the Act does deal with roads over which the public have a right of way but to which S. 30 does not apply and which accordingly do not vest in the Commissioners cannot be disputed, 17 Cal 680 (5) at p. 684. The general law relating to the rights of the owner of the land vis a vis the persons who use the land as road, apart from the provisions of the Act, is the same in India as in England. There may be acquisition of a right of way by prescription by individuals as well as groups of individuals. Or it may be that there has been a dedication to the public, express or implied. As observed in 33 Cal 1290 (4):

Where the owner sets apart land for the use of the public and formally declares that such

5. Ram Chandra Ghose v. Bally Municipality, (1890) 17 Cal 680.

is his intention or he conveys lands to a Municipality or to trustees to hold for the use of the public, an implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made, but rather on the principle that the owner having allowed the public to enjoy the user for any particular purpose is estopped from denying the right of the public to this enjoyment of such user In cases, however, where the dedication is not express but merely implied, and consequently there is no deed defining the extent of the rights created by the dedication, a question may arise as to whether the dedication is of the entire ownership in the land or merely of the right of user, because a dedication is a devotion to public uses, either of the land itself or of an easement in it by any unequivocal act of the owner of the fee manifesting such clear intention. An owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner; nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated.

To constitute a dedication of a way to the public by an owner of the soil there must be an intention so to dedicate, and user by the public is evidence of such intention; there may be dedication of a way to the public for a limited purpose, as for a footway, but there cannot be a dedication to a limited part of the public: (1843) 11 M & W 827 (6). And in order to establish that a road is a public road it is sufficient, if acts of user by the public are shown to have been acquiesced in by the owner of the land over which the road passes and these acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as a public highway: 6 C L R 282 (7), referring to 2 Sm L C 10th Edn 157 (8). Such being the law, there may be roads over which the public have a right of way and yet the road qua road may still be private property. But upon the finding at which the Court of appeal below has arrived and to which I have already referred, namely that the public in general and not the

residents of the neighbourhood only have a right of way over the strip of land in question and that there has been no instance of any member of the public having been ever disallowed the use of the strip of land as road, there can be no room for the contention that the road qua road is still the private property of the plaintiffs. If the case had to be dealt with under Act 3 of 1884 prior to the amendment introduced by Act 4 of 1894, there could be no question whatever that S. 30 of the Act would have applied to the road in question. The question, however, is whether the latter Act introduced any change in the law. In the District Municipal Improvement Act (3 of 1864), there was in S. 2 the following definition of "Highway":

The word "Highway" shall mean any road, street, square court, alley or passage, whether a thoroughfare or not, over which the public have a right of way; and also the road way over any public bridge or causeway.

And in S. 10 of the Act it was said that all public highways 'not being private property' shall vest in and belong to the Municipal Commissioners, while under S. 11 the Commissioners could by agreement with the person in whom the property in any highway was vested, take it over so as to vest it in themselves. In the next Act, the Bengal Municipal Consolidation Act (5 of 1876), 'road' was defined in precisely the same words in which it was defined in the later Act, the Bengal Municipal Act (3 of 1884), the word 'Highway' being abolished. The reason for such abolition probably was that the technical meaning attributed to the word by the English Highway Act of 1835 was not considered suitable to this country. Ss. 32 and 33 of the Act made similar provisions, except for the inclusion of other things, namely, bridges, embankments, tanks, ghats, wharves, jetties, wells, channels and drains, as there were in Ss. 10 and 11 of the previous Act. These provisions were produced in Ss. 30 and 31 of Act 3 of 1884. It seems noteworthy that in all the three Acts of 1864, 1876 and 1884, the same distinctive feature has all along remained present, namely that notwithstanding that each of these Acts brought within its purview all roads, over which the 'public' had a right of way, a distinction was made and kept up all through as between roads which were not private property and roads the pro-

6. Poole v. Huskinson, (1843) 11 M & W 827=152 E R 1039=63 R R 782.

7. Anderson v. Jagadamba Debi, (1880) 6 C L R 282.

8. Dovaston v. Payne, (1795) 2 Sm L C 10th Edn. p. 157=2 H Bl 527=3 R R 497.

perty in which remained vested in the owners of the land itself.

Two cases came up before the High Court, one under the Act of 1876 and the other under the Act of 1864. In the former of these cases, 13 Cal 171 (9), the Municipality claimed compensation money awarded under the Land Acquisition Act for the whole of the soil of what was found to be a public road, on the ground that they had a title to the property under S. 32 of the Act of 1876, while the Zemindar claimed it on the ground that notwithstanding that the road was a public road the soil was his. Following the decision in 7 Q B 47 (10), it was held that "road" in S. 32 of the Act did not mean everything above and below the road and that the sub-soil, therefore, did not belong to the Municipality. In the second case it was held similarly that S. 10, Act 3 of 1864 did not deprive a person of any right of private property that he may have in land used as a public road, nor did that section vest the sub-soil of such land in a Municipality, and that when such land was no longer required as a public road the owner was entitled to recover possession. In this last mentioned decision reliance was placed on the earlier decision in 13 Cal 171 (9) and reference also was made to the decision in 7 All 362 (11), in which it was held that the word 'road' used in the N. W. P. and Oudh Municipal Act (15 of 1873) did not include the sub-soil. It was at this stage that Act 4 of 1894 was passed, S. 22 of which introduced the words 'including the soil and all' between the words 'roads and bridges' in the opening sentence of S. 30, Act 3 of 1884.

The question is whether by inserting these words the Legislature intended to disjoin the clause "not being private property", etc., by which the words "all roads" had been governed all along since 1864. It should be noted that the effect of such disjunction would be to obliterate the distinction which I have pointed out above as between the two classes of roads of which the Acts had all along taken cognizance, over both of which the 'public' had a right of way, giving the word

'public' not the strict but the loose meaning in which I understand the word as used in the Acts. I am not prepared to hold that such was the intention of the Legislature. I am inclined to the view that all that the Legislature intended to do by the enactment aforesaid was to include the vesting of the soil along with the surface of the road under S. 30 of the Act. In England although the surface only of a highway vests in a Local Authority, Courts have enlarged the meaning of such vesting so as to give Local Authorities a limited right to the stratum of the subsoil immediately below the surface: See (1878) 4 Q B D 104 (12), (1880) 14 Ch D 785 (13) and (1896) A C 434 (14). These decisions laid it down that not merely the street surface but something more passes; so much of the depth below the surface, as was essential for the making, maintenance, occupation and exclusive possession of the street for the use of the public being included in the vesting.

The law in England as it stands today, as the result of judicial decisions and statutory vesting, is that the freehold is not transferred to the Authorities, but the effect is to vest in the Authorities the property in the surface of the street or road and in so much of the actual soil below and the air above as may reasonably be required for its control, protection and maintenance as a highway for the use of the public, and to this extent the former owner is divested of the property (Halsbury's Laws of England, Hailsham Edition, Vol. 16, p. 300, where some of the above-mentioned cases, as also a number of other cases, are cited). Amongst these, reference may be made to (1903) 1 Ch 437 (15), in which Collins, M. R., said: "That which is vested is the area of the user." To what extent, if any, the Indian Legislature has gone beyond these decisions, by using such words as "and belong to" in S. 30 or "to take over the property

9. Chairman, Naihati Municipality v. Kishori Lal Goswami, (1886) 13 Cal 171.
10. The Vestry of St. Mary, Newington v. Jacobs, (1870) 7 Q B 47.
11. Nihal Chand v. Azmat Ali Khan, (1885) 7 All 362=1885 A W N 56.

12. Coverdale v. Charlton, (1878) 4 Q B D 104=48 L J Q B 178=40 L T 88=27 W R 257.
13. Rolls v. Vestry of St. George Southwark, (1880) 14 Ch D 785=49 L J Ch 691=43 L T 140=28 W R 867.
14. Mayor of Tunbridgewells v. Baird, (1896) A C 434=65 L J Q B 451=74 L T 385=60 J P 788.
15. Finchley Electric Light Co. v. Finchley Urban Council, (1903) 1 Ch 437=72 L J Ch 297=88 L T 215=51 W R 375=67 J P 97=1 L J R 244=19 T L R 238.

therein" in S. 31 of Act III of 1884 or similar expressions respectively, in Ss. 95 and 96 of Act 15 of 1932, is a matter into which I do not desire to enter here. But the point that I am now on is that the Legislature by (sic) the amending the Act of 1894 included the soil along with the road in the vesting that takes place under S. 30.

In 33 Cal 1290 (4), in which a ghat was concerned, Mookerjee, J., (Rampini, J., agreeing) in construing S. 30 as it ran after the amendment aforesaid took it that the expression "not being private property", etc., still governed the words "all roads." This, it is true, was obiter. In 43 Cal 130 (1), the facts were the following: the plaintiffs alleged that a pathway was private and not a public pathway and asked for a perpetual injunction restraining the Municipality from interfering with its exclusive user by the plaintiffs. Their case was that the Municipality had been trying to make the pathway a public pathway by causing false reports to be submitted by the Municipal Officers and getting entries made to the effect in the existing maps and records. The Municipality pleaded inter alia that the pathway was not a private pathway but was a 'road' within the definition of the Act and was vested in the Municipality, and that, in the alternative, it was a road under the control of the Municipality. The Munsif granted the injunction, holding that the pathway was a private one. The Judge, on appeal by the Municipality, held that though the pathway was a 'road' over which the public might have a right of way, it did not necessarily vest in the Municipality under S. 30 of the Act, and made a declaration to that effect, withdrawing the injunction which the Munsif had granted. He thought that it was not necessary for him to decide the question whether the pathway was one over which the public had, as a matter of fact, a right of way and whether, in that event, the pathway was under the control of the Municipality. The case was taken on appeal to this Court by the Municipality and in that appeal it was held that the construction of S. 30, which the Judge had adopted, was correct, but it was necessary to determine the second question which the Judge had left undetermined; and in that view of the matter the case was remanded for further hear-

ing and fresh decision. Fletcher, J. (Richardson, J., agreeing) observed thus in his judgment:

"The first question is—Is the pathway vested in the Municipality under S. 30, Bengal Municipal Act? That depends upon the construction of the section. The section has been amended by recent legislation and it is argued that by reason of that amendment the statute operates to vest all roads whether private or not within the limits of the Municipality. That view is supported by two unreported decisions of this Court, both by a single Judge of this Court. On the other hand in a considered judgment of Mookerjee, J. in 33 Cal 1290 (4), the learned Judge has put what to my mind is the only possible construction of S. 30. I agree with the learned Judge in the view he has expressed there as to the meaning of the section. Any other view, I think, is outside the range of argument.

Of the two unreported decisions referred to in the above passage one was the decision in 9 I C 562 (2). In that case Coxe, J. held that upon the findings of fact arrived at by both the Courts below the pathway in question which the plaintiff in that suit claimed as his private property was not a 'road' within the meaning of S. 6 (13) of the Act, a finding which was enough to support the decree which was being challenged before him. But the learned Judge went on to construe S. 30 of the Act and observed thus:

It appears to me that if the words in parenthesis apply to 'roads' as well as to 'bridges, tanks' etc., the words 'and all' in the first line of the section are superfluous. Moreover, as is pointed out by Mr. Collier, a commentator on this Act, whose view on this point appears to me to be correct, before the amendment of the Act in 1894 the words in parenthesis could hardly have applied to 'roads', because before the amendment the word 'road' did not include the soil, but related merely to the surface, and having regard to the definition of road in the Act it was not possible that the surface of any road, as defined in the Act could be private property. In 1894 the words 'including the soil' were added and it then became necessary to decide whether the subsoil of roads, which had not up till then been included in the scope of the Act, should in the case of private property vest in the Commissioners or not. The express insertion of the words 'and all' is an indication that the legislature intended that the subsoil should follow the surface, and should cease to be private property as the surface had already ceased under the original Act before the amendment. In any case, as the words at present run, they must grammatically be construed in the sense contended for by the appellant. It is true that it is difficult, if not impossible, to reconcile this construction with S. 31. But this difficulty may be due to a slip in drafting and need not compel me to construe S. 30 otherwise than in the ordinary grammatical way. If, therefore, the lands in suit are a road as defined in the

Act they must, I think, vest in the Municipality under S. 30.

The observations quoted above are obiter. Nextly they have for their foundation an erroneous assumption that before the amendment of 1894 the words in parenthesis did not govern the word 'roads'—an assumption which is clearly untenable and has not been sought to be justified before us. Thirdly, they proceed on the basis of another assumption that having regard to the definition of the word 'road' in the Act it was not possible that the surface of any 'road' could be private property. And this assumption entirely overlooks the distinction to which I have referred and which, as I have already stated, has been consistently maintained in the Acts of 1864, 1876 and 1884. Lastly as has been noticed by the learned Judge himself, the construction which found favour with him would not fit in with the very next section; and the difficulty can only be removed by making another assumption, equally unwarranted, that there was a slip in drafting that section. If there was a slip, it is clear that that slip was not corrected ever since 1864. A grammatical construction, which is open to so many objections and produces results which are so unsatisfactory, can hardly be preferred to a construction, which, though not strictly grammatical, applies more consistently to the act in all its parts: see 9 H L C 32 (16). The other unreported decision referred to in the judgment of Fletcher, J. gives no reasons, and need not be discussed. There is a recent decision of this case, 62 Cal 692 (3), in which my learned brother Nasim Ali, J. has adopted the aforesaid grammatical construction.

The learned Judge has not gone so far as Coxe, J. did, and has not suggested that prior to the amendment of 1894 the words in parenthesis did not govern the word 'roads'.

I am firmly of opinion that to give a reasonable and consistent meaning to the provisions of the Act the grammatical construction based on the principle of proximity should not be adopted, and that S. 30 of the Act should be construed in the manner in which it was construed by Mookerjee, J. (Rampini, J. agreeing) in 33 Cal 1290 (4), and by Fletcher, J.

(Richardson, J. agreeing) in 43 Cal 130 (1). In that view of the matter, there can be no question that upon the findings of the Court of appeal below as regards the character of the road in the present case, the road, qua road, including the subsoil, was vested in and does belong to the Commissioners under S. 30 of Act 3 of 1884 as amended by S. 22 of Act 3 of 1894. I am also of opinion that S. 95, Bengal Municipal Act (15 of 1932), has not, beyond doing away with the definition of 'road' as contained in the Act of 1884 which led to some confusion and difference of opinion and introducing two definitions of 'private street' and 'public street' [S. 3, Cl. (43) and S. 3 Cl. (44)], which more precisely define the rights of the owner of the land concerned, has not made any substantial change in the rights of the Municipality in such pathways as the Act purports to deal with.

In any case, the words of S. 95 of the Act are, in my opinion, so plain that I can see no escape from the conclusion that the land in the present suit, coming as it admittedly does within the definition of a 'public street,' has on the Act coming into force, vested in and came to belong to the Commissioners even if it be assumed that the repealed Act had not already produced any such effect. The Court of appeal below appears to have been of the same opinion. We have been asked on behalf of the plaintiffs to determine to what extent their proprietary rights, as owners of the land, have been lost to them, by the operation of the Acts or any of them. We do not see any necessity to go into a question which has not yet arisen and will have to be decided when, if ever it will arise. Here the only cause of action upon which the suit was founded was one which arose in connection with the surface of the road and its soil meaning by that word so much of the depth below the surface as was essential for the making, maintenance, occupation and exclusive possession of the road qua road for the use of the public. It was on that cause of action that the reliefs were asked for in the suit. It is true that the Municipality denied the title of the plaintiffs to the land itself, but this they did only as a plea to repel the prayer for such reliefs as were asked for and as were pertinent to the cause of action. That plea has been overruled by the learned Judge and so no controversy on that question can

16. *Easter Counties & Companies v. Marriage*, (1860) 9 H L C 32=31 L J Ex Ch 73=7 Jour N S 53=8 W R 748.

ever arise again. But to avoid any difficulty arising in future I think we should make it clear in our order that the plaintiffs' prayer for declaration of their title to the plaint land qua road including its soil and for a declaration that the defendant Municipality has no right, title or interest in the same, and also their prayer for the injunction as made in the plaint are dismissed, and that no other question is now decided. The result, in my judgment, is that the questions formulated for our decision should be answered in the manner following : 1. Roads over which the public have a right of way, if they are not private property, vest in the Municipality under S. 30 of Act 3 of 1884 as amended by Act 4 of 1894. 2. Yes, in so far as it is a decision on the question of construction of the aforesaid section. And the appeal should be dismissed with costs, fee being allowed for the hearing before the Division Bench according to scale, and for the hearing before this Bench at five gold mohurs

Jack, J.—This Reference has arisen out of an appeal in which the plaintiff appellants pray for a declaration of their title to a strip of road in Kamarhati Municipality connecting their private ghat with the Pithuri Ghat Municipal road. In the suit which was instituted on 3rd November 1930, they also prayed for an injunction on the municipal commissioners restraining the latter from interfering with their possession. The defendant Municipality deny the plaintiff's title and maintain that the disputed land is part of the Pithuri ghat road belonging to the Municipality which has all along been maintaining it. It has been found that the disputed piece of road way is on land belonging to the plaintiffs but that the public have a right of way over the land as shown by their free and uninterrupted use of it for a very long time. On these findings of fact the suit was dismissed. In second appeal the plaintiffs maintain that their title should have been declared (even if they were given no other relief) on the ground that under the provisions of the Bengal Municipal Act 6 of 1884 (which was the Act in force when that suit was instituted), the land being private property has not vested in the Municipality and that Bengal Municipal Act 15 of 1932 has no retrospective effect.

The appeal has been referred to this Bench on account of the decision of the

43 Cal 130 (1), by which the learned referring Judges state that they are pressed. In connection with the reference two questions are framed for our decision, viz. (1) Do roads over which the public have (sic) a right of way in a Municipality vest in Municipal Commissioners? (2) Was the case, 43 Cal 130 (1), correctly decided? Under S. 95, Bengal Municipal Act 15 of 1932, all public streets including the soil, the pavements, stones and other materials within the Municipality shall vest in and belong to the Commissioners. Public street (as defined in S. 3, Cl. 30) means any street, road, lane, gully, alley, passage, pathway, square or court, whether a thoroughfare or not over which the public have a right of way.

The first question for decision must therefore be answered in the affirmative. But obviously the learned Judges really want our decision whether under S. 30 of Act 3 of 1884 as amended in 1894 a road including the sub-soil vests in the Municipal Commissioners if the roadway is one over which the public have a right to pass. This is their view and they are of opinion that the case, 43 Cal 130 (1), in which the contrary view has been expressed, was wrongly decided. In that suit the plaintiffs sued the Howrah Municipality for a perpetual injunction restraining them from interfering with the exclusive use of a certain pathway by the plaintiffs, and claiming that it was private pathway. It was held that the pathway was a private pathway and therefore did not vest in the Municipal Commissioners under S. 30 of the Act of 1884 as amended by the Act of 1894 as that section did not operate to vest all roads, whether private or not, within the Municipality in the Municipal Commissioners. That decision I think was right. The learned Judges in that case however also held that if the public had a right of way over the pathway then the Municipality would have a right of control under later sections of the Act, inferring that in that case the path would not vest in the Municipal Commissioners. In this, with all due respect, I think they were wrong for, if the public had a right of way, the owner would have ceased to have any separate right if the path was a pathway for, as a pathway, it would have ceased to be private property, and under S. 30 of the Act would have vested in the Municipality. The learned Judges who have referred these

questions reached the same conclusion as to the application of S. 30 of the Act of 1884, but by a different route. "Road" is defined in the Act of 1884, as a road, street, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of way,

and S. 30 of the Act runs as follows:

All roads (including the soil and all) bridges, ghats, wells, channels and drains in any Municipality (not being private property and not being maintained by Government or at the public expense) now existing, or which shall hereafter be made and the pavements, stones and other materials thereof and all the erections, materials, implements and other things provided therefor shall vest in and belong to the Commissioners.

The learned Judges say that the words in parenthesis "not being private property and not being maintained by Government or at public expense" do not apply to the roads but only to the bridges, tanks, etc., because of the words "and all" inserted after roads and before bridges etc.; the context however shows that the words "not being private property" must have been intended to apply to roads notwithstanding the separating words "and all" for otherwise the words "in any Municipality" would also be divorced from the words "all roads", and further the words "not being maintained by the Government or at the public expense" would be disconnected from the words "all roads", though in each case it is evident that they were used in connection with the roads as well as bridges, etc. I am not impressed with the interpretation favoured by the learned referring Judges based on the grammatic construction of the sentence following the decision of two single sitting Judges in 9 I C 562 (2) and 62 Cal 692 (3), but rejected by their Lordships Rampini and Mookerjee, JJ. in 33 Cal 1290 (4). My impression is that the words "and all" were possibly introduced merely to make the sentence more euphonious. If it had read "all roads (including the soil) bridges, tanks, etc.," it would not have been so euphonious as the sentence "all roads (including the soil) and all bridges, tanks, etc." and the additional words were added when the clause "including the soil" was introduced by the amending Act of 1894. The use of the word "private" as applying to roads is explained I think because roads in this section as in S. 31 and in S. 217, Cl. (1) (where public roads are referred to) meant roads in the ordinary sense including

private roads and not exclusively roads over which the public had a right of way the definition of roads in the Act not applying as repugnant to the context. Long continuous user by the public with the owner's knowledge and acquiescence raises a presumption of dedication to the public for use as a road including such portions of the sub-soil as were necessary for the maintenance of the road and it is these non-private rights in the land that vest in the Municipality. This was the view taken in 33 Cal 1290 (4). Accordingly such roads as roads cannot be regarded as private property and vest in the Municipality. Since therefore the plaintiffs' claim was really for declaration to their title to the land in suit as a road-way the suit was rightly dismissed though both the Courts have found that the plaintiffs have a good title to the land over which the road was made.

The discussion raised in this appeal is somewhat academic for S. 30 of the Act of 1894 is no longer of any practical importance whatever since there can be no question that under S. 95, Municipal Act of 1932, all roads in a Municipality over which the public have a right of way now vest in the Commissioners; and, if S. 30 of the amended Act of 1894 had been construed against the Municipality, the Municipality could immediately bring a suit under the existing law and get a declaration that the land had vested in the Municipality. There is ample authority for the view that in such cases the law as it now is can be applied to lessen litigation. For example, the cases 20 C L J 107 (17) and 47 C L J 530 (18) may be referred to. I agree therefore with my learned brother Mukerji, J. that the appeal should be dismissed, the first question answered in the affirmative and the second question partly in the affirmative and partly in the negative as I have indicated.

D. N. Mitter, J.—I have had the pleasure and the advantage of reading beforehand the judgment just delivered by my learned brother Mukerji, J. I agree entirely that the question referred to the Full Bench should be answered in the way he has answered them. I so entirely agree with the conclusions reached by

17. *Rai Charan Mandal v. Biswa Nath Mondal*, 1915 Cal 103=26 I C 410=20 C L J 107.

18. *Suresh Chandra v. Kanti Chandra*, 1928 Cal 436=110 I C 715=47 C L J 530.

him and generally with the reasons on which the said conclusions are based that I have nothing further to add.

S. K. Ghose, J.—The questions of law referred to the Full Bench are :

(1) Do roads over which the public have a right of way in a Municipality vest in the Municipal Commissioners?

(2) Was the case, 43 Cal 130 (1), correctly decided?

The matter arises out of a second appeal preferred by the plaintiffs whose case is that the land in suit is their private property and that the Kamarhaty Municipality has no title to it. This land is a continuation of a public street which is on the east side; on the west there is a private ghat of the plaintiffs. The suit was instituted on 3rd November 1930 when the Bengal Municipal Act 3 of 1884 was in force, but during its pendency that Act was replaced by the Bengal Municipal Act 15 of 1932. The Courts below have concurred in finding that the land in question is included in the rent-free property of the plaintiffs and that the public have a right of way over it so that it is a "road" as defined in S. 5 (13) of the Act of 1884. The contention of the plaintiffs-appellants is that in accordance with S. 30 of the Act of 1884 the property in the road remains with them and does not vest in the Municipality. The lower appellate Court pointed out that under S. 95 of the Act of 1932

all public streets, without reservation of private property in such streets, have become vested in the Municipality,

and it held that the declaration which is sought for under the old Act would be infructuous because the Municipality could by another suit obtain a declaration in its favour under S. 95 of the new Act. Thereupon a question arose as to whether the new Act would have retrospective effect, and the contention for the Municipality was that S. 95 of the new Act has made no change in the law but is of a declaratory nature. This contention has found favour with the learned referring Judges. The question is whether under S. 30, Act 3 of 1884, as amended in 1894 a road, including its soil, vests in the Municipal Commissioners if the public have a right of way over that road. The learned referring Judges take the view that the phrase "not being private property" in S. 30 does not refer to "all roads, including the soil, that it only refers to the succeeding words "and all bridges, tanks,

etc." This they consider to be the grammatical meaning of the section as amended. In this they have the support of two decisions of this Court. In 9 I C 562 (2) Coxe, J. thought that if the words in parenthesis apply to roads as well as to bridges, tanks, etc., the words "and all" in the first line of the section would be superfluous and that the express insertion of the words "and all" was an indication that the legislature intended that the subsoil should follow the surface and should cease to be private property, as the surface had already ceased under the original Act before the amendment of 1894. In taking this view Coxe, J. was following the commentary of Mr. Collier. The difficulty in the way of this view, as Coxe, J. himself says, is that

it is difficult, if not impossible, to reconcile this construction with S. 31. But this difficulty may be due to a slip in drafting and need not compel me to construe S. 30 otherwise than in the ordinary grammatical way.

It does not appear that Coxe, J. had before him the earlier case in 33 Cal 1290 (4) which was decided by Rampini and Mookerjee, JJ. in 1906. There the question was with regard to a ghat and S. 30 of the Act of 1884 was construed from that point of view. Mookerjee, J. mentioned that under S. 30, as it stood before the amendment by Act 4 of 1894, the term "road" comprised only the surface of the road and not the subsoil underneath it as was held in 13 Cal 171 (9) and 20 Cal 732 (19). In 1894 the legislature amended the section so as to make all roads, including the soil, vest in the commissioners. A question was raised before us as to the true effect of the words not being private property and not being maintained by Government at . . . public expense

which find place in S. 30. In my opinion the phrases connected by the conjunction "and" must be taken distributively and not collectively. The section clearly means that all roads, etc., shall vest in the commissioners, but roads, etc., being private property shall not so vest, and roads, etc., maintained by Government or at public expense shall also not vest. The intention of the legislature appears to have been not to vest in the commissioners such roads, etc., as are either private property or are maintained by Government

19. *Modhu Sudan Kundu v. Promoda Nath Roy*, (1893) 20 Cal 732.

or at the public expense. But here also a little difficulty was felt.

So far as ghats are concerned however it may be observed that Ss. 30 and 32 overlap and there is an apparent inconsistency.

It was held in that case that the word ghat in S. 30 was not intended to include the burning ground that the title to the burning ground did not vest in the Municipality, but that the ghat itself belonged to the Municipality. The next case, 43 Cal 130 (1), was decided in 1915 by Fletcher and Richardson, JJ. There the subject-matter was a pathway which was held to be private, and the question was whether it vested in the municipality under S. 30. Fletcher, J. discarded the view of Coxe, J. in 9 I C 562 (2) which was quoted in argument and followed that of Mookerjee, J. in 33 Cal 1290 (4) declaring "any other view I think is altogether outside the range of argument." Then he proceeded to say:

Then comes the other question. The learned Judge has not found whether the public have or have not a right to go over the pathway in question. If the public have a right to go over the private pathway then the Municipality, under certain later sections of the Act, have been given the power of control, the difference being that, in the case of roads vested in the Municipality, they are the body responsible for the lighting, watering, sewerage and clearing the roads and, in the other case, where the road is not so vested in the Municipality, they have only the power of control to prevent the road from becoming a nuisance or the rights of the public from being interfered with. The learned Judge has failed to consider that case altogether and he has made a declaration that this is a private pathway.

Ultimately the case was remanded for the determination of this question. Therefore the view taken was that private pathways do not vest in the municipality under S. 30, but that if the public have a right of way over such a pathway the municipality have "a right of control as conferred by the later sections of the Act". These and other cases were before Nasim Ali, J. in 62 Cal 692 (3) which was decided in 1935. He favoured the view that "private property" would not refer to "roads". But he proceeded to remark:

If however the words "private property" be taken to refer to roads as well, only private roads or pathways would be exempted . . . S. 31 evidently contemplates private roads, the surface of which did not vest in the Municipality under S. 30 of the Act before the amendment of 1894.

Mr. Panchanan Ghose for the appellants before us has strenuously contended that the parenthetical clause "not being

private property etc." must refer back to "all roads", finding support from Coxe, J., and Nasim Ali, J., and further that "private property" includes land belonging to a private individual but over which the public have a right of way, such as the land in dispute in this case. His contention is that the public right is a right of passage only and the owner retains his property in the soil and that therefore such a "road" would be "private property" and would not "vest in and belong to the commissioners." Dr. Mukherji for the other side has contended that the parenthetical clause does not apply to "all roads" and that even if it does the word "roads" has been loosely used and not strictly in accordance with its definition in the Act. According to the latter argument, only such roads are excepted as are private roads qua roads i. e., over which the public have no right of way. In this connexion Dr. Mukherji has contended that it is a well established canon that a grammatical construction should not be followed if it leads to inconsistency if not absurdity. As to this it is just as well as to recognize that opinion is by no means uniform as to what the grammatical construction of the particular passage in S. 30 is. What Coxe, J. took to be the grammatical construction did not find favour with Fletcher, J. who took it to be "altogether outside the range of argument. A reference to the older Acts will now be useful. In the District Municipal Improvement Act, Act 3 of 1864 the relevant S. 10 runs as follows :

All public highways in any place to which this Act shall be extended (not being the property of and repaired by and kept under the control of the Government, and not being private property) existing at the time this Act comes into operation, or which shall afterwards be made, and the pavements, stones and other materials thereof, and also all erections, materials, implements, and other things provided for such highways, shall vest in, and belong to the Municipal Commissioners.

Here there is no question that the parenthetical clause, which is practically the same as in S. 30 of the Act of 1884, refers to "all public highways." "Highway" is defined thus :

Highway shall mean any Road, Street, Square, Court, Alley, or Passage, whether a thoroughfare or not, over which the public have a right of way; and also the roadway over any public bridge or causeway.

With the exception of the last clause the definition is the same as that of a "road," in the subsequent Acts. But in

S. 10 the words "all public" before "highways" is noteworthy. The next S. 11 runs thus:

It shall be lawful for the Municipal Commissioners to agree with the person or persons in whom the property in any highway is vested, to take over the property therein, and after such agreement to declare by notice in writing put up in any part of such highway that the same has become a public highway. Thereupon such highway shall vest in the Municipal Commissioners, and shall thenceforth be repaired and kept out of the Municipal Fund.

The next Act was the Bengal Municipal Act, 1876, (Act 5 of 1876), in which the corresponding sections are Ss. 32 and 33. The first paragraph of S. 32 runs thus:

All roads, bridges, embankments, tanks, ghats, wharves, jetties, wells, channels and drains in any Municipality (not being private property) and not being maintained by Government or at the public expense, now existing or which shall hereafter be made, and the pavements, stones and other materials thereof, and all erections, materials, implements and other things provided therefor, shall vest in and belong to the Commissioners.

It will be noted that the term "roads" is substituted for "public highways," an expression which has a technical meaning in English law, and between "roads" and the parenthetical clause some new items "bridges, etc.," are introduced. It is a reasonable inference that the parenthetical clause does not cease to govern "roads" and that it governs all the items "roads, bridges etc." S. 6 (16) gives a definition of "road" which is practically the same as that of "highways" in the previous Act and is identical with the definition in the subsequent Act. S. 33 also mentions "road." In the succeeding Act 3 of 1884, Ss. 30 and 31 maintain the identical language and provisions. Thereafter occurred decisions to the effect that the word "roads" comprised only the surface of the roads, but did not include the subsoil which belonged to the Zemindar within whose estate the road was situated: 13 Cal 171 (9) and 20 Cal 732 (19). Hence the amendment by Act 4 of 1894 by which the words "including the soil and all" were introduced between the words "roads" and "bridges." Obviously this amendment was not intended to disturb the force of the parenthetical clause which remained where it was and must govern "roads" as also the other items "bridges," etc. This is consistent with the interpretation put upon the section by Mookerjee, J. in 33 Cal 1290 (4). But Fletcher, J. in 43 Cal 130 (1) sought to go further and exclude from the scope of

S. 30 roads over which the public have a right of way by referring them to a later section, meaning possibly S. 31. The contention of Mr. Ghose for the appellants that roads over which the public have a right of way are still private property is based upon authorities which were not concerned with the amendment of 1894.

The decision in 13 Cal 171 (9) follows the English case (1872) 7 Q B 47 (20). In 25 Mad 635 (21) the matter in issue was the meaning of the phrase "vesting streets in a Municipal Council" with particular reference to the Madras District Municipalities Act. The current of authorities in England and India, including 13 Cal 171 (9) and 20 Cal 732 (19), was considered and it was held that such vesting does not transfer to the municipal authority the rights of the owner in the site or soil over which the street exists, that it does not own the soil from the centre of the earth *usque ad coelum*, but that it has only the right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to maintain the street as a street. This view was adopted by Mookerjee and Cuming, JJ. in 44 Cal 689 (22). That was a case in which the vesting of a street was considered with reference to the Calcutta Municipal Act, and 13 Cal 171 (9) was also cited. The amendment of 1894 was not under discussion. It has been said that the effect of the amendment is that by the addition of the words "including the soil" in 1894, the Commissioners have been constituted the owners of the roads and all the soil beneath and therefore the amendment overrules the law as formerly laid down. It is however another question whether the ownership of the soil will continue in the Municipality where the road has been definitely abandoned or has ceased to exist. For our present purpose it may be said that the effect of the addition of the words "including the soil" is only this: that where the road vests in the Municipality the soil vests also, but this does not touch the provision that a road which is private property does not vest.

20. Vestry of St. Mary, Navington v. Jacobs, (1872) 7 Q B 47.

21. Sundaram Aiyar v. Municipal Council Madura, (1902) 25 Mad 635=12 M L J 37.

22. Khetra Mohan Ghose v. Corporation of Calcutta, 1917 Cal 95=37 I O 96=44 Cal 689=21 O W N 234=24 O L J 358.

In the present Bengal Municipal Act 15 of 1932 the corresponding sections are Ss. 95 and 96. The language is completely changed though the purport of the enactment appears to be the same. The Act defines public street, S. 3 (44), the relevant words being the same as in the case of "highways" in the Act of 1864 and of "roads" in the succeeding Acts; but goes further and defines "private street" in a negative way (Cl. 43), but subject to a minimum requirement as to dimensions or size, to that extent introducing a new provision in the law. "Street" is defined as meaning a public or private street (Cl. 51). In S. 95 (1) (a) the term used is "all public streets." The parenthetical clause of the previous Acts finds place in sub-s. (1) but the clause referring to private property is omitted. S. 96 on the other hand refers to "any street," etc. Thus all through the various enactments we find two sections which embrace, among other things, all roads with which a Municipality has to deal: (1) roads, not being private property, which vest in the Municipal Commissioners, and (2) roads, property in which vests with private parties who may arrange with the Commissioners as regards control. This gives support to Dr. Mukherji's contention that the word "roads" (or highways or streets) has been loosely used in the two sections and that S. 30 in particular excludes only such roads which are private property qua "roads" and not roads over which the public have a right of way. Private property qua roads are referred to in the succeeding section. It is further pointed out that public roads comprise two classes: (1) where the site has been acquired from the Municipality, (2) where the site is private but the public have the right of way. If the second class were excluded S. 30 would be confined to the first class only, which is absurd, because roads of that class already vest in the Municipality apart from S. 30.

Therefore the second class of roads must be included in the scope of S. 30 and only private roads over which the public have right of way are excluded, there being a matter of arrangement under S. 31. Technically, it may be said, this is not inconsistent with the Act because the definition of "roads" is subject to the usual condition "unless there be something repugnant in the subject or context." Moreover a glance at some other

sections will show that the term "roads"; has been loosely used: S. 217 (1), for instance mentions "public road," etc.; sub-s. (5) mentions "any road." It has been held that the latter term is not limited to roads vested in the Municipal Commissioners: 17 Cal 684 (5). S. 245 refers to "roads" to be constructed by bustee owners, failing which the Municipality may construct them and recover the cost under S. 247. In the present case it seems to me the inconsistency disappears if we accept the contention, as we must, that the word "roads" has been used in Ss. 30 and 31 of Act 3 of 1894 loosely and not in accordance with the definition in S. 6 (13); Cl. (a) of S. 95 of Act 15 of 1932 has made no change in the law. In my judgment, the answers to the questions of law referred must be as follows:

(1) Roads over which the public have a right of way in a Municipality vest in the Municipal Commissioners; (2) the case, 43 Cal 130 (1), was rightly decided in so far as it held that under S. 30, Bengal Municipal Act, 1884, as amended by Act 4 of 1894 private pathways do not vest in the Municipality. But it was wrongly decided in so far as it held (p. 135) that "a road within the meaning of S. 6, Cl. (13) of the Act, that is, a road over which the public have a right to go," does not vest in the Municipality under S. 30 of that Act.

Patterson, J.—My learned brother Mukerji, J. has dealt with the matter before the Court exhaustively and in all its aspects. I find myself in entire agreement both with the conclusions and with the reasons he has given for arriving at those conclusions. I concur in his judgment and have nothing to add.

V.B./R.K.

Reference answered.

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GUHA AND BARTLEY, JJ.

Kurani Debya — Decree-holder — Appellant.

v.

Jogamaya Debya—Judgment-debtor—Respondent

Appeal No. 531 of 1935, Decided on 5th May 1936, from appellate order of Dist Judge, Nadia, D/- 16th August 1935.

(a) Civil P. C. (1908), O. 21, R. 2—Arrangement by judgment-debtor with decree-holder providing for satisfaction differing from one mentioned in decree, is adjustment within O. 21, R. 2.

An act of the parties agreeing to vary the decree is not an adjustment of the decree; but an agreement made by a judgment-debtor with a decree-holder providing for the satisfaction of a decree which differs from the one mentioned in the decree itself is not a variation of the decree directing payment of money, but is merely an adjustment to the satisfaction of the decree-holder as contemplated by O. 21, R. 2 (1): 1928 Cal 527, *Disting.* [P 519 C 2]

(b) Civil P. C. (1908), O. 21, R. 2 (1) — Instalment decree—Execution—Compromise providing for payment by instalments—Compromise recorded by Court and execution case dismissed as partly satisfied—Payments according to compromise—Default—Execution of application for entire debt—Compromise held amounted to adjustment within R. 2.

On an application for execution of a decree which provided for payment of the decretal debt by instalments, and in the course of the proceedings in execution, a compromise was arrived at between the parties, providing for satisfaction of the original decree by instalments. The terms of the compromise were set out in a petition and filed in Court. The Court recorded the compromise, and ordered dismissal of the execution case on part satisfaction crediting Rs. 100 in the decree. Some instalments were subsequently paid in accordance with the compromise but default was made and entire decretal amount fell due as per compromise. Decree-holder applied for execution. Judgment-debtor thereupon raised an objection under S. 47, that application was barred by limitation :

Held : that the application was not barred by limitation. The compromise petition and the order of the executing Court thereon amounted to an adjustment of the decree in part to the satisfaction of the decree-holder within O. 21, R. 2 (1), and the payments made in accordance with the compromise were by way of adjustment of the decree as contemplated by law and the compromise did not create a decree at variance with the original decree : 1928 Cal 527, *Disting.* [P 520 C 1]

Hiralal Chakrabarty and Durga Charan Chatterjee—for Appellant.

Chandra Shekhor Sen and Shyamapada Majumdar—for Respondent.

Judgment.—This appeal has arisen out of a proceeding in execution of a decree. The decree-holder, appellant in this Court, applied for execution of the decree passed in the year 1924, which provided for satisfaction of the decretal debt by instalments; the execution was applied for in the year 1928, on default in the payment of two instalments as provided in the decree. In the course of the proceeding in execution, started in the year 1928, there was a compromise arrived at between the decree-holder and the judgment-debtor, providing for satisfaction of the decree passed in the year

1924. The order recorded in the order sheet on 8th April 1929 was to this effect :

Both parties filed a joint petition of compromise, let the terms of compromise be recorded in the register of suits and the execution case be dismissed on part satisfaction crediting Rs. 100 in the decree.

Subsequent to that, there were two payments made by the judgment-debtor on 12th February 1930, and on 12th February 1931, according to the instalments provided by the compromise mentioned above. Thereafter the entire decretal amount fell due on 14th February 1932, as provided by the compromise; and application for execution was made by the decree-holder on 4th February 1933. The judgment-debtor resisted the proceeding in execution on the ground of limitation, by means of an application under S. 47, Civil P. C. The Court of execution overruled the objection to the execution as raised by the judgment-debtor; the decision of that Court was, however, reversed on appeal by the learned District Judge of Nadia. Hence this appeal by the decree-holder.

The decision of the question raised in the case before us rests on the determination of the real scope and operation of the compromise effected between the decree-holder and the judgment-debtor filed in Court on 8th April 1929, by which the manner and method of the satisfaction of the decree passed in the year 1924, was provided for afresh by consent of parties. If the compromise amounted to an adjustment of the decree passed in the year 1924, as contemplated by O. 21, R. 2, Code of Civil Procedure, there was, and could be, no question of limitation involved in the case; and the execution started on 4th February 1933 could not be held to be barred by limitation. An act of the parties agreeing to vary the decree is not an adjustment of the decree; but an arrangement made by a judgment-debtor with a decree-holder providing for the satisfaction of a decree which differs from the one mentioned in the decree itself is not a variation of the decree directing payment of money, but was merely an adjustment to the satisfaction of the decree-holder as contemplated by O. 21, R. 2 (1), Civil P. C. In the case before us, the effect of the arrangement of 8th April 1929 was that the decree-holder agreed to the arrangement for adjustment and satisfaction of

the decree, proposed by the judgment-debtor; and the decree-holder was thus debarred from proceeding with her decree otherwise than in the manner provided by the compromise.

We have come to the conclusion that on the terms of the compromise petition filed in Court in the case, at a stage when proceeding in execution in the manner provided in the decree passed in the year 1924 was pending, amounted to an adjustment of the decree in part to the satisfaction of the decree-holder within the meaning of O. 21, R. 2, Civil P. C., and we are unable to agree with the District Judge in the Court of appeal below, that the order passed by the executing Court on the compromise petition was illegal and could not be given effect to, as, in our opinion, the order gave effect to an adjustment of the decree passed in the year 1924, by consent of parties, as evidenced by joint petition of compromise filed in Court. The payments made in accordance with the terms of the compromise petition were, in our judgment, by way of adjustment of a decree as contemplated by law, and the compromise did not create a decree at variance with the original decree passed in 1924. As indicated above the question for consideration in the case before us is solely one of construction, depending on the scope and effect of the compromise between the decree-holder and the judgment-debtor, regard being had to the intention of the parties, expressed in the same.

The compromise provided for satisfaction of the decree passed in the year 1924, and evidenced an adjustment of the same to the satisfaction of the decree-holder, and we are unable, therefore, to express agreement with the view taken by the Court of appeal below that the decision of this Court in 32 C W N 434 (1) was applicable to the facts of this case admits the conclusion that the application for execution made by the decree-holder, appellant, on 4th February 1933, was barred by limitation. In the result, the appeal is allowed, the order of the Court of appeal below, against which it directed, is set aside. The order of the Court of execution passed on 12th December 1934, is restored. The judgment-

debtor, respondent, is to pay the costs of the decree-holder appellant through out, including the costs of this appeal. The hearing fee in this appeal is assessed at two gold mohurs.

V.B./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 520

R. C. MITTER, J.

Abdul Majid Mian—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1220 of 1935, Decided on 14th January 1936.

Penal Code (1860), S. 408—Employee, when leaving service, submitted accounts but withdrawing certain amount as due to him on account of security furnished by him—Withdrawal, though not legal, was not with dishonest intention—Employee held not guilty under S. 408.

An employee of a zamindar furnished certain amount as security. At the time of leaving his service he handed over the account papers to his master. One item of expenditure shown in the account papers was the item withdrawn by him being the money that he had put in as security for his service.

Held: that in such case dishonest intention could not be made out on the part of the employee. It might be that he took a wrong view of his civil rights in taking away the amount due as his security; but he believed that he had the right on giving up his service. Hence he could not be convicted under S. 408. [P 521 C 1]

Order.—The petitioner before me has been convicted under S. 408, Penal Code, and sentenced to pay a fine of Rs. 50 by the lower appellate Court, in default to suffer simple imprisonment for six weeks. The petitioner was an employee of the Narail Babus. He got his employment in July 1933 and served the said zamindar for about a year till about July 1934 when he left the service. At the time when he entered the service, he furnished security in cash to the extent of Rs. 500. After he left service, a complaint was made against him by the said zamindars for criminal breach of trust in respect of four items, viz., an item of Rs. 500 and three small items making a total of Rs. 92-10-0. The lower Court has held that the charge in respect of the last three items had not been substantiated, but has convicted the petitioner of criminal breach of trust of the first item.

At the time of leaving his service the petitioner handed over the account papers to his masters. One item of expenditure shown in the account papers was this

item of Rs. 500, which the petitioner showed as being withdrawn by him being the money that he had put in as security for his service. In fact, that is the finding of the learned Sessions Judge. On these facts, I do not see how dishonest intention could be made out, on the part of the accused. It may be that at that point of time, he had not the right to take away the said sum of Rs. 500, as the final accounting had not been made, but he had submitted the account papers to his masters and left the service. It may be that he took a wrong view of his civil rights in taking away Rs. 500, but he believed that he had the right on giving up his service. In this view of the matter I do not see how he can be convicted.

The result is that this rule is made absolute, the conviction and sentence be set aside and the petitioner acquitted. The fine, if paid, must be refunded.

D.S./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 521

PANCKRIDGE, J.

Chhatrapat Singh Dugar—Applicant.
v.

Kharaj Singh Lachmiram — Non-Applicant.

O. O. C. J. Suit No. 79 of 1926, Decided on 10th March 1936.

(a) Civil P. C. (1908), S. 39—Ground for transfer one under sub-s. 1 (b)—Execution will be limited to execution against judgment-debtor who satisfies that condition.

Where the condition justifying transfer is that set out in S. 39, sub-s. 1 (b), the intention of S. 39 is that execution should be limited to execution against the judgment-debtor who satisfies that condition. To hold that a judgment-creditor may obtain an order for transfer on the ground that one judgment debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and may then execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfil that condition, is absurd. [P 523 C 1]

(b) Provincial Insolvency Act (1920), Ss 58 and 59 (e)—Order for costs in favour of insolvent and against creditor—Death of Receiver and insolvent—Right of heirs to execute order for costs—Mere leave to execute order is not sufficient.

Where an order for costs is made against creditors and in favour of the insolvent, and at the time there is a Receiver appointed of the insolvent's property, on the death of the Receiver, if no other Receiver is appointed, insolvent's estate vests in the insolvency Court, and the order for costs cannot be executed by the insolvent or on his death pending insolvency by his

heirs as agent under S. 59 (e) without the leave of the Court on an application in that behalf. Mere leave to execute the order is not sufficient to entitle the heirs of deceased insolvent to clothe them with title to execute the decree.

[P 523 C 2]

Benimadhab Banerjee—for Applicant.
P. C. Basu & S. C. Bose—for Non-Applicant.

Order.—This application is in the form of an appeal against the order of the learned Master dismissing the application of one Surpat Singh Dugar, for leave to execute an order for costs made by His Majesty in Council against certain minors as representatives of a deceased respondent in the Privy Council proceedings. The learned Master has set out the facts in detail, and has dealt very fully with the questions raised. The salient facts are as follows: one Chhatrapat Singh Dugar, the father of the present applicant, made an unsuccessful attempt to have himself adjudicated an insolvent under the provisions of the Provincial Insolvency Act. Being aggrieved by the refusal of the Courts in India to adjudicate him, he appealed to His Majesty in Council, and on 23rd November 1916, the appeal was allowed, Chhatrapat was adjudicated an insolvent, and an order for costs was made against the respondents generally. Among them was a creditor of Chhatrapat Singh, by name Raja Bijoy Singh Dudhoria. A receiver was appointed of the insolvent's assets on 2nd August 1917, by the District Judge of Murshidabad, exercising insolvency jurisdiction.

The insolvent died on 25th April 1918. On 17th February 1921, the order of His Majesty in Council was sent to the Murshidabad Court. On 6th November 1922 the receiver in the insolvency proceedings resigned, and no other receiver was appointed to take his place. Meanwhile, there was a partition suit pending on the Original Side of the Court, to which the parties were the heirs of the deceased Chhatrapat. In that partition suit there was a reference to arbitration, and by an award of 23rd November 1922, the present applicant was allotted the benefit of the Privy Council order for costs. I am told that with regard to the insolvency the position was that most of the creditors had been paid in full, but that the claim of one alleged creditor was still outstanding. The heirs of Chhatrapat were contesting this claim, and had furnished security for its payment in case the claim

was established. In April 1923 there was an application to which the present applicant was a party for execution of the order for costs against Raja Bijoy Singh Dudhoria, but it was abandoned and dismissed for default on 26th May 1923.

On 20th January 1926 the present applicant made an application under S. 39, Civil P. C., for transmission of the decree to this Court for execution. In accordance with the rules he presented a tabular statement, and in the column provided for stating the name of the person against whom execution of the decree was sought, he entered the name of Bhagabati Prosad, described as proprietor of Ramsarup Suryaprosad of No. 7 Kalakar Street, Calcutta. In the column provided for setting out the mode of execution, the applicant stated that, as the moveable and immovable properties of Bhagabati Prosad consisted of the premises No. 7 Kalakar Street, Calcutta, he asked that a certificate might be sent to the High Court, Calcutta. He also set out that Chhatrapat was dead, and stated that on the basis of the award he had become entitled to the benefit of the order for costs. The order sheet of the Murshidabad Court states that the applicant has asked for issue of a certificate to the High Court for execution of the order for costs against creditor No. 33, Ramsarup Suryaprosad, who was one of the principal respondents in the Privy Council appeal. It also states that the application alleges that the said creditor Ramsarup Suryaprosad has property within the jurisdiction of the High Court.

The order sheet shows that the Court made an order for the issue of the certificate for which the applicant prayed. On 26th November 1928 a tabular statement was filed in this Court against Raja Bijoy Singh Dudhoria, and directions were given for a notice to issue under O. 21, R. 22. The proceedings have hung fire for a considerable time, in the course of which Raja Bijoy Singh Dudhoria has died, and an order has been obtained for substitution of the present respondents as his representatives and for the appointment of a guardian ad litem. The Master finally disposed of the matter on 18th February 1936. A large number of objections were taken on behalf of the respondents, but I do not think it is necessary to deal with all of them. For the first time before the Master a contention was

raised that the proceedings were vitiated by the fact that in the order of the Privy Council Raja Bijoy Singh Dudhoria's name appeared as Raja Benoy Singh Dudhoria. The learned Master has accepted the contention of the respondents on this part of the case, and this clerical error in the Privy Council order is one of the reasons why he has dismissed the application. He points out that no Court has the power to correct clerical or other errors in a Privy Council order, and he suggests that the only way of putting matters right is to make an application to the Privy Council. I do not think it necessary to decide this point, but certainly my sympathies are with the applicant.

There is no doubt as to the identity of the person, and I think there is considerable force in the contention that as Raja Bijoy Singh Dudhoria himself took part in the insolvency proceedings and resisted the application for execution of the order without taking any exception to the form in which his name appeared in the order, he must be taken to have waived any objections that he might have put forward, and also that his representatives, after his death, are bound by such waiver. I see no injustice in this, and to decide otherwise and hold the proceedings against Raja Bijoy Singh Dudhoria and his representatives are bad throughout, because of this clerical error, recalls the days when the harshness of the criminal law was mitigated by the tendency of the Courts to direct the jury to acquit, because of the omission of one of the Christian names of the prisoner from the indictment. I have not heard counsel for the respondents on this point, so I am not in a position to decide it.

To my mind the most important question raised is that regarding the application and construction of S. 39, it will be noticed that in the application for transfer the name of the respondent Raja Bijoy Singh Dudhoria was not mentioned, and it is not suggested that if he had been the sole respondent in the Privy Council proceedings, there was any ground which would justify an order for transfer of the decree for execution to this Court. Learned counsel for the applicant points out that under S. 39 the only power a Court has got is to send the decree for execution to another Court, and that there is nothing in the language of the section which would lead one to suppose that the Court

has the power to qualify the mode of execution by which the decree is to be enforced by the Court to which it is transferred, or to limit the number of the judgment-debtors against whom execution proceedings may be taken in that Court. He quite rightly says that if the legislature had thought it right to impose any limitations of the nature suggested, it could have made its intention clear. From the language of the order for transfer as also from the materials on which the order was based it is clear that the grounds for the order were those set out in sub-s. 1 (b). It cannot be suggested that sub-s. 1 (d) has any application to the facts of this case, for the Court was not asked to record, nor did it record, any reasons in writing why the decree should be executed by another Court. Various authorities have been referred to in support of the proposition that the Court has no power to make a limited order for transfer. In my opinion however the question depends not upon the language of this particular order, but upon the language of the section. Having regard to the scheme of the section, I have come to the conclusion that where the condition justifying transfer is that set out in sub-s. 1 (b), the intention of the section is that execution should be limited to execution against the judgment-debtor who satisfies that condition. To hold that a judgment-debtor may obtain an order for transfer on the ground that one judgment-debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and may then execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfil that condition, seems to me so absurd that the section must be given the limited construction which I indicated.

I decide therefore that the learned master was right in holding that this Court has no jurisdiction to execute the order against any judgment-debtor except Bhagabati Prosad. This is enough to dispose of the appeal. There are other interesting points raised; among them is the question of the title of the applicant to execute the decree at all. Admittedly, as long as the insolvent was alive, the benefit of the order for costs was vested in the receiver. I think upon a true construc-

tion of S. 58, Provincial Insolvency Act, that on the receiver's death, the insolvent's estate was vested in the insolvency Court. The right of the present applicant to execute the order for costs is justified by his counsel on the ground that the Court having given him leave to execute the order, he must be regarded as an agent to take proceedings which have been sanctioned by the Court within the meaning of S. 59 (e). In none of his applications does he ask to be appointed an agent, nor does the Court anywhere purport so to appoint him. It is a little difficult to see on what his title to the decree exactly rests, or when the decree ceased to vest in the insolvency Court. There has been, as far as I can see, no formal order terminating the insolvency proceedings or releasing any part of the insolvent's assets in favour of his heirs. It appears to me very doubtful if the benefit of the order could be allocated by the award of the arbitrators and there is the further difficulty that although the arbitrators directed assignments to be made by the co-sharers inter se, no assignment of the order has ever been executed; nor has any decree been passed in terms of the award.

In my judgment the decree cannot be rightly said to have been transferred to the applicant by operation of the law within the meaning of O. 21, R. 16. Nor do I think that it has been transferred by assignment, and if it has been transferred by assignment, it is conceded that the proviso to R. 16, requiring notice of the application for execution to be given to the judgment-debtor, has not been observed. I am therefore disposed to hold that the applicant is not in a position to execute the order as against the heirs of Bijoy Singh Dudhoria. I do not propose to deal with the issue of limitation, which has been raised, and I hold that upon a true construction of S. 39, Civil P. C., and in the circumstances in which the order for transfer was made, this Court has no jurisdiction to give leave to execute the order for costs against any respondent except Bhagabati Prosad, and possibly against any other respondent who satisfies the condition of S. 39 (1) (b). This application is therefore dismissed with costs. Costs as of a motion

V.B./R.K. *Application dismissed.*

A. I. R. 1936 Calcutta 524

GUHA AND LODGE, JJ.

Sachin Das—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 336 of 1935, Decided on 20th August 1935.

(a) **Sedition—Intention—Determination of—Test is reasonable and natural effect of speech.**

To determine whether the intention of the accused was to call into being hostile feeling, the rule that a man must intend the natural and reasonable consequences of his act must be applied; so that if on reading through the speech, the reasonable, natural and probable effect of the same on the minds of those to whom the speech was addressed, appears to be that feeling of hatred contempt and disaffection would be excited towards the Government, then it is justifiable to say that speech was delivered with that intent, and that there was an attempt to create the feeling against which law seeks to provide. [P 524 C 2; P 525 C 1]

(b) **Sedition—Speech showing spirit of revolt against Government—Exciting disaffection against Government by bringing it into hatred and contempt—Speech taken as whole held seditious.**

The entire speech delivered by the accused taken as a whole showed a spirit of revolt against the established Government in this country, as also an intention to excite disaffection towards the Government by bringing it into hatred or contempt. The predominating idea of the speech in question was not only to support the idea of communism and to suggest some other form of Government but to bring the present Government and the supporters of the same into hatred and contempt and raise hostile feelings against them:

Held: that speech was clearly one which attracted the provisions of S. 124-A, Penal Code. 22 Bom 152 (F B), *Rel. on.*

[P 524 C 2; P 525 C 1, 2]

Kshitish Chandra Chakravarti and *Manmatha Nath Das*—for Appellant.

A. K. Bose and *D. N. Bhattacharji*—for the Crown.

Judgment.—The appellant Sachin Das was charged with having committed an offence under S. 124-A, I. P. C., and on being tried for the same, by the learned Chief Presidency Magistrate, Calcutta, was sentenced to rigorous imprisonment for one year. The charge against the appellant was that he by delivering a speech under the auspices of the Unemployed Council, Calcutta, brought or attempted to bring into hatred or contempt or excited or attempted to excite disaffection towards Government established by law in British India. The defence of the accused placed on his trial before the

Magistrate was that he had no intention whatsoever of preaching sedition, and that his only object was to express his views regarding the unemployment problem and to explain the various efforts made in different countries to tackle it. The question to be decided in the case was whether upon the speech taken as a whole, it could be held that it attracted the provisions contained in S. 124-A, I. P. C. As has been stated before us by the learned advocate for the appellant, that the speech in question is full of jargon of communism, which may ordinarily be meaningless to an ordinary audience, but there is no question that the speech contained passages of which the following may be said to be typical:

Hence I find today the situation is that how all the communist leaders, all the workers leaders are being subjected to oppression; for a single speech three months, six months and eleven months; provoking them unjustifiably and framing a charge of rioting against them. . . . For imperialist power is most afraid of workers movement. . . . Hence it is not that Government put down the workers merely by means of a paper propaganda. In order to preserve simultaneously a balance of power they set up a counter revolutionary organisation.

I want only to say that if you really feel any interest you should come forward under the Red Flag, you should come forward under Leninism.

The passages quoted above have to be considered with the entire speech which shows a spirit of revolt against the established Government in this country, and an intention to excite disaffection towards the Government by bringing it into hatred and contempt. The predominating idea in the speech in question was not only to support the idea of communism, and to suggest some other form of Government, but to bring the present Government and the supporters of the same into hatred and contempt, and raise hostile feelings against them. It is well settled that to determine whether the intention of the accused was to call into being hostile feelings, the rule that a man must intend the natural and reasonable consequences of his act must be applied; so that if on reading through the speech, the reasonable, natural and probable effect of the same on the minds of those to whom the speech was addressed, appears to be that feelings of hatred, contempt and disaffection would be excited towards the Government, then it is justifiable to say that the speech was delivered with that intent, and that there was an attempt to

create the feelings against which the law seeks to provide. This is inspite of what was stated by the accused in his written statement before the Magistrate that he had no intention of preaching sedition, and was only expressing his views on the unemployment problem. In this connection it may be stated, that we are in entire agreement with the observations of Beaumont, C. J., that if a person chooses to speak in the same speech with two different voices, and one of those voices brings him within the reach of the criminal law, it is no excuse of him to say that the other voice expresses his real views, so as to do away with the inference deducible from the speech taken as a whole: see Ratanlal's Law of Crime, Edn. 13, p. 294, quoting the observations of the Chief Justice of the Bombay High Court, in the case of *Chimanlala Rava Shankar Joshi*.

The question to be considered in a case of the present description was whether the accused by his speech brought or attempted to bring into hatred or excited or attempted to excite disaffection towards the Government. The case of bringing in to hatred or contempt and that of exciting or attempting to excite disaffection have, in view of the scheme of S. 124-A, I. P. C., to be considered together, the one resulting from the other. There was a very clear exposition of the law on the subject, by Ranade, J. in 22 Bom 152 (1), in which the learned Judge explained the word 'disaffection' as used in S. 124-A, I. P. C.:

It is a positive political distemper and not a mere absence of negation of love or goodwill. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motive to it, makes men indisposed to obey or support the laws of the realm and promote discontent and public disorder.

Keeping the above view of the law in mind, with which we are in entire agreement, the speech which was the subject of the charge under S. 124-A against the appellant, taking the speech as a whole, was clearly one which attracted the provisions of the law contained in that section. In our judgment, the Magistrate in the Court below was right in his decision

that the speech delivered by the appellant on 18th January 1935, mentioned in the charge framed against the appellant, was calculated to bring the entire administration of the country, executive and judicial, into contempt and hatred, and the appellant was rightly convicted under S. 124-A, I. P. C. The sentence passed on the appellant is not severe. The appeal is dismissed.

S.R./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 525

R. C. MITTER, J.

Secy. of State—Petitioner.

v.

Joy Narain Chunder and others—Opposite Parties.

Civil Rule No. 1586 of 1935, Decided on 7th May 1936, from order of President, Calcutta Improvement Tribunal, D/- 9th September 1935.

Land Acquisition Act (1 of 1894), Ss. 31 (2) and 34—'Deposit' means deposit in place indicated by S. 31 (2).

The word 'deposit,' as used in S. 34, means and refers to the actual fact of deposit in the place indicated by S. 31 (2). Whether the deposit actually made in such a place by the Collector was by reason of any error of judgment on his part on a matter which has to be judicially determined does not matter, and the Collector would not be incurring any liability to pay interest by sending money to the Court referred to in S. 31 (2) in such circumstances: (1904) A (Judicial) P R No. 44, p. 133 *Disting.* [P 527 C 1, 2]

B. K. Mukerjee—for Petitioner.

Kushi Prasun Chatterjee—for Opposite Parties.

Order.—The case so far as this Court is concerned raises a question of first impression and involves a principle which would not only affect this particular case but may affect many other cases of the same description, and it is for this reason that I have heard learned advocates appearing for the respective parties at great length and have bestowed considerable attention to their arguments. The position is this: Premises No. 16 Bartala Street was acquired under the Land Acquisition Act. It belonged to Babu Subal Chand Chunder, but at the time of the acquisition that gentleman was dead. He left a will, two executors being appointed, and probate has been taken by them out. The award was made on 27th March 1935 and a large sum of money, namely about a lac and twelve thousand of rupees, was awarded as compensation

1. Queen-Empress v. Ram Chandra Narayan, (1898) 22 Bom 152 (F B).

money. Before the Collector it seems that the executors produced the will and they wanted the money from the Collector, but the Collector being doubtful of their powers to alienate land remitted the compensation money to the Calcutta Improvement Tribunal in accordance with the provisions of S. 31 (2), Land Acquisition Act. He took the view that the will contained restrictions on the powers of the executors to alienate land and he accordingly, as I have said before, deposited the money with the Calcutta Improvement Tribunal. The material portion of that section applicable to this case is as follows:

If there be no person competent to alienate the land the Collector shall deposit the amount of the compensation in the Court to which a reference under S. 18, would be submitted.

The Court here, in this particular case, is the Calcutta Improvement Tribunal and to that Court the money was forwarded. On the said deposit being made the executors of the late Subal Chand Chunder made an application to the Calcutta Improvement Tribunal stating that the money cannot be invested under the provisions of S. 32 (1), but has to be made over to them, inasmuch as according to the terms of the will, there was no restriction on their powers to alienate the land. The President of the Calcutta Improvement Tribunal construed the will, and he came to the conclusion that there was, in fact, such restriction. He accordingly refused the application of the executors by an order dated 17th June 1935. The possession of the property had not been taken by the Collector up to this date. He took possession 10 days later, namely, on 27th June 1935. The executors of the said gentleman moved this Court on 24th June 1935 against the order of the President Calcutta Improvement Tribunal, dated 17th June 1935. A rule was issued and that rule was made absolute on 12th July 1935 by a Division Bench of this Court but without costs. This Court held on a construction of the will that there were no restriction on the executors' power of alienation. In pursuance of this order the executors applied for withdrawal of the compensation money, and on 28th July 1935 the money was actually paid to them. Subsequently two applications were made by them in the Court of the Calcutta Improvement Tribunal. In one they stated that they ought to be awarded costs incidental to the withdrawal

of the money. According to them the costs incidental to the withdrawal of the money included the money they had to spend before the Improvement Tribunal and the High Court for getting a construction of the will. This application was dismissed. The learned President has given certain reasons, but it is not necessary for me to consider those reasons because the executors have not moved this Court against that order.

The other application filed by the executors is this: they stated that they were entitled to claim interest on the amount of the compensation from 27th June 1935, the date when the Collector took possession to the 28th July 1935 when they actually received payment of the compensation money. This amount comes up to about Rs. 600. This application was successful before the President of the Tribunal on the basis of S. 34, Land Acquisition Act. The Secretary of State for India in Council has moved against that order and his learned advocate says that this case does not come within the terms of S. 34 at all. S. 34 is in these terms:

When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of six per cent per annum from the time of so taking possession until it shall have been so paid or deposited.

The liability to pay interest is a statutory one and that liability is defined by the aforesaid section. The Collector is bound to pay interest at the rate of 6 per cent from the date of his taking possession till the compensation money is actually paid in certain defined circumstances. The word "deposit" in that section has reference to the provisions of S. 31 (2) and, in my judgment, the liability to pay interest does not arise when there has in fact been a deposit in the place where the statute required it to be deposited. That is to say, if the deposit is made in the Court in which a reference would lie under S. 18, the liability to pay interest under S. 34 does not arise. If the deposit is not made at the place indicated in S. 31 (2) different consideration may arise: It would not be a deposit in accordance with S. 31 and the liability to pay interest in such a case would arise in spite of the fact that the Collector had parted with the money by sending it elsewhere, e. g. when he has deposited in the Govern-

ment treasury. In fact that was a case which occurred in (1904) A (Judicial) P R No. 44, P. 133 (1), a case on which the learned President relied in making the order in favour of the executors. I do not consider that that case has any bearing upon this case at all. The other reason which the learned President has given in support of his order is that if the Collector commits an error of judgment on the point of construction of a will, and comes to a conclusion that the executors' powers of alienation are restricted and makes a deposit in Court under S. 31 (2) that is no deposit in the eye of the law within the meaning of S. 34 and the liability to pay interest arises.

I do not agree with this reasoning. The Collector has to pay the compensation money to a person who is entitled to it, and is entitled to form his own judgment and to satisfy himself as to whether that person is entitled to take the money from his hands. When he feels a bona fide doubt in the matter, it is his duty not to take upon himself the task of determining that question himself, for his adjudication would not be binding on anybody, not being the adjudication of a civil Court, but he must act in the way provided for under S. 31 (2) and send the money to the Court that would have jurisdiction to hear the reference under S. 18. Any other view of the provisions of statute would, in my judgment, lead to serious consequences. Suppose a Collector in a matter of this kind which I have before me comes to the conclusion that the executors' powers are not limited by the Will and he makes over the money to the executors, and if in a later adjudication in a civil Court between the parties interested in the estate of the testator it be found that their powers are restricted, I do not know what would be the position of the Secretary of State with regard to the moneys paid by the Collector on his own responsibility to a man, when he ought to have, if the correct position had been appreciated by him, deposited the money in Court under the provisions of S. 31 (2). This consideration alone leads me to construe the word "deposit" as used in S. 34 to mean the actual fact of deposit in the place indicated in S. 31 (2). Whether the deposit actually made in such a place by

the Collector was by reason of any error of judgment on his part on a matter which has to be judicially determined does not matter and I do not consider that the Collector would be incurring a liability to pay interest by sending the money to that Court in such circumstances. For these reasons I make this Rule absolute and discharge the order complained of, but in the circumstances of the case I do not make any order for costs.

V.B./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 527

CUNLIFFE AND HENDERSON, JJ.

Jogneswar Ghosh and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 118 of 1936, Decided on 17th June 1936.

(a) Criminal Trial—Trial by jury—Accused charged with offences under Ss 395 and 399, Penal Code, and with conspiracy to commit those offences—Jury's verdict of "not guilty"—Sessions Judge convicting accused of offence under S. 395 read with S. 120-B, Penal Code, and acquitting on main offence—Accused contending that Sessions Judge had no jurisdiction to convict accused in face of verdict of acquittal by jurymen—No notification of local Government that such trial was to be by jury—Judge held empowered to pass such order.

The accused were charged with offences punishable under Ss. 395 and 399, Penal Code. They were further charged with a conspiracy to commit both those offences. The jury brought in a unanimous verdict of "not guilty." The Sessions Judge acquitted all the accused of the main charges, but convicted them under S. 395 read with S. 120-B, Penal Code, holding that the jury were assessors and that he was entitled to take a contrary view. It was contended on behalf of the accused that the trial was with jurymen and not with assessors, and that the Judge had no jurisdiction to convict them in the face of the verdict of acquittal:

Held: that since there was no notification of the local Government directing that such an offence was triable by jury, the trial should be construed to have been carried on with the aid of assessors and the Sessions Judge had jurisdiction to pass that order. [P 528 C 1]

(b) Criminal Trial—Conviction—Accused declared 'not guilty' by jury sitting as assessors—Judge cannot convict accused without assigning reasons.

Where the accused are declared 'not guilty' by the unanimous opinion of the jury sitting as assessors and the evidence does not support the guilt of the accused, the Judge cannot convict

1. Parmanand v. Secy. of State, (1904) A (Judicial) P R No. 44, p. 133.

them further without giving any reasons for so doing. [P 528 C 1, 2]

Jitendra Chandra Banerjee — for Appellant.

Khundkar, Anil Chandra Rai Chaudhuri and *Nirmal Chandra Chakravarty* — for the Crown.

Henderson, J.—This appeal raises a point which had not come to us before, although it might be expected to be raised every week, if not every day. The appellants with certain other persons were put on their trial, charged with offences punishable under Ss. 395 and 399, I P. C. They were further charged with a conspiracy to commit both those offences. The jury brought in a unanimous verdict of 'not guilty.' The learned Judge acquitted all the accused persons of the main charges and then proceeded to convict them of an offence punishable under S. 395 read with S. 120-B, holding that the Jury were assessors and that he was entitled to take a contrary view. The first point taken on behalf of the appellants was that these gentlemen were not assessors but Jurymen and that the learned Judge had no jurisdiction to convict them in the face of the verdict of acquittal. In view of the provisions of S. 269, Criminal P. C., there can be no doubt that the normal procedure under the Code is trial by assessors, and it is only when the local Government publish an order in the Gazette that the trial of an offence becomes triable by Jury. Such orders may be made or revoked at any time. The offence of which the appellants have been convicted is one triable under Ch. 5-A, I. P. C. The learned advocate who has appeared on behalf of the appellants has not been able to show to us any notification of the Local Government directing that such an offence is triable by jury. We must therefore overrule this preliminary objection.

The only remaining question is whether we can uphold the convictions. It would certainly be a most extraordinary thing that, if the main part of the case were disbelieved and an order of acquittal passed, the accused persons should be convicted on the substratum, if any, which remains. The learned Judge in this case has taken the remarkable course of convicting the appellants on his own view of the facts without giving any reason whatsoever. The learned Deputy Legal Re-

membrancer, with his usual fairness, stated that he could not support this and that the evidence in the case is not such that we ought to say that a finding of guilty is the only reasonable or proper finding. We are certainly not prepared to accept the opinion of the learned Judge as opposed to the unanimous opinion of the Jury sitting as assessors, when no reasons for that opinion are assigned at all. We, accordingly, allow this appeal, and set aside the convictions and sentences. The appellants, who are on bail, are discharged from their bail bonds. The fines, if already paid, will be refunded to them.

Cunliffe, J.—I agree.

R.W./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 528

EDGLEY, J.

Kalikumar Deb and others — Appellants.

v.

Secy. of State—Plaintiff—Respondent.

Appeal No. 38 of 1935, Decided on 28th May 1936, from appellate decree of Sub-Judge, Fourth Court, 24-Parganas, D/- 2nd June 1934.

(a) Bengal Tenancy Act (8 of 1885), S. 182 — Holding acquired subsequent to homestead—Raiyat is entitled to benefit of S. 182.

When a raiyat holds his homestead otherwise than a part of his holding, he is entitled to the benefit of S. 182, although he may have become a raiyat subsequently to the taking of his residential tenancy: 163 I C 406, *Foll*

[P 529 C 1]

(b) Bengal Tenancy Act (8 of 1882), S. 182 (as amended in 1928) — S. 182 applies to tenancies in existence at passing of amending Act.

Section 182 of the Amending Act of 1928 became applicable to tenancies which were in existence at the time of the passing of the Amending Act. Both raiyats and under-raiyats on that date would get the benefit of the new section and would therefore be entitled to hold their homestead subject to the provisions of the Act as amended, and the incidents of their homestead will be governed by provisions of new Act applicable to raiyats and under-raiyats. [P 529 C 1]

Gopendra Nath Das—for Appellants.

Bijan Kumar Mukherjee—for Respondent.

Judgment. — In the suit out of which this appeal arises the plaintiff sued the defendant for ejectment from his homestead. The defendant contended that he should not be ejected, inasmuch as he

had acquired occupancy rights in certain other lands in the village and this being the case he was entitled to the benefit of S. 182, Ben. Ten. Act. He also contended that the ejectment notice, which had been served upon him, was defective. It has not been urged before me that the provisions of the Transfer of Property Act apply in this case. The Courts below have both held that S. 182, Ben. Ten. Act, has no application in a case of this sort, because the agricultural land, in respect of which the defendant claims to have occupancy right in the village, was acquired after the acquisition of the homestead by the defendant. It has however been decided by this Court in 40 C W N 599 (1) that, when a raiyat holds his homestead otherwise than a part of his holding, he is entitled to the benefit of S. 182, Ben. Ten. Act, although he may have become a raiyat subsequently to the taking of his residential tenancy. With regard to this point it is however contended by the learned Advocate for the respondent that, in the particular circumstances of the case out of which this appeal arises, the defendant cannot in any event obtain the benefit of S. 182 of the Act, because the other land in the village in respect of which he has occupancy rights was acquired by him before the passing of the amending Act of 1928 and, in these circumstances, it is contended that the provisions of the old Act should apply.

There is evidence on the record to show that the defendant holds a certain plot of land in the village as an under-raiyat with occupancy rights (Ex. C). Admittedly this land was acquired by him before the year 1928. If the provisions of the old Act applied, it is clear that he would not get the benefit of S. 182 of the Act as it now stands. It would appear however that, when the amending Act of 1928 was passed, the new S. 182 became applicable to tenancies which were in existence at the time of the passing of the Act. This being the case both raiyats and under-raiyats would get the benefit of the new section and they would therefore be entitled to hold their homestead subject to the provisions of the Act as amended and the incidents of their homestead tenancies will be governed by the provisions of the new Act applicable to

rai-yats and under-raiyats as the case may be. In this view of the case I think that the decision of the lower appellate Court is wrong. The judgments and decrees of the lower Court, are therefore set aside and the plaintiff's suit is dismissed. The defendant will get his costs throughout.

V.B./R.K.

Appeal allowed.

*** A. I. R. 1936 Calcutta 529**

CUNLIFFE AND HENDERSON, JJ.

Netai Chandra Jana and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 488, 489 and 490 of 1935, Decided on 14th May 1936.

(a) Interpretation of Statutes—Statute curtailing personal liberty should be construed most strictly, and, in favour of subject.

A statute curtailing personal liberty should be construed most strictly, and, if anything, in favour of the subject. The principle should all the more, be rigidly enforced in this country in view of the fact that there is no major Act such as Habeas Corpus upon the statute book.

[P 531 C 1]

* (b) Bengal Suppression of Terrorists Outrages Act (12 of 1932), S. 25—Scope of—Prima facie case of murder disclosed by prosecution evidence—Local Government cannot direct trial before Special Magistrate—Such trial is without jurisdiction.

Section 25 does not empower the local Government to order a trial before a Special Magistrate where a case of murder is prima facie disclosed by prosecution evidence and trial by the special Magistrate under such circumstances is without jurisdiction.

[P 531 C 2]

Per Henderson, J.—An opinion of the Local Government merely that an accused person has committed an offence not punishable with death would not give it jurisdiction to appoint a special Magistrate to try him. The Local Government have not in their power to decide finally that a particular accused person has not committed an offence punishable with death and to ignore the most serious part of the crime altogether simply to give jurisdiction to a special Magistrate.

[P 532 C 2; P 533 C 1, 2]

(c) Criminal Trial—Murder—Person committing crime successfully making attack on their victims—Attack directly resulting in death—It is prima facie case of murder.

If for purpose of committing a crime the persons who wish to commit that crime, successfully make an attack upon their victims which results in death directly caused by that attack, it is a prima facie case of murder.

[P 531 C 2]

* (d) Bengal Suppression of Terrorists Outrages (Supplementary) Act (24 of 1932), S. 3 (1) and (2)—Appeals from convictions of offences alleged to have been committed under Bengal Suppression of Terrorists Outrages Act—High Court retains its ordinary

1. Pulin Chandra Daw v. Abu Bakhar Naskar, (1936) 168 I O 406=40 C W N 599.
1936 C/67 & 68

powers as provided for in Chap. 31, Criminal P. C., in dealing with appeals.

The Judges of the High Court hearing appeals from convictions for offences alleged to have been committed under the Bengal Suppression of Terrorists Outrages Act, retain their full rights of procedure and their full rights of alteration or acquittal as provided for in Chap. 31, Criminal P. C. unless there is some specific language in any part of the Acts which qualifies these rights, and they are entitled to act as they would act in similar circumstances in an ordinary appeal. [P 532 C 1]

(e) **Criminal Trial—Forum—Advantages or disadvantages of trial before different types of tribunals—It is only opinion of accused which is entitled to serious consideration.**

Per *Henderson, J.*—The only persons capable of weighing the respective advantages or disadvantages of trial before different types of tribunals are the accused persons themselves and it is their opinion which is entitled to serious consideration. [P 533 C 1]

Manmathanath Das Gupta (in 488), J. C. Gupta, Purnendu Chaudhuri (in 489) and Sailendra Mohan Das (in 490)—for Appellants.

S. M. Bose, Jitendra Mohan Banerji and Birendra Chandra Nag—for the Crown.

Cunliffe, J.—These are 9 appeals from convictions and sentences passed by a Special Magistrate sitting at Hooghly. The accused persons were put upon their trial on a number of different charges. They included, conspiracy to engineer a rising against the Government, conspiracy to commit offences under the Arms Act and, as to five of them, charges of committing dacoity in furtherance of the aims attributed to the terrorist movement. On the appeal being opened, a preliminary point was put forward by Mr. Gupta, Senior Counsel for the appellants, with which the other advocates for the appellants associated themselves. This point was directed to an attack upon the jurisdiction of the learned Special Magistrate, having regard to the case advanced by the Crown against the five appellants implicated directly in the dacoity. It was contended that these five persons with regard to the dacoity were originally charged, not under S. 395 of the Code, but under S. 396, the difference between the two sections being that the latter section, namely S. 396 is the provision in the Code which deals with the class of dacoity in which a murder has taken place. It was further argued that although at the trial the charge under S. 396 was dropped and the lower charge

substituted, nevertheless, the substantive case for the Crown advanced against these five people was of such a character that if it were true, (which was of course denied by the appellants) they ought to have been placed upon their trial for dacoity with murder.

The gravamen of this argument is based upon the wording of S. 25, Bengal Suppression of Terrorists Outrages Act, 1932 the section under which the Special Magistrate was empowered to try the case. I think it will be convenient if I set out that section. It runs as follows:

Where in the opinion of the Local Government or of the District Magistrate, if empowered by the Local Government in this behalf, there are reasonable grounds for believing that any person has committed a scheduled offence not punishable with death (these are the important words "not punishable with death") in furtherance of or in connection with the terrorist movement, or an offence punishable under this Act, or under S. 6, Bengal Criminal Law Amendment Act, 1930, the Local Government or District Magistrate as the case may be, may, by order in writing, direct that such person shall be tried by a Special Magistrate.

Our attention was called to parts of the evidence produced before the learned Special Magistrate. This evidence showed that by reason of the dacoity two lives were lost owing to the action of the five appellants to whom I have referred. The prosecution maintained that as participants in the dacoity the five appellants had provided themselves with cotton wool, and also with a bottle of chloroform. It was said that by means of the chloroform applied to this cotton wool, these five accused asphyxiated the two persons who lost their lives, for the purpose of enabling the robbery to be committed. If that were correct, say the appellants, the crime which they committed was one which was certainly punishable by death under S. 396. It is further suggested that for the sake of convenience or for some other purpose, the Local Government directed that this trial should take place before a Special Magistrate rather than before a Court consisting of three Judges sitting together which it is said is the proper tribunal to try cases of this character. The answer made by the Crown to this argument is, firstly, that the language of the section shows that it is the opinion of the Local Government, erroneous or not, which is to govern trials under the special procedure and, secondly, that even if this is not so, the facts disclosed in the prosecution case do not

reveal a true case of murder at all. I may say at once that it has always been a canon of the construction of the type of statute which curtails personal liberty that it should be construed most strictly and, if anything, inclining in favour towards the subject. A wholesome canon I think, and a principle which ought to be rigidly enforced in this Court, more especially when we consider that in this country we have no major Act such as Habeas Corpus upon our statute book.

Now, if we examine S. 25 closely, we find that the opinion of the Local Government before cases may be allotted to a Special Magistrate has to be taken upon several points. The first point is that there must be reasonable grounds for believing that a scheduled offence has been committed. A scheduled offence is that type of offence which, as far as this Act is concerned, is enumerated in the schedule to the Act. S. 2 of the Act lays this down; and the offences charged in the Court below are clearly within the ambit of the schedule in question. The next point upon which the Local Government is required to give a preliminary opinion is whether the offence alleged to have been committed is one which is punishable with death. And the third and the last view which the Local Government has to express is, that the offences put forward by the prosecution must have been committed in furtherance of or in connexion with the terrorist movement.

Now, as I read the section, it empowers the Local Government to appoint a special Magistrate to try only those offences of a terrorist nature contained in the schedule which are not punishable by death. But it does not give power to the Local Government to send for trial before a Special Magistrate an offence which is punishable by death. It is interesting to note that in another Act contained in the Manual of Legislation which has been handed to me, in which are included a number of these special statutes demonstrating the scheme adopted by the authorities to deal with the terrorist movement, (I refer to the Bengal Criminal Law Amendment Act of 1925) that there is provision for the trial of persons who are said to have committed offences under a schedule which resembles very closely Sch. 2 to the Suppression of Terrorist

Outrages Act schedule, but without the qualification introduced into the subsequent Act that they are offences not punishable by death. Under the provisions of the 1925 Act a person who has committed an offence punishable by death has the right to be tried by a tribunal of three Judges with senior qualifications. This is laid down in S. 4 thereof. We were invited therefore to say that the appellants could legally insist in the circumstances on being tried before such a tribunal rather than by a Special Magistrate who, according to S. 24, Bengal Suppression of Terrorist Outrages Act of 1932, need only be a Magistrate of the First Class or a Presidency Magistrate who has exercised his powers as such for a period of not less than 4 years.

As to the argument advanced by the Crown that, on a reasonable consideration, the facts disclosed in the prosecution case here do not disclose an offence on the part of the five persons which amounts to dacoity with murder, I cannot accept it. It would be improper for me to go with any particularity into the evidence; but I shall merely say this: that, *prima facie*, if for the purpose of committing a crime the persons who wish to commit that crime successfully make an attack upon their victims which results in death directly caused by that attack, *prima facie* it seems to me that a case of murder has been set up. I have no intention of giving illustrations of this principle; but if it were necessary I could do so. I therefore answer the contention put forward by the Crown at the risk of reiteration in this way, that S. 25 does not empower the Local Government to order a trial before a Special Magistrate where a case of murder is *prima facie* disclosed by the prosecution evidence; and secondly, that I do not agree that this offence, according to the prosecution case, is anything less than *prima facie* murder, as far as the five persons implicated are concerned. Holding this view of the law, the question remains: What have we power to do? I notice that the Bengal Suppression of Terrorist Outrages Act, which is a local Act, has a supplement, in the form of an All India Statute which deals *inter alia* with the right of appeal from the decisions of the special Courts which function under the local special legislation. S. 3, Supplementary Act, sub-s. (2), runs as follows:

An appeal under sub-s. (1) which provides for an appeal to this High Court shall be presented within thirty days from the date of the sentence and shall be disposed of by the High Court in the manner provided in Ch. 31 of the Code of the hearing of appeals.

(The reference to the word Code there, or rather I should say its definition, is that the Code means the Code of Criminal Procedure.) Now, I believe that the intention of the persons who framed that section which relates solely to procedure and is therefore one in which I can safely consider the intention of the framers was that this Court when hearing appeals in such cases should hear them in the ordinary way and with the ordinary powers which the appellate side of this Court has been given by Ch. 31, Criminal P. C. It seems to me that if we were not, by the language of the section, endowed with the full powers of an appellate Court under the Code, our powers, if they had been cut down, would necessarily have to be defined and defined strictly. But in my view the ordinary meaning of the language used in the section is that in hearing this class of appeals we retain our full rights of procedure and our full rights of alteration or acquittal, unless there is some specific language in some part of these Acts to which my attention has not been called which qualifies those rights.

We propose therefore to act as we should act in similar circumstances in an ordinary appeal. We think that the right course to adopt will be to set aside the convictions and sentences passed by the learned Special Power Magistrate. We are not forgetful that the argument based upon the construction to be put upon S. 25 was only advanced on behalf of five of the appellants and could only have been advanced on the facts of the case in favour of these five persons. Nevertheless we think that it would not be in the public interest, if we did not include in our order setting aside the convictions and sentences those four other appellants who, according to the case for the Crown, were closely associated with the five persons said to have been involved actively in the murder which the dacoity involved. It would be creating an invidious position were we merely to confine our order to the first five appellants, and one can imagine that it would be still more embarrassing if we dealt with the appeal with regard only to the remaining four. We

shall therefore include all the appellants in the order which I have just passed. There will be no order for bail; but we give learned counsel for the appellants leave to re-apply to us within 10 days with notice to the Crown. Meanwhile the appellants will be treated as under-trial prisoners. We propose to extend the time for the bail application to 10 days from the date of the above final signature.

Henderson, J.—A preliminary objection has been taken on behalf of the appellants before us which raises the question whether in a case where the prosecution evidence, if true discloses an offence punishable with death, the local Government has jurisdiction to appoint a Special Magistrate under the provisions of S. 25, Bengal Act 12 of 1932. The question is not only a very difficult one but is also of the utmost importance not only to the public in general but to all those who are connected in any way, either directly or indirectly, with the trial of persons charged with committing offences in furtherance of the terrorist movement. On behalf of the Crown the learned standing counsel met this objection by arguing that the opinion of the local Government in the matter is decisive and cannot be called in question. Now, it would be very difficult to say that the opinion of the local Government that the accused person has committed a certain offence cannot be called in question; because if that suggestion is rigidly followed out, a conviction must automatically follow and a Magistrate, as soon as he acquits an accused, is calling that opinion in question in the most emphatic manner possible. In my opinion the important words are "in furtherance of or in connexion with the terrorist movement." I certainly agree that it is not open to the appellants to suggest before us that this particular crime was not committed in furtherance of or in connexion with the terrorist movement. But I should certainly not be prepared to go so far as to say that the opinion of the local Government that they have committed a certain offence cannot be called in question. It is also clear that an opinion of the local Government merely that an accused person had committed an offence not punishable with death would not give jurisdiction to appoint a special Magistrate to try him. But in any view of this parti-

cular matter this is not the real point. The objection really goes much deeper than that and is to the effect that the section itself by its terms does not empower the local Government to appoint a Special Magistrate to try a case of this kind.

Now, the objection, if sound, is a perfectly reasonable objection. If the appellants are said to have committed an offence punishable with death they would ordinarily be entitled to a trial by a jury or, at any rate, in view of certain special legislation, by three Commissioners. They are at liberty to attach any value they please to such a privilege, if it be a privilege. It is of course very easy to say or to suggest that the procedure adopted in this case is really to the advantage of the appellants; because the greatest risk they run is that of a sentence of 7 years' imprisonment. But it seems to me that the only persons capable of weighing the respective advantages or disadvantages of trial before different types of tribunals are the accused persons themselves and it is only their opinion in the matter which is entitled to any serious consideration. The objection is not one that would be taken in a light-hearted manner. Indeed in the course of the present argument, we pointed out to Mr. Gupta the risks that his clients would run in the event of our giving effect to this objection; but after consulting the learned Advocates instructing him he informed us that in his opinion the objection ought to be pressed. In such circumstances, in my judgment, if the appellants can show that the order was made without jurisdiction they are then entitled to demand any appropriate relief which we have it in our power to give them.

Now, I entirely agree with my learned brother that, if the appellants are to be deprived of the right of trial before a jury or before Commissioners to which they attach a certain value, the words depriving them of that right must be absolutely clear and specific. I can find no such words in this section. In considering the intention of the legislature we cannot close our eyes to the fact that special legislation was passed to provide for the trial of serious offences including offences punishable with death. There can also be no doubt that the Special Magistrate has no power to try such an offence. I should, therefore, find it very difficult to

believe that the intention of the legislature was to give the local Government power to ignore the most serious part of the crime altogether simply to give jurisdiction to a Special Magistrate. Another difficulty is that it would imply that the Local Government have it in their power to decide finally that a particular accused person has not committed an offence punishable with death. There is no such power clearly conferred upon them and I find it impossible to say that they have the right to send a case of this kind to be tried by a Special Magistrate. For these reasons, particularly because there is no specific provision for empowering a Special Magistrate to deal with this type of case, I agree that the order made was without jurisdiction.

The next question which we have to determine is what orders we can and what order we ought to pass. We are then confronted with another very difficult question, that is to say, what powers we have, sitting to hear appeals from the decision of a Special Magistrate. That matter was determined by sub-s. (2), S. 3 of Act 24 of 1932 and the decision rests upon the meaning to be given to the words "in the manner." Those words might apply merely to procedure or go further and apply to the method in which the appeal is to be disposed of. I think it might be argued with some show of reason that the natural interpretation of those words would be that the Court in the exercise of certain limited powers in appeal was to follow the procedure laid down in Ch. 31, Criminal P. C. But the difficulty in accepting such an interpretation is that this Act of the Indian Legislature confers no powers on us whatever, and if sub-s. (2) merely deals with procedure, we can do nothing more than issue notices and listen to arguments. For example, it cannot be denied that this Supplementary Act does not confer upon us any power to reduce a sentence. From time to time this Court in hearing appeals from the decisions of Special Magistrates has reduced sentences and, so far as I know, it has never been suggested that in so doing the Court was acting without jurisdiction. In my view, therefore, the only possible interpretation of this subsection is that the intention was to confer upon us the powers of an appellate Court hearing appeals under the provisions of Ch. 31 of the Code. If that be so, the

irresistible conclusion is that we have all the powers referred to in S. 423.

Now, if we have the powers conferred by that section, we have the right in suitable cases to order a re-trial by a Court of competent jurisdiction subordinate to us or to commit the accused persons to trial by the Court of Session. The moment that position is reached the appellants are not limited to showing that the appointment of the Special Magistrate is without jurisdiction; they are also entitled to go further and show that the order made by the Magistrate, though not without jurisdiction, was improper and liable to be set aside. In fact their position is exactly parallel to that of an accused person who has been improperly tried by a First Class Magistrate for a minor offence when he ought really to have been committed to the Sessions. In such cases, so far as I know, it has always been held that, even though the order of the Magistrate is not strictly without jurisdiction, it is an improper order and this Court has never had any hesitation in setting such an order aside in a proper case and directing the accused person to be committed to the Sessions. So far as the present case is concerned, I agree with my learned brother that the trial was without jurisdiction and that, therefore, the proper order to pass is merely one setting aside the convictions and sentences, leaving it to the Local Government to take such further steps, if any, as they may be advised. But had I not reached the conclusion that the appointment of the Special Magistrate was without jurisdiction, I should still have been prepared in view of the facts to which my learned brother and I have referred, to say that the order was an improper one and that the appellants ought to be tried either by the Court of Session or by a Special Tribunal.

R.M./R.K.

Order accordingly.

*** A. I. R. 1936 Calcutta 534**

EDGLEY, J.

Rakhal Das Mukherji and others—Defendants—Appellants.

v.

Kalipada Bhattacharji and others—Respondents.

Appeal No. 1925 of 1934, Decided on 26th May 1936, from appellate decree of Sub-Judge, Khulna, D/- 30th June 1934.

* Civil P. C. (1908), O. 1, R. 9—Declaration in respect of right of easement of pathway—Every owner of servient tenement denying plaintiff's right and every person obstructing are necessary parties.

Where the plaintiff claims a decree for a declaration that he is entitled to a right of easement in respect of a certain pathway, every owner of the servient tenement who denies the plaintiff's right, or is concerned in the obstruction of the pathway, is a necessary party; and any decree obtained in the absence of any such person is infructuous: 1921 Cal 622, *Foll.*; 1924 Cal 369, *Ref.*; 1925 Cal 1138, *Disting.*; 1915 Cal 403 and 1924 Cal 1050, *Not approved.*

[P 535 C 2]

*Gunada Charan Sen and Tarapada Mukherjee—*for Appellants.

*Prokash Chandra Majumdar—*for Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiffs sued the defendants for a declaration of their right of easement in respect of a certain pathway leading from their house in the direction of Maheswarpassa Main Road to the south. This pathway passed to the west of a certain tank belonging to the defendants and that path is said to have been obstructed by defendant 11 acting on behalf of the other defendants. The suit was dismissed by the Court of first instance and the plaintiffs thereupon appealed to the lower appellate Court where their appeal was contested by defendant 11. One of the points taken by the contesting defendant was that the appeal to the lower appellate Court was incompetent, because the appeal had abated as against the heirs of defendant 8. This being the case it was urged that, even if the plaintiffs succeeded in their appeal, any decree which they might obtain would be infructuous. This point however was decided in favour of the plaintiff-appellants and it was held by the learned Subordinate Judge that the appeal was not incompetent. The defendants have now come before this Court on second appeal.

The learned Advocate for the appellants in this case contends that the lower appellate Court was wrong in holding that the heirs of defendant 8 were not necessary parties to the appeal before the lower appellate Court. The learned Advocate for the respondents, on the other hand, contends that the heirs of defendant 8 were not necessary parties, because defendant 8 had not actually obstructed the plaintiff's right of way and that being the case his heirs were not interested in the

subject-matter of the suit. With regard to this argument it appears from the pleadings filed in the first Court that the plaintiffs' allegation was that their right of way had been obstructed by defendant 11 acting on his own behalf and also on behalf of the other defendants. It appears to have been admitted that the pathway in question actually belonged to the defendants and was recorded in their names in the record of rights. It further appears that separate written statements were filed in the first Court: one on behalf of defendant 11 and the other on behalf of defendants 1, 2, 5, 8, 9, 10 and 13. In the later written statement the contesting defendants, including defendant 8, strenuously denied the plaintiff's allegations which appeared in the plaint and contested his right to the declaration which he sought. It therefore appears from the pleadings in this case that defendant 8 was not only one of the owners of the alleged servient tenement, but he had also contested the plaintiff's claim. It is also significant that the judgment of the learned Subordinate Judge contains the following finding:

Though there is no specific act of obstruction attributed to defendant 8, who appeared in the lower Court and filed a written statement, still the facts stated in the plaint and disclosed in evidence are that defendant 8, along with other defendants, had some hand in the obstruction and was therefore a necessary party and was made a party.

The general principle which governs the question of joinder of parties in a case of this nature has been stated by Sir Ashutosh Mookerjee in 25 C W N 249 (1) in which his Lordship made the following observations:

The Court will not entertain a suit in which no effective decree can be made in the absence of an interested party In a case like the present where the decree is to be made for declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon, if it is discovered that a person interested in the servient tenement has not been made a party to the suit, the Court will not proceed to make a decree. The decree so made must be infructuous.

This general principle was reiterated by Ghose, J. in 1924 Cal 369 (2). In the later case it was however pointed out that, regard being had to the facts of that particular case, it was not necessary to implead certain persons who were alleged

to be the cosharers of some principal defendants. In this connection the learned Advocate for the respondents relies upon certain observations made by N. R. Chatterjee, J. in 19 C W N 1211 (3) at p. 1213. In that particular case his Lordship held that it was not necessary to implead certain persons who were alleged to be necessary parties, because "the owners of the land bhadrar kola alone have caused the obstruction, and all the owners of that land have been made parties to the suit." He further held that a dominant owner has not necessarily any cause of action against servient owners who have not caused obstruction or raised any objection to the exercise of his right of easement. This case was cited with approval by Suhrawardy, J., in 40 C L J 74 (4). But in the later case, the learned Judge pointed out that in order to determine whether certain parties are necessary parties or not, reference should be made to the plaintiff's case as set out in the plaint. Further in referring to 25 C W N 249 (1) his Lordship stated:

There the plaintiff wanted to establish rights in respect of certain properties; and it may be argued that he could not do so in the absence of any person who had any interest in the property since such person would be materially affected by the establishment of such a right.

Finally the learned Advocate for the respondents relied on another decision of Suhrawardy, J., in 1925 Cal 1138 (5), in which it was held that certain persons who had not actually obstructed the alleged plaintiff's right were not necessary parties. It is however clear that this case can be distinguished on the facts from the case out of which the present appeal arises. As I have already pointed out, in the case now before this Court, defendant 8 was not merely one of the owners of the servient tenement and had denied the plaintiff's right, but he was also, on the findings of the lower appellate Court, directly concerned in the obstruction. It therefore follows that any decree obtained by the plaintiffs in the absence of the heirs of defendant 8 will be infructuous and the suit cannot therefore be maintained in the absence of those persons.

3. Madan Mohan Chakravarty v. Sashi Bhusan Mukherjee, 1915 Cal 403=31 I O 549=19 C W N 1211.

4. Surja Narain Bera v. Chandra Bera, 1924 Cal 1050=84 I O 467=40 C L J 74.

5. Bhola Nath Mandal v. Mohesh Chandra Bera, 1925 Cal 1138=88 I O 664.

1. Haran Shelkh v. Ramesh Chandra, 1921 Cal 622=62 I O 425=25 C W N 249.

2. Amritanath Biswas v. Jogendra Chandra Bhattacharjee, 1924 Cal 369=69 I O 183.

I am therefore of opinion that the appeal to the lower appellate Court was incompetent. The result is that this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and those of the Court of first instance are restored. The defendants will be entitled to their costs in the lower appellate Court as well as in this Court. The cross-objection is not pressed and is therefore dismissed without costs.

V.B./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 536**

R. C. MITTER, J.

Sarojini Roy—Plaintiff—Appellant.

v.

Romesh Chandra Biswas and others—Respondents.

Appeal No. 542 of 1932, Decided on 29th March 1935, against decree of Addl. Sub-Judge, 2nd Court, Sylhet, D/- 8th August 1931.

Landlord and Tenant — Abandonment—Sale in invitum stands on same footing as transfer by act of occupancy raiyat—Entire holding need not be sold at once—Different parts sold at different times—Abandonment takes place when last transfer is made—Transfer of entire holding completed by landlord himself purchasing portion of holding in execution of decree against raiyat—He cannot put forward his purchase for sustaining case of abandonment.

For the purpose of abandonment a sale in invitum stands on the same footing as a transfer by the act of the occupancy raiyat. So also, for the purpose of constituting abandonment, the transfer of holding need not be effected all at once. If the entire holding is sold, but in parts at different times, it will amount to abandonment as soon as the last transfer is made. [P 536 C 2; P 537 C 1]

Where however the landlord purchases a portion of the holding, at a Court sale in execution of a decree against the raiyat, and the effect of the purchase is to complete the transfer of the entire holding, the landlord cannot put forward his own purchase for sustaining a case of abandonment: 1932 Cal 405, Rel. on; 12 C W N 721, Disting. [P 537 C 1, 2]

*Hemendra Kumar Das—for Appellant.**Paresh Lal Shome—for Respondents.**Bireswar Chatterjee—for Deputy Registrar.*

Judgment.—This appeal is on behalf of the plaintiff in a suit for declaration of her title to seven plots of land, described in the plaint, for confirmation of her possession over an area of 4 keors of land, being the northern portion of plot 1, and for recovery of possession of the remaining lands. All the plots of land con-

stituted a non-transferable occupancy holding held by one Ejaraddin under the plaintiff and her predecessor-in-interest.

Her suit was decreed by the learned Munsif in its entirety, but on appeal the learned Subordinate Judge has maintained the decree of the learned Munsif in respect of 4 keors of land, being the northern part of plot 1, and has dismissed her claim for khas possession in respect of the remaining lands. It has been found that on 15th Falgun 1323 Ejaraddin sold all the lands of his holding, save and except the aforesaid 4 keors of land, which was his homestead, to defendants 1 and 2. Thereafter he remained in possession of his homestead which he retained, and on his death his heirs remained in possession thereof. The plaintiff sued his heirs for rent, and obtained a decree, which was not a rent decree, but had the force of a money decree. In execution of the said decree the plaintiff has purchased on 10th May 1924 the said 4 keors of land and thereafter took possession of the same on 20th May 1924. By reason of the transfer by Ejaraddin to defendants 1 and 2, and by reason of the aforesaid Court sale all the lands of the holding have passed out of the hands of the heirs of Ejaraddin. The plaintiff sues on the basis that by reason of the said transfers the holding has been abandoned and she sues for possession in her character as landlord. The learned Munsif held that the aforesaid two transfers constitute abandonment. The learned Subordinate Judge has held that:

Partial transfers done by sale in Court, and another by a private conveyance at two different times, cannot be tacked together to make a complete transfer of the holding for the purpose of building the theory of abandonment.

He accordingly held that the plaintiff was entitled to get a decree for confirmation of possession to the said 4 Keors of lands on the basis of her having purchased the right, title and interest of the heirs of Ejaruddin in the same at the Court sale but was not entitled to get khas possession in the rest of the lands. The reasons given by the learned Subordinate Judge are clearly wrong, but the decree which he has made, in my judgment, is a correct decree, for the reasons which I will state hereafter. It is now well settled that for the purpose of abandonment a sale in invitum stands on the same footing as a transfer by the act of the occupancy raiyat, and for the pur-

pose of constituting abandonment, the transfer of the entire holding need not be effected all at once. If the entire holding is sold but in parts at different times it will amount to abandonment as soon as the last transfer is made. In the case before me the sale by Ejaraddin to defendants 1 and 2, on 15th Falgoon 1323, did not amount to abandonment, as all the lands had not been sold, a substantial part of the holding being retained by the tenant. The transfer of the entire holding was only completed by reason of the purchase by the plaintiff at the Court sale of the said 4 keors of land. The question is whether the plaintiff can put forward her own purchase for sustaining a case of abandonment. In my judgment she cannot. I do not rest my judgment on the ground of estoppel. It has been held that a cosharer landlord purchasing an occupancy holding cannot raise the question of transferability of the holding as against another purchaser of the same: 11 C W N 76 (1), 14 C W N 71 (2) and 19 C W N 1307 (3); but where the purchase is by the sole landlord or by the entire body of landlords it has been held that the said principle has no application: 12 C W N 721=8 C L J 29 (4) and 40 C L J 90=28 C W N 865 (5).

In the case before me the plaintiff by her act has put the tenants out of possession on the remaining portion of the holding. She purchased the right, title and interest of the tenants in the 4 koers of land and by taking proceedings through the execution Court has taken possession by removing her judgment-debtors, the tenants, from the said lands. If she had taken a conveyance from the tenants of the said piece of land she would not have been allowed to urge the transfer to her as constituting abandonment, and in her capacity as landlord come in and take possession of all the lands of the tenancy. She would have stepped into the shoes of the tenant, and on the principle adopted by the Full Bench in 48 Cal 605=

25 C W N 29 (6), would not have been allowed to put forward the rights of a landlord. The same principles would apply, in my judgment, when she has purchased at the Court sale. The claim on the basis of abandonment can be sustained only by her retaining her character as purchaser of the portion of the tenancy. If she casts aside her character as such purchaser there would be no abandonment as then there would be no transfer of the entire holding. The retention of her character as assignee of the tenant, i. e. of her character as representative of the tenant, is inconsistent with her insisting on her claim to recover possession on the ground of abandonment in her character as landlord. I accordingly hold that her claim on this basis cannot be allowed on the principle that a party cannot be allowed to blow hot and cold at the same time in the same suit. The view that I am taking of the rights of the plaintiff accords with the decision of Subhawardy and Jack, JJ., in 35 C W N 648 (7). The case in 12 C W N 721 (4) is distinguishable as that was not a case where the landlord relied upon a purchase by himself of the tenants interested in the non-transferable occupancy holding for the purpose of raising a case of abandonment of the holding. I accordingly hold that the decree made by the Court of appeal below is a correct decree and the appeal must be dismissed but without costs.

R.M./R.K.

Appeal dismissed.

6. Syed Mohsenuddin v. Baikuntha Chandra Sutradhar, 1921 Cal 444=61 I C 443=25 C W N 29=48 Cal 605 (F B).

7. Ruhini Kumar Dass v. Amiruddin, 1932 Cal 405=137 I C 668=35 C W N 648.

A. I. R. 1936 Calcutta 537

R. C. MITTER, J.

Aymamud Sarcar — Objector—Appellant.

v.

Ebaruddin Sarcar and others—Respondents.

Appeal No. 398 of 1935, Decided on 26th May 1936, from appellate order of Sub-Judge, Dinajpur, D/- 18th April 1935.

Civil P. C. (1908), S. 47 — Purchase of equity of redemption of one of several properties mortgaged by mortgagee after decree on his mortgage—Purchase does not amount to pro tanto satisfaction of decree.

Purchase of the equity of redemption of one of the several mortgaged properties or of a share

1. Ayenuddin Nasya v. Srish Chandra Banerjee, (1907) 11 C W N 76.

2. Harro Chandra Poddar v. Umesh Chandra, (1910) 14 C W N 71=5 I C 39=11 C L J 20.

3. Ohandi Prosannao v. Gour Chandra, 1916 Cal 452=33 I C 434=19 C W N 1307.

4. Bibi Asmatennessa v. Harendralal, (1908) 35 Cal 904=12 C W N 721=8 C L J 29.

5. Jnanendra v. Dukhlram, 1924 Cal 850=82 I C 386=28 C W N 865=40 C L J 90.

of the properties included in the mortgage decree, by the mortgagee decree-holder before his execution does not amount to protanto satisfaction of the decree and the mortgagee decree-holder is not bound to apportion the decretal amount proportionately on the properties purchased by him and the other properties not so purchased included in the mortgage decree for sale: 4 C L R 156 and 34 Cal 13, *Foll.*; 22 All 284 (*FB*); 10 All 570; 1920 All 129; 4 C L J 15 (*n*) and 195, *Dissent.*; 1934 *Mad* 250, *Ref.*

[P 539 C 1, 2]

Gunendra Krishna Ghose—for Appellant.

G. P. Sanyal and Sourindra Narayan Ghose—for Respondents.

Judgment. — The question raised in this appeal is whether respondent 1 can execute a mortgage decree for the full amount mentioned in the said decree, against all or any of the mortgage properties, or is he entitled to levy execution only for a proportionate amount and confine his execution to properties Nos. 2 to 4 of the mortgage decree.

The question is one on which the High Courts of India have taken divergent views.

Respondent 2, Hiralal Shaha, advanced money to the predecessor-in-interest of respondents 3 to 9 on the security of some properties, which may be called properties Nos. 1 to 4. He obtained a mortgage decree in the year 1928 on this mortgage, which decree has been assigned to respondent 1 who has applied to execute the same, limiting his execution in the first instance to property No. 1 in pursuance of the order of the Court made on 18th January 1929 at an earlier execution. Hiralal had taken another mortgage from the same person for another loan, but that mortgage included only property No. 1. This mortgage was assigned to respondent 1 who sued upon it, obtained a decree and in execution thereof purchased the mortgaged property himself in the year 1930, that is at a date subsequent to 18th January 1929.

The appellant before me is a puisne mortgagee in respect of properties Nos. 2 to 4 only. He sued upon his mortgage, obtained a decree in the year 1929 and in execution thereof purchased the said properties on 14th November 1930. He was a party to Hiralal's suit, which terminated in the decree passed in the year 1928, the decree which is now under execution.

In 1928 respondent 1 as assignee of the said decree started execution (O. C. Execution Case 221 of 1928). The ap-

pellant filed an objection under S. 47 of the Code and on his objection the execution Court passed an order on 18th January 1929 that property No. 1 was to be put up for sale first, and if the sale proceeds be not sufficient to satisfy the decree then and then only properties Nos. 2 to 4 were to be sold, and directed a note to that effect to be inserted in the sale proclamation. That execution did not proceed further and was ultimately dismissed for default on 2nd April 1929. It is after this that respondent 1 purchased property No. 1 at a Court sale as I have stated above.

There was an intermediate execution in the year 1932 (Execution Case No. 39 of 1932) and the said execution was dismissed on 29th November 1932. The last order passed in that execution case has only been exhibited in this case. It runs thus:

"29th November 1932. Objection under S. 47, Civil P. C., allowed with costs. The execution be dismissed."

What those objections under S. 47 were, I do not know, and it is not possible in the state of the record to find out the reasons for this order.

The present execution was started on 25th January 1933. Respondent 1 prayed for sale of property No. 1 in the first instance in pursuance of the order of the Court dated 18th January 1929 passed in execution Case No. 221 of 1928, and prayed for sale of properties Nos. 2 to 4 thereafter if the sale proceeds of property No. 1 did not satisfy his decree.

To this execution the appellant raised objections. He said that the whole decretal debt cannot be thrown on properties Nos. 2 to 4, but that the respondent 1, having himself purchased in another execution property No. 1, was bound to apportion the decretal amount and could only take out execution against properties Nos. 2 to 4 for an amount which would bear the same proportion to the whole decretal debt as the value of properties Nos. 2 to 4 bear to the total value of properties Nos. 1 to 4. This objection was given effect to by the trial Court but has been negated by the lower appellate Court, which has allowed execution to proceed for the whole of the decretal amount but has directed property No. 1 to be sold first. The appellant contends before me that the view taken by the trial Court is the

correct view and that its order ought to be restored.

The point raised is a difficult one. Not only do the Allahabad and Madras High Courts support the contention of the appellant, but in this Court divergent views have been expressed. The cases of the Allahabad and Madras High Courts expressly in point are respectively 42 All 544 (1), and 141 I C 366 (2). In this Court the cases in 4 C L J 15 (n) (3) and 4 C L J 195 (4), support the contention of the appellant, while the cases in 4 C L R 156 (5) and 34 Cal 13 (6) are against the appellant, the decision in the last mentioned two cases proceeding on the view that the question cannot be raised in execution proceedings but whatever equity there is must be enforced by a suit for contribution. In 34 Cal 13 (6) the Division Bench refused to refer the case to the Full Bench on the ground that the judgment in 4 C L J 195 (4) proceeded upon earlier cases of this Court which did not support the proposition laid down therein. The objection of the appellant can only be given effect to, if it comes within S. 47 of the Code, that is to say only if it can be held that the purchase of the equity of redemption of one of the properties or of a share of the properties included in the mortgage-decree by the mortgage decree-holder before his execution amounts to pro tanto satisfaction of the decree. This is the view which was formulated by Mahmud, J. in 10 All 570 (7), and accepted by the Full Bench of the Allahabad High Court in 22 All 284 (8). The last mentioned case was a case of purchase by the mortgagee who had not at the date of his purchase sued upon his mortgage and the question arose not in execution but in the suit which the mortgagee brought to enforce his mort-

gage. This view proceeds upon the view of coalescence, the creditor becoming one of several judgment-debtors. The principle so formulated is one of the main reasons on which the decision in 42 All 544 (1) was rested.

In that case the mortgagee had already obtained his decree before he purchased shares in the equity of redemption in two of the mortgaged properties in execution of a simple money decree levied by a third party, and the question arose in execution of the mortgage-decree, as in the case before me. Tudball and Sulaiman, JJ. also gave another reason namely avoidance of multiplicity of proceedings, in support of their view that the mortgagee decree-holder was bound to apportion the decretal amount proportionately on the properties purchased by him and the other properties not so purchased, included in the mortgage-decree for sale. They said that where a mortgagee purchases the equity of redemption in one of such properties, he is bound to contribute to the mortgage-debt in proportion to the value of the property purchased by him, and the equities must be worked out in the execution itself for the purpose of avoiding multiplicity of suits and proceedings. If this last mentioned principle is the correct principle, in my judgment the question cannot be raised in an objection to execution having regard to the terms of S. 47 of the Code, which contemplate only three questions, the question of satisfaction and discharge either wholly or in part, of the decree being two of them which are relevant for this case before me. In my view the principle of avoidance of multiplicity of suits and proceedings is the real principle and so the objection cannot be entertained in the course of execution proceedings, where the executing Court must execute the decree as it stands.

As between co-mortgagors or persons who have acquired interests in the equity of redemption in the several properties included in the mortgage security, there is the right of contribution. If one of them pays the whole of the mortgage debt or decree, or if it is realised from his property, he has the right to claim contribution rateably. If the mortgagee himself purchase the equity of redemption in one of such properties, he is also liable to contribute in his capacity as the purchaser of the equity of redemption. The mortgage

1. Sarju Kumar Mnkherjee v. Thakur Prasad, 1920 All 129=58 I C 743=18 A L J 690=42 All 544.
2. Chinniah Rowther v. A. B. Muthuraman Chettiar, 1934 Mad 250=141 I C 366.
3. Muhamed Taki Reza v. Thomas, (1906) 4 C L J 317=4 O L J 15 (n).
4. Harendra Kumar Guha v. Dindayal Shaha, (1906) 4 C L J 195.
5. Naffer Chandra Mandal v. Balkanto Nath Roy, (1879) 4 C L R 156.
6. Amir Chand v. Sheo Prasad Singh, (1907) 34 Cal 13=4 O L J 573.
7. Kudhai v. Sheo Dayal, (1898) 10 All 570=1888 A W N 231.
8. Bisheshur Dial v. Ram Swarup, (1900) 22 All 284=1900 A W N 69 (F B).

security is then split up and the right accrues to those who have equity of redemption in the other properties of redeeming piecemeal (S. 60, T. P. Act). A suit to enforce piecemeal redemption in such a case is really the combination of a suit for redemption and a suit for contribution against the mortgagee. When a suit for enforcement of his mortgage by sale by such a mortgagee, who has purchased the equity of redemption in one out of many properties included in his security is brought, there cannot be any valid objection to the defendants to such a suit setting up the plea of contribution for the purpose of maintaining and preserving their right of piecemeal redemption which they have acquired so that that decree for sale to be passed may by apportioning the mortgage-debt on the different properties give effect to their aforesaid right of piecemeal redemption. The phrase "protanto satisfaction" used in the judgment of the Full Bench of the Allahabad High Court, 22 All 284 (8), should in my judgment, be taken to be a convenient expression only, but is really the expression in a terse form of the principle which I have formulated above. I accordingly follow the decision of White and Morris, JJ. in 4 C L R 156 (5) and of Rampini and Mookherjee, JJ., in 34 Cal 13 (6), and hold that the objection of the appellant cannot be given effect to and his remedy lies in a suit for contribution if the decree be realised wholly or partly, but in excess, from properties Nos. 2 to 4. The appeal is accordingly dismissed with costs. Leave to appeal under S. 15 of the Letters Patent prayed for is granted.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1936 Calcutta 540**

GUHA AND BARTLEY, JJ.

Priyabala Dassi and another—Plaintiffs—Appellants.

v.

Sarajubala Choudhurani and others—Respondents.

Appeal No. 237 of 1932, Decided on 27th April 1936, from original decree of Sub-Judge, Second Court, Dacca, D/- 24th May 1932.

Civil P. C. (1908), O. 22, R. 3—Death of some plaintiffs after preliminary decree for ascertainment of mesne profits—Suit does not abate by reason of non-substitution of

deceased plaintiffs' legal representatives within time.

Where a preliminary decree has been passed directing ascertainment of mesne profits and some of the plaintiffs die after it, the suit does not abate by reason of the non-substitution of the legal representatives of the deceased plaintiffs within the time limited by law : 1929 Cal 430 ; 1928 Mad 914 (F B) ; 1925 P C 117 and 1931 Pat 57, Rel. on ; 1930 All 779, Dissent.

[P 541 C 1]

Gopal Chandra Das and Navadwip Chandra Saha—for Appellants.

Sarat Chandra Basak, Priya Nath Datta, Bhuban Mohan Saha, Nikunja Behari Roy, Kanai Lal Saha, Satish Chandra Choudhury, Amarendra Mohan Mitter, Rajendra Chandra Guha and Bhupendra Chandra Roy Choudhury—for Respondents.

Judgment.—This is an appeal by the legal representatives of two of the plaintiffs in the suit in which the decree passed on 10th February 1913, in Suit No. 65 of 1910, in the Second Court of the Subordinate Judge, Dacca, directed that the amount of mesne profits which the plaintiffs were entitled to get from defendants in the suit was to be ascertained afterwards, according to the petition of the plaintiffs, at the time of the execution of the decree. It appears that the appellants as the legal representatives of the original plaintiffs 2 (ka) and 8 applied for ascertainment of mesne profits before the Court below, and it must be taken to be established in the case before us that all the necessary representatives of those plaintiffs had not applied for substitution of their names within the time limited by law, as mentioned in O. 22, R. 3, Civil P. C. On that state of facts the learned Subordinate Judge in the Court below held that the proceeding for ascertainment of mesne profits had abated so far as the shares of the two plaintiffs mentioned above were concerned, regard being had to the position that no cogent grounds had been made out or even attempted to be made out for setting aside the abatement, on any proper application made in that behalf. The result of the decision arrived at by the Court below was that the suit in which a decree for ascertainment of mesne profits was passed in favour of the original plaintiffs 2 (ka) and 8, was considered to have abated, so far as it related to the right of those plaintiffs to get mesne profits from the defendants in the suit.

The material question for consideration in the case before us is whether the provisions contained in O. 22, R. 3, Civil P. C., were applicable to a case in which a preliminary decree has been passed directing ascertainment of mesne profits. In the case of suit for enforcement of mortgage, it has been held by this Court, in consonance with the rule laid down by their Lordships of the Judicial Committee in 51 I A 321 (1), that no abatement of a suit takes place, when the plaintiff dies after a preliminary decree has been passed, for the reason of non-substitution of the legal representatives within the time limited by law: see 57 Cal 285 (2). The same view was taken by a Full Bench of the Madras High Court in 51 Mad 701 (3), and we are unable to agree with the reason for the decision of the Allahabad High Court in 52 All 910 (4), taking a view, contrary to that expressed by this Court in 57 Cal 285 (2), mentioned above, with which we are in entire agreement. In the case of a proceeding for ascertainment of mesne profits, it was held by the Patna High Court in 1931 Pat 57 (5), that O. 22, R. 3, Civil P. C., did not apply to an application made after a decree in a preliminary form had been passed for ascertainment of mesne profits, inasmuch as after the decree has been passed, the suit could not be dismissed, unless the decree has been reversed, and no question of abatement could arise in such case even though one of the parties dies after the preliminary decree is passed and no legal representative is brought on the record within the time allowed by law. In our judgment, there can be no question that the above decision of the Patna High Court is in accordance with the law laid down by the Judicial Committee of the Privy Council in 51 I A 321 (1), mentioned above, that :

The parties have on the making of the decree acquired rights or incurred liability which are

fixed, unless or until the decree is varied or set aside.

On the conclusion arrived at by us, as indicated above, the decision of the Court below holding that the claim for mesne profits so far as the original plaintiffs 2 (ka) and 8 were concerned, had abated, must be set aside. The legal representatives of those plaintiffs, the appellants in this Court, are entitled to have their share of the mesne profits ascertained on the application made before the Court below in that behalf. A question of the amount of court-fees payable in the memorandum of appeal filed in this Court was raised before us on behalf of the respondents. It appears that the court-fees on the amount of Rs. 500 were paid on the memorandum of appeal, that being the amount at which the claim for mesne profits was tentatively valued in the suit. In our opinion no further amount was payable by the appellants as court-fees at this stage, seeing that their application for ascertainment of mesne profits was held to have abated. There can be no question that the appellants will be required to pay, according to the directions of the Court below, adequate court-fees, in proper time, on the amount which is ascertained to be their share of the mesne profits, and for which the defendants-respondents are held liable.

In the result, the appeal is allowed, the decision of the Court below and the decree passed by it disentitling the appellants as the legal representatives of the original plaintiffs 2 (ka) and (8), are set aside, and we direct that mesne profits to which the appellants are held entitled under the decree in Suit No. 65 of 1910 in the second Court of the Subordinate Judge of Dacca, be ascertained in accordance with law. The appellants are entitled to get their costs in the lower Court as also their costs in this Court from the defendants-respondents in this appeal. The hearing fee in this appeal is assessed at three gold mohurs.

D.S./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 541

M. C. GHOSE, J.

Sachindra Kumar Roy and others—Appellants.

v.

Purna Chandra Pal — Respondent.
Appeal No. 177 of 1935, Decided on 28th May 1936.

1. Lachmi Narain Marwari v. Bal Mukund Marwari, 1924 P O 198=81 I O 747=51 I A 321=4 Pat 61 (P O).

2. Nazir Ahammad v. Tamijaddi Ahammad, 1929 Cal 430=122 I O 303=57 Cal 285.

3. Perumal Pillay v. Perumal Chetty, 1928 Mad 914=112 I O 116=55 M L J 253=51 Mad 701 (F B).

4. Anmol Singh v. Hari Sankar, 1930 All 779=126 I O 20=1930 A L J 825=52 All 910.

5. Mt. Bhattia v. Abdus Shakur, 1931 Pat 57=129 I O 84=11 P L T 796.

Bengal Tenancy Act (8 of 1885), S. 74—Old kistibandi patta—Small sum of moltana put down to be paid with instalment—In Record of Rights rent shown inclusive of moltana — Small sum of moltana is not abwab.

Where in a kistibandi patta the instalments put down include a small expense of moltana to be paid along with every instalment, and the document is of old times and Record of Rights shows the amount of instalment inclusive of moltana as the rent, the small sum cannot be deemed to be an abwab. [P 542 C 1]

Bankim Chandra Banerji—for Appellants.

Nagendra Chandra Choudhury — for Respondent.

Judgment—This is an appeal by the plaintiffs in a suit for rent. The question in controversy between the parties is as to the rate of rent. The plaintiffs claim rent as Rs. 8-5-6. The defendant stated the rent was Rs. 8-2-10. The difference between the parties is a sum of annas 2 and pies 8. It appears that the howla of the defendant was created by a patta dated 29th December 1869. The relevant portions of the patta are in these terms:

In respect of the total 2 kanis 3 karas 2 kags 15 tils of land I appoint you howladar by settling the total jama at Rs. 8-5-6 altogether made up of Rs. 8-2-10 per year calculated at the rate of Rs. 4 per kani and 2 annas 8 pies as moltana costs at the rate of 4 pies per rupee.

The question is whether the 2 annas 8 pies as moltana costs is to be considered part of the rent or as an abwab which is offensive under S. 74, Ben. Ten. Act. In the kistibandi of the patta the instalments are put down thus:

	Rs. A. P.	P.
Kist Ashar ... Mokrari 2-0 0 Moltana 8		
Kist Aswin ... Mokrari 2-0 0 Moltana 8		
Kist Agrahayan ... Mokrari 2-0-0 Moltana 8		
Kist Magh ... Mokrari 2-2-10 Moltana 8		

Total Rs. ... 8-2-10 As. 2-8 p.

Grand total Rs. 8-5-6

It is apparent therefore that this small expense of moltana was to be paid along with every instalment. Considering that the document is of old times and the Record of Rights supports the plaintiffs' case that the rent is Rs. 8-5-6, in the circumstances of this case the Court of appeal below committed an error in holding that the small sum was an abwab. The appeal is allowed. The decree of the lower appellate Court is reversed and the plaintiffs' suit is decreed in full with costs in all the Courts. Leave to appeal is refused.

V.B./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 542

M. N. MUKERJI AND JACK, JJ.

Bhabani Prosanna Lahiri and another
—Plaintiffs—Appellants.

v.

Chairman, Municipal Commissioners, Rangpur Municipality—Defendant 1 and others—Respondents.

Appeal No. 19 of 1933, Decided on 16th March 1936, from original decree of Second Addl. Dist. Judge, Rangpur, D/- 14th September 1932.

(a) Bengal Municipal Act (3 of 1884), Ss. 112, 118, 120 and 121 — Assessment reduced on review—If distress can issue without fresh notice—Procedure stated.

The provisions as to time in the matter of process for distress cannot be construed as indicating that the protection of the tax-payer was the sole concern of the legislature; and consequently remedy by way of distress in a case where, on review, the tax is reduced, is permissible. The procedure, in short, is as follows: (a) Presentation of a bill at the rate entered in the list, notice whereof is published under S. 112 or at the altered rate, if there has been subsequent alteration, to be made within six months after the tax has become due (S. 120, para. 1), and the tax will be deemed to be due on the first day of the quarter for which it is payable. (b) Non-payment of the bill: the Municipality may wait for any reasonable time, subject to the general law of limitation. (c) Service of notice of demand with copy bill at any time subsequent to presentation of bill (S. 120, para. 2). (d) Application for review: either before or after service of notice of demand; in the latter case, the application must be made within 15 days of service of the notice of demand (Form A Note). (e) If the review fails: if a notice of demand has been already served no fresh notice is necessary, because in the notice itself it is stated that the amount due will have to be paid within 15 days of the order on the review. If a notice of demand has not been served then it will have to be served and within 15 days of the service the amount due will have to be paid. (f) If the review succeeds: if there has been no previous service of a notice of demand such notice will have to be served with "copy of bills" (S. 120, para. 2). But now the tax due will be tax as altered. If there has been a previous service of a notice of demand a fresh notice at the altered rate would not be necessary because of the statement in the note in Form A to which reference has already been made. But a better practice is to wait for the result of the review. (g) Non-compliance with the notice of demand taken along with the order on review, if any, within 15 days (S. 121, para. 1). (h) Distress and sale: within three months of the service of demand or order on review, as the case may be (S. 121, para. 2).

[P 545 C 2; P 546 C 1]

(b) Bengal Municipal Act (3 of 1884), Ss. 118, 120 and 121 — Quarterly instalment is distinct instalment—Unpaid arrears—One entire demand—Tender of one instalment refused—Distress for entire amount in arrears

— Distress is illegal and distrainer is liable in damages without deduction of tax due.

Act treats each quarterly instalment of tax as distinct amount recoverable, and when several such instalments remain unpaid, it is wrong to consider that the total amount remaining unpaid constitutes an entire demand, and tender of one such instalment without others is not bad and cannot be refused by the Municipal Committee: if on refusal of such tender a distress is issued for the entire amount including the tendered instalment, the distress is illegal, the distrainer becomes trespasser ab initio and the full value of goods distrained without any deduction on account of tax due is recoverable as damages. [P 546 C 2; P 547 C 1]

Charu Chandra Biswas, Satis Chandra Sinha, Debendra Nath Bagchi and Rabindra Nath Chowdhury—for Appellants.

Atul Chandra Gupta, Hiralal Ganguli, Priyanath Bhattacharjee, Sourindra Narain Ghose, Shambhunath Banerjee, Madan Mohan Malhotra and Sudhansu Bhushan Sen—for Respondents.

Judgment. — The plaintiffs are the owners and occupiers of certain premises situated within the Municipality of Rangpur. They instituted the suit against 5 defendants: No. 1 the Chairman of the Municipality; No. 2, Jogendranath Chatterjee, in his individual capacity and also as the Chairman; No. 3, Phanibhusan Majumdar, in his individual capacity and also as the Vice-Chairman; No. 4, Narendra Mohan Chatterjee in his individual capacity and also as the warrant-officer; and No. 5, Rishikesh Dutta Gupta, in his individual capacity and also as the tax-collector. The suit was commenced as one for recovery of damages on the ground that certain goods of the plaintiffs had been wrongfully and maliciously seized and detained by the defendants, causing them annoyance, disturbance, mental worry and loss of prestige and reputation. It transpired after the plaint was lodged that the goods had already been sold and so the claim for damages was also pressed on the ground that the sale was wrongful and unauthorized. The Subordinate Judge having dismissed the suit, the plaintiffs have preferred this appeal. Mr. Biswas, appearing on behalf of the appellants, has expressly given up the allegations as regards malice and has restricted his claim to one based upon wrongful distress not authorized by law.

For this, the magnitude of the suit has been considerably reduced and the controversy has been brought within a very narrow compass. All the questions that

now arise for our consideration are more or less questions of law, the facts being entirely undisputed. In 1927 there was a general assessment in this Municipality the tax for the holding in suit being raised from Rs. 109-9-0 per quarter to Rs. 163-14-0 per quarter. The first bill and notice of demand at this rate were served on the plaintiffs on 9th June 1927, the amount representing the tax for the first quarter of 1927-28. On 20th June 1927 the plaintiffs applied for a review. The application remained pending and in the meantime bills at the enhanced rate continued to be served: Bill for the second quarter of 1927-28 was served on 26th July 1927; for the third quarter of 1927-28 on 17th November 1927; for the fourth quarter of 1927-28 on 29th February 1928; for the first quarter of 1928-29 on 18th July 1928; for the second quarter of 1928-29 on 20th August 1928. On 17th October 1928 order was passed on the review reducing the enhanced tax to Rs. 136-8-0 per quarter.

On 29th November 1928 a bill at the rate of Rs. 163-14-0 for the third quarter of 1928-29 was served apparently having been drawn up at that old rate before the order was passed on the review. On 7th February 1929 a bill for the fourth quarter of 1928-29 at the reduced rate was served. No payment was made on any of these bills. It is important to note that no notice of demand was served in connexion with any of the aforesaid bills with the exception, of course, as already stated, of the bill for the first quarter of 1927-28. On 16th March 1929 a second notice of demand was served on the plaintiffs, as for a sum of Rs. 1,092 accompanied by eight bills in printed forms with the heading "copy bills" with the blanks filled in, and purporting to be bills at the rate of Rs. 136-8-0, for eight quarters of the two years 1927-28 and 1928-29. On 28th March 1929 plaintiff 2 tendered a sum of Rs. 136-8-0 to the Chairman of the Municipality with a letter which ran as follows:

Sir—I have the honour to remit herewith Rs. 136-8-0 on protest—municipal-tax for the fourth quarter of 1928-29 * * *. The tax in my opinion is excessive and assessed illegally. I understand that you would issue distress warrant for the realization of the tax. To avoid trouble I do hereby pay on protest the sum demanded although we do not admit the same to be legally assessed.

This tender was refused by a letter to the plaintiff dated 28th March 1929 over the signature of the Vice-Chairman which said :

Sir,—with reference to your letter No. Nil of 28th March 1929 sending under protest Rupees 136-8-0 for the municipal tax for the 4th quarter, 1928-29 I have the honour to state that the whole amount of taxes may be paid under protest, if you like. Part payment of the demand cannot be received now at this stage.

On 29th March 1929, plaintiff 2 wrote to the Chairman putting forward certain arguments as to why distress should not be levied for non-payment of the taxes. On 20th April 1929 a distress warrant was issued, the particulars of which are the following :

For the 2nd, 3rd and 4th quarters of 1927-28, and 1st, 2nd, 3rd and 4th quarters of 1928-29.

House tax	Rs. 477-12-0
Latrine tax	Rs. 477-12-0
Warrant fee	Rs. 10-0-0

Total, Rs. 965-8-0

The distress was levied and the goods were seized on 27th April 1929. The plaintiffs gave the notice under S. 363 of the Act on 13th June 1929 and instituted this suit on 16th July 1929. On 15th July 1929 however the goods were sold, the price fetched at the sale being Rs. 1,010-8-0. In the Court below, as well as in this Court, various considerations were put forward for the purpose of establishing that the distress was unwarranted by law; and some of the points urged in that Court have been given up here as untenable, while others, not previously adverted to, have been urged. The substantial contentions directed against the legality of the distress as urged before us will now be dealt with.

The first contention is that the demand made on 16th March 1929 was not a valid demand in that the notice of demand was accompanied by 8 bills, aggregating the total amount of demand, which were all issued for realization at the reduced rate of Rs. 136-8-0 per quarter and were headed "copy bills;" but of these, with the exception of one bill, namely the one for the last quarter of 1928-29, of which the original was issued for the said rate, the remaining seven purported to be copies of original bills which had been issued not at the reduced rate of Rupees 136-8-0 but at the enhanced rate of Rs. 163-4-0. It has been contended that under para. 2, S. 118 of the Act every instalment of tax shall be deemed to be

due on the first day of the quarter in respect of which such instalment is payable and that under S. 120 of the Act a bill for an unpaid instalment which is due can only be presented within six months after it has become due; that each of the original bills for the said seven quarters had been issued within the said prescribed period, but on 16th March 1929 when the eight "copy bills" were presented along with the notice of demand, only two of them, namely those for the 3rd and 4th quarters of 1928-29 were within time, while the six others were all out of time; and as the original bills for the said six quarters had become ineffective by reason of the rate of tax stated in them having been reduced on review, these "copy bills" should be regarded as not copies but originals presented beyond time and so it should be held that S. 120 has been contravened.

It has been argued that the foundation of a process for distress is the service of "such bill and notice" (vide S. 121); that is to say, a bill and notice issued under S. 120 which provides for the presentation of a bill at the rate at which the realization is to be made; and that inasmuch as the six so-called "copy bills," which are the only bills in which such rate was mentioned, were each presented beyond six months of the respective dates when the tax became due, the process was issued without jurisdiction. Another branch of this contention which has been put forward in the alternative is that if S. 121 of the Act is construed in such a way as to mean that no fresh presentation of bills at the altered rate is necessary, even though the rate may have been reduced on review, and that the section contemplates that the party has to make the payment within 15 days of the order on the review, and that failing such payment the arrears due may be realised by distress within three months after the order, then also the distress and sale were beyond time, having been made on 27th April 1929 which was beyond three months from 17th October 1928 on which date the order was passed on the review. It has been argued that the provisions of these sections which have been laid down for regulating a special procedure for a speedy and summary remedy by way of distraint must be strictly complied with, and that there is no injustice or hardship in construing the

sections as meaning that it is only in normal cases, that is to say cases in which the application for review fails to result in a reduction of the tax, that the sections taken in conjunction with the note contained in Form A prescribed for a notice of demand, which says :

If you present such petition no amount will be levied from you until the Commissioners shall have passed an order on your petition, but after 15 days from such order, etc.,

make out a consistent procedure perfectly in accord with the several periods of time prescribed for the different steps. And it is argued that unless the provisions as regards time are entirely disregarded a case in which the review results in an alteration in the assessment cannot be brought within the purview of the sections so as to enable the Municipality to levy the arrears by distress.

It has been pressed on us that the legislature must have intended such normal cases only as deserving of the summary procedure and to leave the Municipality to seek its remedy in other cases by way of suit, as provided for in S. 129 of the Act. There is, it has been said, considerable sense in this interpretation, for it is only fair to assume that if the assessment was excessive and is subsequently reduced, the party should not be harassed by distress for arrears which may have remained unpaid because of the pendency of the review. There is no doubt much to be said in favour of these arguments. But the arguments assume that there was an anxiety on the part of the legislature to protect the tax-payer from distress rather than to enable the Municipality to levy distress for realization of its statutory dues provided it has been sufficiently diligent. Is this assumption correct? Let us examine the several essentials that are laid down and the several periods of time prescribed therefor. They stand thus :

A. Presentation of a bill.	Within six months from when the tax becomes due.
B. Service of notice of demand with copy bill.	At any subsequent time.
C. Failure to comply with the demand.	Within 15 days of the service of notice or of the order on review.
D. Distress and sale.	Within three months of the service of notice or of the order on review.

It is obvious that while steps A, B and D are to be taken within given time,

there is no time limit as regards step C. This omission allows the Municipality to wait for any indefinite period, subject of course to the general law of limitation. The provisions as to time therefore cannot be construed as indicating that the protection of the tax-payer was the sole concern of the Legislature. A more sensible interpretation is that the legislature intended that if process for distress is to be allowed, the Municipality will have to begin with presentation of the bill within six months, but may wait for such reasonable time at their option, subject to the general law of limitation, as the circumstances of the case may demand, and then issue a notice of demand; and that once such notice is served it must give the party fifteen days' time for payment; but if no payment is made it must levy distress within three months of the service or of the order on review, as the case may be. An interpretation of the sections based on a supposition that it is the interest of the tax-payer alone that was being safeguarded by the legislature or that a remedy by way of distress in a case where on review the tax is reduced was not favoured by the legislature, does not, in our opinion, seem permissible.

On a careful consideration of the sections it seems to us that they construct a perfectly workable and reasonable procedure in all conceivable cases without necessitating any violence to their language. The procedure may be described thus: (a) presentation of a bill at the rate entered in the list, notice whereof is published under Section 112, or at the altered rate, if there has been subsequent alteration: We need not consider the question whether a further application for review will lie in a case where there has already been an alteration. Such presentation has to be made within six months after the tax has become due (S. 120, para. 1), and the tax will be deemed to be due on the first day of the quarter for which it is payable. (b) Non-payment of the bill: The Municipality may wait for any reasonable time, subject to the general law of limitation. (c) Service of notice of demand with copy bill at any time subsequent to presentation of bill (S. 120, para 2). (d) Application for review: Either before or after service of notice of demand: In the latter case, the application must be made within 15 days of service of the notice of demand (Form

A, Note). (e) If the review fails : If a notice of demand has been already served no fresh notice is necessary, because in the notice itself it is stated that the amount due will have to be paid within fifteen days of the order on the review. If a notice of demand has not been served then it will have to be served and within fifteen days of the service the amount due will have to be paid. (f) If the review succeeds : If there has been no previous service of a notice of demand such notice will have to be served with 'copy of the bills' (S. 120, para 2). But now the tax due will be the tax as altered. S. 118 says :

The amount due shall be deemed to be amount entered in the lists unless the amount entered in the lists is subsequently altered in which case the amount to which the assessment or rating is so altered shall be deemed to be the amount due.

The law itself thus corrects the amount due as stated in the original bill and the original notice if any, and says that the amount so altered shall be deemed to be the amount due. The fresh notice must therefore show the altered amount and the 'copy of the bill' in order to be correct must also show the altered amount. If there has been a previous service of a notice of demand it would seem that a fresh notice at the altered rate would not be necessary because of the statement in the note in Form A to which reference has already been made. But a better practice is to wait for the result of the review, as has been done in the present case. (g) Non-compliance with the notice of demand taken along with the order on review, if any, within fifteen days (S. 121, para 1). (h) Distress and sale : Within three months of the service of notice of demand or order on review, as the case may be (S. 121, para 2). In the present case all the different steps were correctly taken; the notice of demand was served after the order on review and the distress and sale have taken place within the time prescribed. We therefore see no reason to hold that the proceedings referred to so far were not in order.

The second contention urged on behalf of the appellants is that the distress and sale were illegal because they were for a sum which included an amount in respect of which a valid tender was unlawfully refused. The tender was, as already stated, in respect of the tax for the last quarter of 1928-29. The learned Judge

has held that the tender was bad because it was not an unconditional tender; with this conclusion we entirely disagree. It does not appear to us that there was any condition attached to the tender or any ambiguity in the letter (Ex. 10) by which it was made. Indeed from the reply (Ex. 11), by which the tender was refused it is more than clear that the Municipality understood the tender as one in respect of the tax for the said quarter only and not coupled with any condition. The refusal was based on the ground that it was in respect of a part only of the whole amount of the taxes for which demand had been made.

The question therefore is whether the amount tendered could be regarded as a distinct or separate demand. Now the law of tender as between contracting parties and so forming a part of the law of contract does not apply to the present case; for the relations between the Municipality and the tax-payer are not contractual. If the said law did apply there is authority for holding that it was a good tender. For instance, if two quarters' rent are in arrears and the tenant tenders the amount for one of the quarters the tender is a good tender as to that quarter (see Chitty on Contracts, Edn. 18, p. 892). The relations being statutory we have to look to the provisions of the Act itself. It is true that under the Act the tax is assessed at a yearly rate; but the whole process for its recovery as formulated in the Act treats each quarterly instalment of the tax as a distinct amount recoverable by the procedure laid down in it. For each instalment, a bill is to be made out and presented, a notice of demand is to be served with copy of the bill, and in case of non-payment a remedy by distress and sale is available. In such circumstances it is difficult to imagine that when several such instalments remain unpaid, the total amount remaining unpaid constitutes one entire demand and that the several sums as per each instalment do not each constitute a distinct demand. It is true that there may be a convenience in serving one notice of demand embracing all the instalments remaining unpaid, but it is highly debatable whether in view of the form of such notice prescribed in the Act (Form A) it is open to the Municipality to use one form embracing all the instalments. The form speaks of an amount as due on a bill accompanying.

It will appear from Ss. 118 to 121 that the scheme of the sections is to treat each instalment as a distinct item and in the second paragraph of the section last mentioned it is provided that each such instalment, treated as the amount of the arrear due, together with costs on the scale shown in the table of fees marked B in the fourth schedule, is to be realised by sale and distress. If one distraint is held for several instalments unpaid the costs in respect of the aggregate amount as prescribed in the table are to be levied. But even then the demands, in our opinion, are distinct. The notice of demand in respect of the 4th quarter for 1928-29 with "copy of bill" was served on 16th March 1929 and within fifteen days of the service the entire amount of the demand was tendered on 28th March 1929. The amount had not yet become "an arrear due" within the meaning of the second paragraph of S. 121. At such a stage it was wholly illegal to refuse the tender.

It necessarily follows that the warrant that was issued, including the amount of tax due for the 4th quarter of 1928-29 was illegal, and the distress and sale held thereunder must be held ultra-vires. In such circumstances the fact that the warrant was a good warrant, so far as the taxes for the other six quarters are concerned does not alter the position. In the case of an illegal distress the distrainer is a trespasser ab initio, and the full value of the goods which have been lost to the plaintiff without any deduction for the tax due is recoverable as damages: (see Hailsham's Laws of England, Vol. 10, Art. 759). The value of the goods as found by the Court below is Rs. 1,010-8-0; and this is not disputed.

The result is that this appeal succeeds in part. The decree of the Court below is modified in the manner following: A decree should be made in plaintiffs' favour declaring that the distress and sale were illegal and ordering that the plaintiffs do recover from defendant 1 the sum of Rs. 1,010-8-0 with interest at the rate of 6 p. c. p. a., from 27th April 1929, the date of seizure, until this day, the date of the decree of this Court, the total amount carrying interest thenceforward at the rate of 6 p. c. p. a. till realisation. As between the plaintiff and defendant 1, the latter will be entitled to recover 2/3rds of the costs which the Court below

has decreed in his favour; and the order for costs made in the decree of the Court below in favour of defendants 2, 3, 4 and 5 will stand. So far as the costs of this Court are concerned the plaintiffs and defendant 1 will each bear their or his own costs, but defendants 2, 3, 4 and 5 will each recover his costs from the plaintiffs, hearing-fee in favour of each of them being assessed at two gold mohurs.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1936 Calcutta 547

R. C. MITTER, J.

Bulanda Bashini Dasi — Auction-purchaser—Petitioner.

v.

Pran Govinda Dhar and others—Judgment-debtors—Opposite Parties.

Civil Rule No. 1653 of 1935, Decided on 22nd May 1936, from order of Dist. Judge, Murshidabad, D/- 16th September 1935.

Bengal Tenancy Act (8 of 1885), S. 174 (1) —Attaching creditor can apply to set aside sale.

A person who has obtained a decree for money and has attached the holding in question is a person "whose interests are affected by sale" within the meaning of those words in S. 174 (1), and such person has a right to apply to have the sale set aside: 30 *Mad* 413; 1933 *Mad* 455; 1924 *Cal* 786; 1930 *Pat* 451 and 17 *C W N* 80, *Rel. on*; 1925 *Sind* 101; 1928 *P C* 139; 1920 *Mad* 804 (*F B*) and 1933 *Cal* 212, *Disting.* [P 549 C 2]

Jatindra Nath Sanyal and Bijali Bhusan Sanyal—for Petitioner.

Bijan Kr. Mukerji and Sanat K. Chatterjee—for Opposite Parties.

Order. — The Secretary of State for India in Council, who is opposite party 2 in this rule, obtained a decree for rent against opposite parties 3 and 4, Hatu Dutta and Sudhangsu Bhusan Dutt. In execution of his decree the defaulting holding was sold and purchased by the petitioner, Bulanda Bashini Dasi, on 27th May 1935. It is this sale that the opposite party 1, Pran Gobinda Dhar, wanted to set aside by making a deposit under the provisions of sub-s. 1, S. 174, Tenancy Act. His application for setting aside the said sale was refused by the 1st Court but has been allowed by the lower appellate Court, and the said sale has been set aside. The question raised in this rule is whether the Court had jurisdiction to entertain the said application of opposite party 1. This question de-

pend upon the question as to whether he is a person whose interest has been affected by the rent sale.

The answer to this question depends upon the following facts which are not disputed by any of the parties to this rule: Opposite party 1 had obtained a money decree against opposite parties 3 and 4. He applied for execution of his decree. An order for attachment of the holding in question was passed in the proceedings for execution of his decree on 23rd May 1935, that is four days before the rent sale, but the property was actually attached after it, that is on 21st June 1935. He made the application under S. 174 (1) and made the deposit as required by that section on 22nd June 1935. It is now settled law, so far as this Court is concerned, that an attaching creditor, who has attached in execution of his decree, has the right to apply to set aside a sale under O. 21, R. 90, of the Code, which contains the same words namely "whose interests are affected by the sale" as occur in S. 174 (1), Tenancy Act. But it is said by the learned advocate appearing for the petitioner that the fact of attachment alone in execution of a decree gives him the *locus standi* to apply for setting aside the sale under the provisions of O. 21, R. 90, of the Code, or S. 174, Tenancy Act, according as the sale is under the Code or the Tenancy Act. It is necessary to examine in this case the said contention and the precise principle.

In my judgment a person who has a proprietary or possessory interest existing at the date of the challenged sale, which would be affected by it, has the right to apply to set aside the sale under O. 21, R. 90 of the Code, or S. 174, Tenancy Act. That is the simplest case. But a creditor who has attached the property in execution of his decree for money is a person who has got no proprietary or possessory interest therein. But he has a pecuniary interest therein, because it is the property to which he looked for the satisfaction of his decree. He has the right to its preservation in the same state and can sue if a third party by wrongful acts destroys it or diminishes its value, 30 Mad 413 (1); for such wrongful acts would ultimately affect the price that the property would fetch at the

Court sale, the price which would have been the means of satisfaction of his decree. If it is sold in execution of another's decree, he, having the right of rateable distribution is entitled to see that it has been sold not at an inadequate price by an irregular or fraudulent sale, for, more the price fetched the more would be his share in the rateable distribution. If he has not the right to claim rateable distribution, the surplus sale proceeds, after satisfying the claim of the decree-holder at whose instance the property was sold, would be available to him, and the more the price fetched the more would be the surplus. He has therefore a pecuniary interest affected by an irregular or fraudulent sale which had fetched an inadequate price by reason of the irregularity or fraud. It is on this principle and this principle only, namely, that his pecuniary interests are affected, that his right to apply for setting aside the sale, is in my judgment, based on 1933 Mad 455 (2), and I consider that this is the only principle on which his right so to apply has been supported in 51 Cal 495 (3). Page, J. expressly puts the case on the said principle alone. Suhrawardy, J. also states the principle in that way at p. 498 of the report. When he says that an attaching creditor has an interest in the sale of the property or in the property itself, he means that he has a pecuniary interest therein, because he looked to the property for the satisfaction of his money decree, which was sold at the instance of another creditor of the same judgment-debtor. That is also the basic principle underlying the decision in 30 Mad 413 (1) as I have indicated above, on which Suhrawardy, J. relies for his support.

Most of the cases where the question has come up are cases where the person who had applied for setting aside the sale had actually attached in execution the property before the sale and consequently in these cases the observations are to the effect that the attachment gave a pecuniary interest in the property to the person seeking to set aside the sale. The question in this case is whether the fact of attachment in execution of a decree only,

2. Venkatesha Kamathi v. Villa Bhakta, 1933 Mad 455=143 I C 492=64 M L J 605=37 M L W 581.

3. Dharendra Nath Roy v. Kamini Kumar Pal, 1924 Cal 786=84 I C 119=28 O W N 899=51 Cal 495.

1. Sankaralinga v. Kandaswami, (1907) 30 Mad 413=17 M L J 334.

gives him a pecuniary interest. In my judgment the fact of attachment is one of the modes by which pecuniary interest is acquired in the property, but only one of many modes in which such an interest can be acquired. A mortgagee of a non-transferable occupancy holding who has recovered a decree, or even one who has not recovered a decree, can apply to set aside a rent sale held under Ch. 14, Tenancy Act. It may be said that the holding being non-transferable, he had not acquired any proprietary interest in the same against the landlord who has obtained the rent decree, but surely his pecuniary interest is affected by the rent sale. It is on this principle that the Patna High Court has supported his right to apply for setting aside a rent sale: 1930 Pat 451 (4). In such cases there is no attachment at all. In my judgment the correct principle for determining whether the applicant for setting aside the sale had acquired before the challenged sale, a pecuniary interest in the property is to be gathered from the following underlined passage in the judgment of Mookherjee, J. in 17 C W N 80 (5) where he was considering the difference between an attachment before judgment and attachment in execution of a decree:

An attachment after decree on the other hand is an attachment made for the immediate purpose of carrying the decree in execution, and it presupposes an application on the part of the decree-holder to have his decree executed.

In that case the question was whether a person who had attached the property before judgment, but had not got a decree, could apply to set aside a sale, and it was answered in the negative. For drawing a contrast the case of an attachment in execution of a decree was spoken of, but in my judgment a decree-holder acquires a pecuniary interest in the property, the sale of which at the instance of another decree-holder he challenges, as soon as he has done a formal act, an act in Court, which indicates unequivocally that he wants that property for the satisfaction of his decree. The act must be specific, in relation to that particular property and must not remotely but proximately or immediately connect his intention to rea-

lize his dues out of that particular property. On this principle a person who has attached before judgment, but who has at the date of the challenged sale, got no decree, would not be entitled to apply for setting aside the sale. A person who has obtained a decree for money, but has not applied for execution, would also have not the right to apply on this principle, as he has not taken any action in Court to indicate that he looked to that particular property sold for satisfaction. The cases cited by the petitioner, namely, 39 I C 932 (6) and 1925 Sind 101 (7), fall within this type. A person who has obtained a decree for money and has only applied for execution but has not applied for and obtained an order for attachment of the particular property may possibly be excluded, but when a person has gone further and has taken effective and definite steps for proceeding against the particular property, which steps in normal course would lead to the sale of the property in question for satisfaction of his decree, I think he would have the right to apply for setting aside the sale. Here such definite steps had been taken by opposite party 1; he asked for and obtained an order for attachment of the holding sold at the rent sale brought about at the instance of the landlord, the Secretary of State for India in Council, before the rent sale. He had unequivocally manifested his intention to look to the said holding as a means of satisfying his decree and had done an act which cannot be said to connect remotely his intention to realize his decretal dues with the said holding. He had obtained an order from the Court which in its normal course, in the course of ministerial acts and proceedings only and without a further judicial order, would, have placed the suit property in custodia legis as a preliminary, necessary and immediate step for enabling the satisfaction of his decree out of the same.

If on this principle I hold that opposite party 1 had locus standi to apply under S. 174 (1), Tenancy Act, though the actual attachment was effected after the rent sale, I do not consider that the case in 55 I A 256 (8) or the cases in 42 Mad

4. Lakhan Choudhury v. Bacha Lal Singh, 1930 Pat 451=126 I C 295=11 P L T 500.

5. Jogendra Nath Chatterjee v. Monmatha Nath Ghosh, (1913) 17 C W N 80=15 I C 668=16 C L J 566.

6. Sulemanji v. Pragji Kala, 1917 Sind 33=39 I C 932=10 S L R 189.

7. Rustomji v. Perozshaw, 1925 Sind 101.

8. Muttiah Chetti v. Palaniappa Chetti, 1928 P O 139=109 I C 626=55 I A 256=51 Mad 349 (P C).

844 (9) and 59 Cal 1176 (10) have any bearing upon the point that I have to decide. Those cases lay down that there is a distinction between an order for attachment and the actual attachment, and where the legislature has used the word attachment, as for instance in Art. 11, Sch. 1, Lim. Act, and Sec. 64 of the Code, it means attachment and not the order in consequence of which the attachment is afterwards made, with the necessary corollary that the result of attachment indicated by the legislature would follow only when there is the attachment and not before. I accordingly hold that the right order has been passed by the Court of appeal below, and this rule must be discharged with costs to opposite party 1, hearing-fee 1 gold mohur.

V.B./R.K.

Rule discharged.

9. Sinnappan v. Arunachalam Pillai, 1920 Mad 804=53 I C 207=37 M L J 281=42 Mad 844 (F B).
 10. Nabadwip Chandra Das v. Lake Nath Roy, 1933 Cal 212=142 I C 452=36 C W N 733=59 Cal 1176.

A. I. R. 1936 Calcutta 550

DERBYSHIRE, C. J. AND COSTELLO, J.

Bejoy Lal Mukherjee — Plaintiff — Appellant.

v.

New India Assurance Co., Ltd. — Defendants—Respondents.

Appeal No. 17-A of 1935, Decided on 10th January 1936.

Insurance—Fire insurance — Limitation—Jute of assured insured against fire—Jute burnt—Claim of assured for loss sustained rejected as being fraudulent — Company's own man declaring petty sum as compensation for loss—"Difference" referred to arbitrator—Arbitrator declaring his award—Suit filed by assured on basis of award — Contention by company that suit was time-barred having been brought after more than three months of rejection of claim—Suit held within limitation since filed within three months of the making of award.

A person insured his jute against fire. The insurance policy contained certain conditions. Condition 13 read that "if the claim be in any respect fraudulent or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, all benefit under the policy shall be forfeited." Condition 18 contained that "if any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in

writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator." As a result of fire, jute was burnt and the assured informed the company likewise and submitted his claim for Rs. 20,000 for loss sustained. The company contended that the loss sustained was about Rs. 800 and rejected his claim for Rs. 20,000. So great arose the difference between the two that the company founded a charge of fraud on the assured. He requested the company to send their representative to arbitration and on the company refusing to do so, an arbitrator was appointed on his behalf. An award was made for Rs. 19,000 and for costs. After the making of the award, a suit for recovery of amount was commenced by the assured within three months. The suit was claimed to be time-barred:

Held: that a difference arose between the parties as to the amount of loss or damage within condition 18 and hence proceedings by way of arbitration were a condition precedent to any proceeding in law and the right to bring a suit did not arise until the arbitration proceedings had been completed and an award had been made. It was competent for the assured to bring his suit at any time within three months of the arbitrator's award. The suit was hence not time-barred: *Case law reviewed.* [P 552 C 2]

S. B. Sinha and A. C. Ganguli—for Appellant.

S. M. Bose, Issacs and Z. A. Rahim—for Respondents.

Costello, J.—The learned Judge in the Court below summarised the main issue which he had to determine in these words:

The company invokes the special period of limitation provided by Cl. 13 of the policies in case of the claim having been rejected. The plaintiff on the other hand claims that an arbitration under Cl. 18 having taken place and the suit having been instituted within three months of the date of the award the suit is within time. The substantial question is whether the plaintiff is entitled to invoke the arbitration clause at all in the circumstances. If he is not, then the fact that he did so and obtained an award in his favour will not help him.

The real and indeed the only question, which we have to determine, in my opinion, is this, namely, whether in the circumstances of this case the plaintiff was entitled to say that it was right and proper that an arbitration should take place between him and the defendant company. If the plaintiff was entitled to call upon the defendant company to go to arbitration then the matter falls within the latter part of Condition 13 in such manner as to extend the period of limitation within which the plaintiff must bring his action to a date which represents the end of the period of three

months from the time when the arbitrator made his award. The respondents to this appeal, that is to say, the defendants in the suit, are faced, as I view the matter, with a dilemma. If it can be successfully contended that this case is governed by the principles laid down in 1915 A C 499 (1) then it is quite clear that it was not open to the respondents-defendants to rely upon or take advantage of any of the provisions with regard to the special limitation for bringing the suit as provided in Condition 13, the case would fall within the view apparently adopted by Lord Haldane and Lord Dunedin in 1915 A C 499 (1). On the other hand if it is to be said that this case is one of that class of cases which is covered by the principles enunciated in (1917) 2 K B 433 (2) then the only question which could possibly arise for determination is whether or not a difference had arisen as to the amount of loss or damage alleged to have been sustained by the insured person, that is to say, the plaintiff in the suit, I am clearly of opinion that this matter was of the kind referred to by Lord Reading in (1917) 2 K B 433 (2) where at p. 437 of the report he said:

If the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact inducing the contract of which the force and effect are not declared by the contract itself. In that case the materiality of the fact and its effect in inducing the contract would have to be tried. In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms.

In the present instance the defendant company, by their letters of 5th June and 12th June, were resisting the plaintiff's claim not by saying that the policies themselves had been avoided, but by placing reliance on the provisions contained in the earlier part of Condition 13. A similar situation is described by Lord Sumner in the course of his speech in

1925 A C 619 (3), at p. 631. In that case, referring to 1915 A C 499 (1), the noble and learned Lord said :

There, persons, who had repudiated the whole contract of insurance, afterwards relied on a limited arbitration clause contained in it, which required the amount payable to be determined by arbitration, and said that, until he had obtained such an award, the plaintiff could not complete his case. It was held that the defendants could not both repudiate the contract in toto and require the performance of a part of it, which only became performable when liability was admitted or established. The present case is the converse. Here an arbitration and award are conditions precedent to any action to enforce the policy. The defendants do not repudiate the policy or dispute its validity as a contract; on the contrary, they rely on it and say that, according to its terms, express and implied, they are relieved from liability.

That, in my opinion, has application to the circumstances of the case with which we are now concerned. The sole question is whether any difference had arisen as to the amount of loss or damage. An examination of the letters written by the defendant company shows that what was in controversy was the value of the jute which had been stored in the godown which was covered by the two policies of insurance. The policy-holder, that is, the plaintiff in the present suit, was claiming that the value of the jute which he had lost amounted to no less a sum than Rs. 20,000; on the other hand the insurance company, after they had obtained a report from an assessor, were saying that the total value of the jute was no more than a sum of Rs. 800. Then they proceeded to say that the discrepancy between the two valuations was so great as to raise an inference of fraud on the part of the claimant of such a character as would entitle the defendant company to resist and indeed to reject the claim because it was fraudulent within the terms of Condition 13. Mr. Bose has argued that once the claim has been rejected by the company there is a definite period of limitation prescribed, namely, three months from the date of the rejection and, in effect, the rejection of the claim, no matter on what ground, operates as a bar to any proceedings in law, unless such proceedings are instituted within a period of three months. If that proposition is correct it quite obviously ignores

1. *Juredini v. National British & Irish Millers Insurance Co.*, 1915 A C 499=84 L J K B 640=112 L T 531=31 T L R 132=59 S J 205.

2. *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.*, (1917) 2 K B 433=86 L J K B 1155=117 L T 337=33 T L R 395.

3. *Macaura v. Northern Assurance Co., Ltd.*, 1925 A C 619=94 L J P C 154=133 L T 152=41 T L R 447=31 Com Cas 10.

altogether what I will describe as the fifth provision of Condition 13 and entirely obliterates that part of Condition 13 which contemplates that the period of limitation may be extended and will be extended in a case where it is proper that an arbitration should take place. In my opinion, there not only was a "difference" between the parties as to the amount of loss or damage, but there was such a serious "difference" as entitled the defendant company in their own opinion to put upon the claimant the stigma of having made a fraudulent claim. In my view there never could be a more serious "difference" than there was in the present instance. That being so, I can come to no other conclusion than that the last part of provision 5, as I have called it, of Condition 13 came into operation.

It is manifestly impossible for the defendant company to argue that where arbitration proceedings are competent those proceedings must be had within the initial period of three months. One has only to observe that both sides are given a period of two months within which to nominate an arbitrator. That at once takes the matter beyond the initial period of three months or may do so. On this point we have the authority furnished by the case in 1927 A C 610 (4). From that case it may be said that where proceedings by way of arbitration are a condition precedent to any proceeding in law the right to bring a suit does not arise until the arbitration proceedings have been completed and an award has been made. As I read the matter, upon the language of Condition 13 and Condition 18, as they stand, there is no sort of limitation prescribed for the institution of arbitration proceedings and, therefore, the institution of any suit consequent upon the result of the arbitration proceedings. It is not without significance, as Mr. Sinha has pointed out, that although all these conditions are in the form of conditions adopted by the English Insurance Companies—they are contained in what is called "the foreign form"—this particular Insurance Company, though they have adopted practically all the relevant provisions from that form, they have omitted the condition which in the "foreign form" is

Condition 19. That condition reads as follows:

In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

We do not know—and it is not necessary that we should know—why that provision was not adopted by this particular company, the defendants in this suit, but its absence indicates that there is no limitation within which arbitration proceedings, if they are required, shall be commenced. Therefore once we come to the conclusion that there was a difference between the parties as to the amount of loss or damage sustained, arbitration proceedings become a condition precedent to bringing a suit and the cause of action does not arise until the arbitration proceedings have been terminated. Therefore, it was competent to the present plaintiff to bring his suit at any time within three months of the making of the award by the arbitrator. This suit was brought within that period and therefore it ought not to be dismissed on any ground of special limitation contained in Condition 13 of the policy. I agree, therefore, that this appeal must be allowed, and, having regard to the finding of the learned Judge on the question whether the claim was fraudulent or not taken in conjunction with the award made by the learned arbitrator, I also am of opinion that judgment should be entered in favour of the plaintiff for a sum of Rs. 19,500.

Derbyshire, C. J.—This is an appeal against a judgment of Buckland, J.—then the Acting Chief Justice of this Court—delivered on 8th May 1934. By that judgment he decided that the plaintiff in this suit, Bejoy Lal Mukherjee, was not entitled to succeed against the defendants, the New India Assurance Co., Ltd. The suit arises out of a claim made by the plaintiff against the defendant Insurance Company under two policies of fire insurance dated 26th March and 7th April 1931 respectively. By those two policies of insurance the defendants insured jute belonging to the plaintiff who traded as Messrs. S. Devi & Co. at 15 B. Biswakosh Lane, Bagh-bazaar, Calcutta. The jute in question was situate at Ghosebilla, Jamjami Railway Station in the district of Nadia, Bengal. The first of the two policies was for Rs. 12,000 and was taken out on 26th March 1931. The second policy was

4. Board of Trade v. Cayzer Irvine & Co., 1927 A C 610=96 L J K B 872=137 L T 419=71 S J 560=43 T L R 625.

for Rs. 8,000 and was taken out on 7th April 1931. The policies remained subject to the conditions and stipulations which are set out on the back of them. The conditions of the two policies are identical.

On 17th April 1931 there was a fire, and jute belonging to the plaintiff situated at Ghosebilla, Jamjami Railway Station, was burnt. On 18th April the plaintiff by a letter informed the defendants of the fire. On 23rd April the plaintiff filled in a claim form under the two fire policies and declared that the actual realizable value of the property insured under each item of the above policies under which the claim was made was at the time of the fire Rs. 24,000. He also stated that the loss sustained by him on the jute which had been burnt amounted to the sum of Rs. 20,000 and he claimed the sum of Rs. 20,000 under the two policies. On 5th June the defendants wrote to the plaintiff a letter:

*Re: Claim under Policies Nos. 254322 & 254408
Fire in Jute Godown at Ghosebilla, Jamjami
Railway Station Alamdanga (Nadia).*

Dear Sir,

Our Assessors, Messrs. Sinclair Murray & Co., Ltd., have to-day forwarded us their assessment report in connection with the above fire estimating the loss at Rs. 800 only against your claim for Rs. 20,000 which appears to them to be fraudulently excessive. In the circumstances we have to refer you to Condition 13 of our policy reading:

"If the claim be in any respect fraudulent; or if any false declaration be made or used in support thereof; or if any fraudulent means or devices used by the assured, or any one acting on his behalf to obtain any benefit under this policy, all benefit under this policy shall be forfeited."

On 9th June the plaintiff wrote back to the defendants:

I have received your letter of the 5th instant to-day and I am surprised to note that assessment report of Messrs. Sinclair Murray & Co., says only Rs. 800. I told your Indian assessors on the day of inspection that I doubt my manager has cheated me and they agreed with me and stated that the stock in godown and outside before fire was not more than Rs. 6,000. I also told the fact in your office immediately after returning from the place. However it is for Rs. 6,000 or Rs. 800, it comes under condition of the policy, and most probably I am a ruined man for the breach of trust of my manager unless the company be kind to consider my case favourably. I solely depend upon the mercy of the company now.

On 12th June the defendants wrote back to the plaintiff:

In reply to our letter of the 5th instant we have for acknowledgment yours of the 9th idem. In view of the circumstances we regret to advise

you that we repudiate our liability under the above policies as per Condition 13, already referred to in our letter of the 5th instant.

On 26th June the plaintiff wrote another letter to the defendants—a very lengthy letter—in which he asked them to investigate the matter further and to pass his claim in full, otherwise he would be reluctantly compelled to seek remedy in Court. On 12th November of the same year the appellant through, his Solicitors Messrs. G. C. Chunder & Co., threatened the defendants with proceedings unless they met the claim. On 27th November the company by a letter of that date drew the plaintiff's Solicitors' attention to the full wording of Condition 13 of the policies under which they contended that any proceedings were too late. On 30th November the plaintiff's Solicitors wrote to the defendants a letter in which they said:

We are surprised that inspite of our client's best endeavours to prove to your satisfaction from independent enquiries that there was no fraud or arson you should have thought fit to take shelter under a technical defence. Assuming that Cl. 13 bars a suit, which in the circumstances we contend it does not, we do not see how proceedings under Cl. 18 will be barred. If, therefore, you do not admit our client's claim, our client appoints Mr. N. C. Chatterjee, Bar-at-law, the arbitrator, and calls upon you either to accept him as the single arbitrator, or within two months in writing to appoint another arbitrator.

On 11th January 1932, some six weeks afterwards, the defendants replied to the plaintiff's solicitors in which they contended that it was too late for arbitration proceedings to begin and they said: "Under the circumstances we do not see the utility of joining in any arbitration at this stage." There is a letter in reply of 12th January in which the plaintiff's solicitors argued the matter. The reply in return from the defendants was on 30th January in which the defendants said that they were not satisfied with the honesty of the claim and believed that the claim set up by the plaintiff was dishonest and that the case was a fit case for enforcement of the provisions of Condition 13. By a letter of 28th November 1932 the plaintiff appointed Mr. N. C. Chatterjee, Barrister, sole arbitrator in the reference that he had begun under the arbitration proceedings in the matter of the claim under the two fire insurance policies. The defendants took no part in the arbitration proceedings with the result that Mr. Chatterjee proceeded to hold the reference and on 28th March

1933 he made an award in which he awarded that the plaintiff was entitled to recover from the defendants under the two policies in respect of his jute which had been burnt a sum of Rs. 19,000 and also Rs. 500 as costs. On 19th May 1933 this suit was brought. The suit purports to be on the award. It would be convenient at this stage to read the two conditions of the policies with which we are concerned in this matter. They are Conditions 13 and 18. Condition 13 reads :

If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the assured or anyone acting on his behalf to obtain any benefit under this Policy ; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the assured ; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or, (in case of an arbitration taking place in pursuance of the 18th Condition of this Policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under the Policy shall be forfeited.

Condition 18 reads :

If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator ; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference, and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or power of the arbitrator, arbitrators or umpire respectively ; and in the event of the death of an arbitrator or umpire another shall in each case be appointed in his stead by the party or arbitrators (as the case may be), by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be at the discretion of the arbitrator, arbitrators or umpire, making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained.

Those conditions appear to be some of the standard conditions adopted by the British Insurance Companies on their

foreign policies.* In these policies not all the standard conditions have been adopted. There is nothing in Condition 18 which provides that arbitration proceedings must be begun within any fixed time. The standard condition adopted by the British Insurance Companies in respect of foreign policies, Condition 19, provides that in no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of a pending action or arbitration. As I said above, most of the standard foreign conditions have been incorporated into these policies, but Condition 19 is not, so that there is in these policies no limit put to the time during which arbitration proceedings can be started. A number of cases have been cited to us during the argument in this matter. Some of those cases deal with the clauses in question, namely Nos. 13 and 18, and what their effect is in certain circumstances. No case has been brought to our notice which is similar in facts to this case.

After considering those cases and the facts to which they related it seems to me in the main that the only way to deal with this case is to apply the conditions that have been relied upon, namely Conditions 13 and 18, to the particular facts of this case. It is contended by the defendants that under Condition 13 any action or suit brought in this matter must be brought within three months of 12th June 1931, which is stated by the defendants to be the date when the plaintiff's claim was rejected. As this suit was brought on 19th May 1933 it is contended by the defendants that it is entirely out of time and out of time notwithstanding that it was brought consequent upon arbitration proceedings. The crucial date is 12th June 1931, when the defendants wrote the letter in which they referred to the letter of 5th June and said that they repudiated their liability under the above policies as per Condition 13. It seems to me upon reading the defendants' letter of 5th June which was written in answer to the plaintiff's claim that on 5th June the defendants were disputing the amount of the plaintiff's loss in respect of the jute burnt. They contended that his loss was about Rs. 800, whereas

*See Wilfred & Ottar Barry's Law of Insurance.

the plaintiff contended that it was Rupees 20,000. On 12th June they still contended that, and the plaintiff still contended that he had lost more than Rupees 800. On 12th June they repudiated their liability under the policies. It seems to me that, both on 5th June and on 12th June there was a difference between the parties as to the amount of loss or damage. That difference was a very serious one, so serious that the defendants founded a charge of fraud upon it, but nevertheless there was that difference. In my opinion, there was both on 5th June and 12th June a difference as to the amount of loss or damage under those policies. As I have said, as a result of that difference the defendants repudiated liability under the policies.

It has been contended by Mr. Sinha for the plaintiff that repudiation of liability amounted to a repudiation of the contracts of insurance such as would disentitle the defendants to rely upon the conditions of the policies. See the case in 1915 A C 499 (1). I think however that the true view of the defendants' repudiation of liability is that they did not repudiate the policy of insurance in toto, but that they repudiated their liability to pay moneys by reason of the operation of Condition 13. See the case in (1917) 2 K B 433 (2) at p. 437 and the case in (1933) 1 K B 515 (5) at p. 527. I am of opinion therefore that the defendants are entitled to rely upon such protection as the conditions of the two policies give them. The only two conditions in question are those set out above, 13 and 18. I have said previously that in my view both on 5th June and 12th June there was between the parties a difference as to the amount of loss or damage under these policies. That being so, it seems to me that the opening clause of Condition 18 applies, namely:

If any difference arises as to the amount of any loss or damage, such difference shall, independently of all other questions, be referred to the decision of an arbitrator.

Then follow the other parts of the condition which are not material at the moment. It follows therefore that each of the parties was entitled on 12th June to an arbitration to settle the question that had arisen as to the amount of loss

or damage. I think that that was so even though the defendants alleged that the difference was so great that they could raise a charge of fraud in respect of it. I think further that the last part of Condition 18 applies :

And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained.

Therefore it seems to me that not only had each of the parties a right to have an arbitration, but that in accordance with the scheme for settling disputes which appears in Condition 18 it was the proper thing that an arbitration should take place and that it must take place before any action or suit was brought upon the policies. The plaintiff did not proceed to arbitration under Clause 18 until 30th November 1931, that is to say, some five and half months after the defendants' liability of 12th June wherein they repudiated liability under the contract. The defendants contend that one of the clauses in Condition 13 of the policy makes this move to arbitration too late. The defendants say that the words:

If the claim be made and rejected and an action or suit be not commenced within three months after such rejection all benefit under this policy shall be forfeited

make the plaintiff's proceeding to arbitration and his starting this suit altogether too late. I am of opinion that in thus contending the defendants have overlooked the fact that the clause which they cite and contend has this effect is joined up with another clause following it, which must be read with it, and when read with it causes a different interpretation to be put upon the words

If the claim be made and rejected and an action or suit be not commenced within three months after such rejection

to have a different meaning. The full wording of the clause is :

If the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or, (in case of an arbitration taking place in pursuance of the 18th Condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.

In my view, if an arbitration properly takes place under this policy, then the assured is not bound to start his action or suit within three months of the rejection of his claim, but he must start his

5. Freshwater v. Western Australian Assurance Co., Ltd., (1933) 1 K B 515=102 L J K B 75=1932 W C & I Rep 379=148 L T 275=76 S J 888.

action within three months after the arbitrator has made his award. The second period may be long after the three months beginning with the rejection of the claim. In my view a difference arose between the parties as to the amount of loss or damage under these policies as was contemplated by Condition 18. Furthermore, it was according to the scheme of arbitration set out in Condition 18 proper, that there should be arbitration proceedings in respect of this dispute. It being proper that arbitration proceedings should be taken in respect of this dispute my view is that the second half of the clause of limitation in Condition 13 applies, namely,

If the claim be made and rejected and an action or suit be not commenced within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.

This suit was commenced within three months of the making of the award by the arbitrator. Therefore, in my view this suit was in time and was properly brought. In the Court below an attempt was made to show that this claim was fraudulent. The learned Judge who tried the case said that he did not think that fraud had been proved beyond all reasonable doubt. Before us in this appeal no attempt was made to support the charge of fraud. Mr. S. M. Bose for the defendants said that he did not propose to do it. The position therefore is that an award has been made by an arbitrator who was appointed pursuant to the provisions of Condition 19. His award stands. It is for Rs. 19,000 and for costs. In my judgment this appeal must be allowed and a judgment be entered for the plaintiff for the sum of Rs. 19,500. This is an appeal by a pauper. The plaintiff must get his costs in the Court below, and as regards the costs in this Court the respondents must pay the successful appellant's attorney's costs in so far as they consist of proper charges for preparation of the paper book and attendance at Court, but no further. The respondents will also pay such court-fees as would have been payable by the appellant had he not been allowed to appeal as a pauper.

R.W./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 556

D. N. MITTER AND PATTERSON, JJ.

Bhupati Nath Chakravarty—Plaintiff
—Appellant.

v.

Basanta Kumari Devi—Defendant and
another—Respondents.

Appeal No. 257 of 1933, Decided on 21st February 1936, from original decree of Sub-Judge, Nadia, D/- 31st July 1933.

(a) **Hindu Law — Adoption — After adoption adoptive father cannot by subsequent instrument alter status of adopted son.**

Once a person is given in adoption he becomes transferred to the adoptive family and gets the status of an adopted son and the adoptive father cannot by any subsequent instrument alter the status that has been conferred on him as an adopted son. [P 557 C 2; P 558 C 1]

(b) **Stamp Act (1899), S. 36—Section is mandatory and once document is admitted, whether rightly or wrongly, it cannot be rejected from evidence for want of proper stamp subsequently.**

Section 36 is mandatory; and once a document is admitted in evidence rightly or wrongly it is not permissible to the Court whether it is a Court of appeal, revision or trial Court, to reject it from evidence on the ground that it has not been duly stamped or that deficiency has not been made up and penalty not paid although subsequently the party producing the document was ordered to do so. The stamp matters are no concern of the parties and if notwithstanding an objection the trial Court admits the document, the matter stops there and the Court cannot subsequently order deficiency to be made up and penalty paid, or failing that reject the document: 1930 Cal 577; 1919 Cal 235 and 1921 Cal 613, *Foll.* [P 559 C 1]

(c) **Deed—Construction — Complete rights of executants in property vesting in idol—Idol is owner, not trustee.**

Where the rights of executants of a deed become extinguished and get completely vested into an idol, the idol cannot be regarded as a trustee in respect of the property in which by the terms of the instrument complete right has vested in the said idol. The property becomes the idol's property although idol holds the property in an ideal sense: 32 Cal 1129 (P C) and 2 I A 125 (P C), *Ref.* [P 560 C 1]

(d) **Deed—Construction — Legal effect of document not to be construed by reference to description at head but substance.**

In order to construe the legal effect of any particular instrument it is not the description at the head of the document which ought to be the controlling factor; it is the substance of the document and not the form which is to be looked into. [P 560 C 2]

(e) **Stamp Act (1899), S. 2 (24)—"Settlement" refers to disposition of successive interests couched in form of trust.**

The word "settlement" as it is generally understood really refers to a disposition of successive interests in immoveable property and is

generally couched in the form of a trust and it is such a settlement which is in the nature of disposition of property moveable and immovable either in consideration of marriage or for one or more of the objects specified, namely, religion, charity, or provision for family, dependants or others, that is contemplated by Cl. (24) of S. 2. It is these objects which attract the benefit of a duty half that of a gift or of a conveyance. [P 560 C 2]

(f) **Hindu Law—Gift—Idol—There can be gift to idol.**

There can be a gift to an idol; and gift to an idol or deity is not hedged in by same limitations and is not subject to same restrictions as a gift to human being or living person: 37 Cal 128 (F B), *Foll.*; 1927 Mad 636 (F B), *not Approved*. [P 561 C 1]

(g) **Stamp Act (1899), S. 61—Court has to declare proper duty and penalty.**

Under S. 61, the Court has not only to declare what the proper duty is, but can also determine the amount of penalty. [P 561 C 2]

(h) **Hindu Law—Maintenance — Adult son—No right to maintenance.**

An adult son is not entitled to maintenance. There is no such obligation in law nor can any obligation arise by reason of a temporary illness or disorder: 12 W R 494, *Ref.* [P 563 C 1, 2]

Bansori Lal Sarkar, Kali Pada Chakravarty and Bijan Kumar Mukherji for Collector, Nadia—for Appellant.

D. N. Bagchi, Nilmoni Goswami and Jitendra Nath Bagchi—for Respondents.

D. N. Mitter, J.—This is an appeal by the plaintiff whose suit has been dismissed by the Subordinate Judge of Nadia by his decision dated 31st July 1933. The case made in the plaint is that after the death of the plaintiff's father he was given in adoption by his mother Bagala Sundari Debi to the husband of the defendant Basanta Kumari, a gentleman of the name of Kshetra Nath Chakravarti, in July 1926. Kshetra Nath died on 16th November 1928. At the time when plaintiff was given in adoption his age, it is stated, was nine years. It is alleged that he was ill-treated by his adoptive mother, the defendant Basanta Kumari and his mother took him back and thereafter Kshetra Nath executed a deed cancelling the adoption. This deed is dated 23rd April 1927. Shortly after, both Kshetra and Basanta Kumari executed a deed which is termed as a deed of settlement, giving all the properties to certain ancestral deities and for the performance of Durga and Lakshmi pujas.

The case which the plaintiff makes is that the deed of cancellation of the adoption cannot be sustained in law, and it does not affect his rights which is based

on the status of an adopted son. It is alleged that the deed of settlement in favour of the deities is inoperative, because undue influence was exercised on Kshetra and further because the deed was not acted upon. It is also said that Kshetra could not by the deed of settlement, lay down a line of succession of shebaitship contrary to the Hindu law after Jitendra Nath Chakravarty who was one of his agnatic relations and would be the shebait after the death of both Kshetra Nath and Basanta Kumari. It was further stated that the document which created the Debutter was insufficiently stamped and that the said document could not be admitted in evidence so as to affect the rights of the plaintiff without payment of the proper stamp duty and the penalty. We will have to revert to this question about the admissibility of this document later. The defences to the suit were that the document of cancellation was a valid document, and that the deed of settlement in favour of the deities was valid. On these pleadings several issues were framed. The issues are printed at p. 13, part 1 of the paper-book. With regard to issue 2 as to whether the plaintiff was the validly adopted son of the deceased Kshetra Nath Chakravarty the finding of the Subordinate Judge is in favour of the plaintiff. Issue 4 is to the following effect :

Are the deed of cancelment dated 10th Baisak 1334 B. S. (23rd April 1927) and the deed of gift and settlement dated 21st Baisak 1334 B. S. (4th May 1927) valid and operative documents? Were they or any of them executed under undue influence and coercion? Has any valid right by the deeds vested in the deity Sridhar Thakur and others by right of the said deed of 21st Baisak 1334 B. S. (4th May 1927).

Issue 5 runs thus :

Can the plaintiff claim any maintenance from the estate of the deceased Kshetra Nath Chakravarti?

Issue 6 was to the effect :

Were the immovable properties mentioned in items Nos. 1, 13, 24, 30 to 38, 82 to 98 and 200 and the debt mentioned in item 12 of the plaint schedule the Stridhan property of defendant 1.

These issues arose for decision: with regard to issue 4 although there is no distinct finding on it, yet the Subordinate Judge evidently proceeds on the view that the deed of cancelment of the adoption cannot take effect. So far as this point is concerned, there is no question that the plaintiff having once been given

in adoption, has been transferred to the adoptive family and has got the status of an adopted son. The question was not a question of contract so that it could be rescinded by a subsequent deed. The adoptive father could not, by any subsequent instrument, alter the status that had been conferred on the plaintiff as an adopted son. This position has not been challenged on behalf of the respondents in this case and nothing more need be said about it. With regard to the deed of gift or settlement dated 4th May 1927, the finding of the Subordinate Judge is that this was not executed under undue influence or coercion and that a valid right had been created by the deed in favour of the deity Sridhar Jiew Thakur and others by the said deed. With regard to the issue relating to maintenance the Subordinate Judge has come to the conclusion that as the plaintiff has attained majority and no authority has been shown to him that under the Hindu law an adult is entitled to maintenance or that his rights with regard to maintenance cannot be affected by any provision either in a will or a deed, the plaintiff's claim for maintenance must fail. There has been no controversy before us with regard to the finding on issue 6 and the decision which we will give will proceed on the assumption that the deed of settlement to which we will refer in detail hereafter covers all the properties that are the subject matter of the present suit. It may be stated here that one of the prayers in the plaint which seems to us to be in the alternative was that if the properties left by Kshetra Nath Chakravarty be held to have been affected by the settlement deed, it may be declared that the plaintiff is the succeeding Shebait after the death of Kshetra Nath and is entitled to the management of the debutter properties. The Subordinate Judge has, after taking evidence and after arriving at his decision on the various issues which were just indicated, dismissed this claim of the plaintiff with costs. In the first prayer in the plaint the plaintiff asked for the following relief (Ka) :

That it may be declared that the plaintiff is the validly adopted son of the late Kshetra Nath Chakravarti and his sole heir according to law.

As has already been stated, the Subordinate Judge has found in favour of the plaintiff on the question of the validity of

the adoption. It is against the decree of dismissal of the plaintiff's suit that the present appeal has been brought and it seems to us at the outset that the plaintiff's entire suit should not have been dismissed seeing that the Subordinate Judge has come to the conclusion that the plaintiff is a validly adopted son and, consequently, the heir of Kshetra Nath Chakravarty according to the Hindu law. This finding has not been questioned before us on behalf of the respondent and we think that the plaintiff's prayer Ka should have been granted and the declaration sought for made. The principal ground on which this appeal has been rested is that the Subordinate Judge should not have admitted the deed of settlement dated 4th May 1927, as it was not properly stamped and as the stamp duty and penalty ordered by the Subordinate Judge had not been paid and it is said that if this document is excluded from evidence plaintiff's suit with reference to the prayer about awarding khas possession of the properties claimed should have been granted. The controversy has therefore turned mainly on the question as to whether this document was properly admitted in evidence. In connexion with this it is to be noticed that as appears from a portion of the record, which portion does not seem to have been printed, that this document which has been marked as Ex. A (see p. 6, part 2 of the paper book) was admitted without objection; and after the said document had been admitted, it appears, that the attention of the Subordinate Judge was drawn to the insufficiency of the stamp leviable on this document, and the Subordinate Judge passed an order on 27th July 1933 to the following effect :

Heard pleaders for both sides. Defendants' Ex. A is impounded, and defendant 1 is directed to deposit Rs. 551-12-0 as stamp duty and Rs. 5,517-8-0 as penalty by tomorrow.

On the next day, namely 28th July, defendant 1 put in a petition stating the impossibility on her part to deposit the stamp duty and penalty within so short a time and that petition was directed to be kept on the record (see p. 3, part 1 of the paper book, Order No. 115). But it seems that this deficit stamp duty and the penalty were never realised from the defendant 1, Basanta Kumari. It is argued for the appellant that in those circumstances this document should have

been excluded from evidence, and if the document was so excluded, the defence of defendant 1 which is based on this should not have been given effect to. We will have to deal with the question as to what the proper stamp duty on this document should be and for that purpose we have heard the learned Junior Government Pleader, Dr. Mukherji. But on the question as to whether by reason of deficit stamp and the penalty not having been put in the document should not have been admitted in evidence, we are of opinion that S. 36, Stamp Act, prevents us from acceding to the contention of the appellant. The document was, rightly or wrongly, admitted by the Subordinate Judge in evidence and, once the document has gone in under the provisions of S. 36, it is not permissible to the Court at any subsequent stage of the suit or proceeding to reject this document from evidence; S. 36 runs as follows:

When an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

Section 36 is, in its nature, mandatory and applies also to the Court of appeal. The question has been considered in a number of cases in this Court and it has been held that it does not matter whether the document was rightly or wrongly admitted, but if once it is admitted it is not permissible to the Court whether it is a Court of appeal or revision or the trial Court to reject it from evidence. In a recent decision of this Court Sir George Rankin, C. J., as he then was, and Mr. C. C. Ghose, J., said this:

On the merits of the appeal, it appears to me that S. 36, Stamp Act, makes it reasonably clear that the instrument having once been admitted in evidence is not to be called in question at any stage of the same suit. The Special Judge has seen this section but has thought to avoid the consequence of it by taking notice of an affidavit in which it is said that the tenure-holders did object when the document was tendered and that there was a discussion as to its admissibility. The learned Judge has entirely failed to see that under S. 36, it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. These stamp matters are really no concern of the parties and if the objection was taken at the time when the record was made up by the trial Court, there it might be rejected; if not, the matter stopped there.

See the case in 51 C L J 569 (1). This is in accordance with a long line of decisions. The same view was taken in an earlier decision of this Court in 29 C L J 305 (2). In that case Chitty and Panton, JJ. said this:

But, as he (the Subordinate Judge) admitted the document in evidence that admission, except as is provided for by S. 61 which does not affect the liability of the defendant, cannot be called in question in this suit.

See p. 311 of the said report. The suit before him was based upon a bill of exchange which was insufficiently stamped. In a matter which came in appeal from the Original Side of this Court Sir Lancelot Sanderson, C. J., as he then was, after citing the provisions of S. 36 observed as follows:

The provisions of S. 61 are not material to the question which arises in this case. The submission was, in my judgment, admitted in evidence by the arbitrators, and having been admitted in evidence by the arbitrators, it was not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. The award, therefore, which was made upon the submission was in my judgment a valid award.

See 27 C W N 513 (3) at p. 518. In the same case Richardson, J., who delivered a separate judgment uses the following language, after quoting the provisions of Ss. 35 and 36:

Under that provision if any penalty is to be exacted, it can only be exacted under S. 61. The revenue is then protected, so far as it is protected, by that section. In my opinion once an instrument is admitted in evidence in any proceeding, either under S. 35 or under S. 36, it is available in that proceeding for all purposes as if it had been properly stamped from the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction merely by reason of non-compliance with the Stamp Act.

Section 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted or acted upon an unstamped or insufficiently stamped instrument. (See p. 520 of the said report).

It seems to us therefore on a plain reading of the language of the statute as

1. Nirode Basini v. Sital Chandra, 1930 Cal 577=128 I O 187=51 C L J 569.
2. Biswa Nath Bhattacharjee v. Govinda Chandra Das, 1919 Cal 235=51 I O 88=29 C W N 534=29 C L J 305.
3. Rung Lal Kaloo Ram v. Kedar Nath Kesriwal, 1921 Cal 613=77 I O 845=27 C W N 513.

contained in S. 36 as also on the authorities to which we have just referred, that the contention of the appellant that this document can now be excluded from evidence must fail, and we will proceed to determine this case on the footing that this document in question is properly before the Court.

It now remains to consider the question relating to the stamp objection: the question is as to what the proper stamp is which should have been put on this document for the purpose of S. 61. The learned Junior Government Pleader was heard on this question as well as Mr. D. N. Bagchi who appears for the respondent, who has filed this instrument. It is contended on behalf of the respondent that this is really in the nature of a trust deed. We have no hesitation in rejecting this contention, for on a plain reading of the deed it appears to us that it is a deed of gift in favour of certain idols some of whom are in existence at any rate. It is conceded that Sridhar Jieu was a family idol which had been established long before the date of this instrument. The material passage of the document is to be found at p. 8, line about 16, part 2 of the paper-book. It is in these terms:

We after much consideration in sound health, in good faith, of our own free will, and without being requested by others, dedicate all the properties mentioned in the schedule below to Sri Sri Iswar Durgamata Thakurani, Sri Sri Iswar Jagadhatrimata, Sri Sri Iswar Sridhar Jieu, Sri Sri Iswar Lakshmimata and Sri Sri Iswar Saraswatimata, etc., and execute this Arpannama (deed of endowment) and agree that whatever right, title, interest and possession we had in the properties of the under-mentioned Schedule become totally extinguished from this day and the aforesaid deities completely become the Maliks of the Schedule properties from to-day.

There can be no doubt that the rights of the executants Kshetra and Basanta Kumari, his wife, to the properties mentioned in the schedule to this instrument became extinguished and that right vested in the idol. The idol cannot be regarded as a trustee in respect of the property in which by the terms of the instrument the complete right had vested in the said idol. It is difficult to spell out of this document any idea of trust in favour of the idols. The property is the idol's property although we are not unmindful of the fact that the idol holds property in the ideal sense. This was pointed out by their Lordships of the Judicial Commit-

tee both in 2 I A 145 (4) and 32 Cal 129 (5). The question of trust, therefore, is out of the way.

Then we are asked by the respondent to construe this deed as a deed of settlement within the meaning of S. 2, Cl. 24, Stamp Act. This, no doubt, is a somewhat difficult question. Settlement as defined in the said clause of S. 2 means any non-testamentary disposition, in writing, of moveable or immoveable property made [we will omit Cls. (a) and (b) which are not material] (c) for any religious or charitable purpose; and it is said that the document is headed as a deed of settlement. But in order to construe the legal effect of any particular instrument it is not the description at the head of the document which ought to be the controlling factor, but it is the substance of the document and not the form which is to be looked into. It is argued for the respondent that "settlement" as defined attracts the provisions of the particular instrument, Ex. A, as it is a non-testamentary disposition of moveable and immoveable property for religious or charitable purpose. The word "settlement" as it is generally understood really refers to a disposition of successive interests in immoveable property and is generally couched in the form of a trust and it is such a settlement which is in the nature of disposition of property moveable or immoveable either in consideration of marriage or for one or more of the objects specified, namely, religion, charity, or provision for family, dependents or others, that in our opinion is contemplated by Cl. 24. It is these objects which attract the benefit of a duty half that of a gift or of a conveyance. We are pressed by the respondents to take the view that this was really not a case of a gift to an idol, but that it was a trust in favour of an idol and that even if it was not a trust it serves as a document which certainly comes within the definition of "settlement" as given in S. 24. The word "settlement" has been defined in the Specific Relief Act as follows:

'Settlement' means any instrument (other than a will or codicil as defined by the Succession Act) whereby the destination or devolu-

4. Prosanno Kumari Debya v. Golab Chand Baboo, (1875) 2 I A 145=4 Beng L R 450=3 Sar 449=23 W R 253=3 Suther 102 (P C).
5. Jagadindra Nath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129=31 I A 203=8 Sar 698 (P C).

tion of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of : (See S. 3 of that Act.)

It seems to us that underlying the idea of settlement there is the notion or conception of trust. It is difficult to say that when a gift is made to an idol, the idol is to be regarded as a trustee although the deed says that the particular idol or idols are to be the Malik of the property dealt with by the said instrument. On this part of the case it has further been pointed out that there can be no gift to an idol, for according to the definition of gift under Ss. 122 and 123, T. P. Act, a gift must be in favour of a living person and, an idol not being a living person it cannot be regarded as a gift. The question as to whether there can be gift to an idol was considered by a Full Bench of this Court in 37 Cal 128 (6), and Asutosh Mookerjee, J., who delivered one of the judgments in that case summarizes his conclusions at p. 161 of the report. The first conclusion is :

The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence.

The learned Judge seems to be of opinion that a gift to a deity is not hedged in by the same limitations and is not subject to the same restriction as a gift to a human being or living person. The learned Judge then observes thus :

The Hindu Law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof.

We do not ignore the fact that it is possible to make a gift for a religious and charitable purpose by appointing trustees and by not making a gift as to an idol or idols as in the present case. It appears that in the Madras High Court the question was raised by a Full Bench of that Court as to how far there can be a gift to an existing idol within the meaning of the Transfer of Property Act : see the case in 50 Mad 687 (7), and there is an

interesting discussion with regard to the provisions of S. 123 about gifts to an idol in the judgment of Kumarswami Sastri, J. at p. 695. It seems that this question was mooted, but was not finally decided. The learned Judge used the following language :

It has been argued for the respondent that an idol is in law recognized to be a juristic person capable of holding property and it must be held that a gift to an idol is a gift to a living person. A juristic person is not necessarily a living person and the fact that for some purpose the law by a fiction invests non-animate bodies with the rights of persons would not make juristic persons living persons for all purposes. It is unnecessary to pursue this point further as the document is not a gift to an idol, but to Sri Kothandarama Moorthy, the Almighty, and by no stretch of imagination, legal or otherwise, can it be said that the Almighty is a living person within the meaning of the Transfer of Property Act.

There the disposition was in favour of the Almighty. Besides, it seems to us that the view taken by the Madras High Court was in conflict with the view taken in this Court in the Full Bench case in 37 Cal 128 (6). We have, therefore, no doubt, having given our anxious consideration to the matter that there was a gift of properties comprised in Ex. A in favour of the idols mentioned there and if so, the proper duty payable under Art. 33, Stamp Act, would be the same duty as on a conveyance for a consideration equal to the value of the property as set forth in such instrument. It seems to us that the Subordinate Judge is right when he holds that the deficit duty is Rs. 551-12-0.

It now remains to consider the penalty which is to be paid on this instrument. Under S. 61, Stamp Act, the Court has to make a declaration as to the amount of the duty payable as also the penalty. It has been strenuously contended before us by the learned advocate for the respondent that having regard to the provisions of S. 61 (2) the Court can only declare what the proper duty is. It has no right to determine the penalty. It becomes necessary therefore to consider the express provisions of the statute. S. 61 (1) runs as follows :

When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding under Ch. 12 or Ch. 36, Criminal P. C., 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under S. 35, the Court to which appeals lie from, or references are made by, such first mentioned Court may, of its own

6. Bhupati Nath Smrititirtha v. Ram Lal Maitra, (1910) 37 Cal 128=10 C L J 355=3 I C 642=14 C W N 18 (F B).

7. Narasimha Swami v. Venkatalingum, 1927 Mad 686=103 I C 302=50 Mad 687=53 M L J 203 (F B).

motion, or on the application of the Collector, take such order into consideration.

Section 61 (2) is in these terms :

If such Court after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under S. 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

Then there is the proviso to Cl. (4) to the following effect : Provided that (a) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such Court, was payable in respect of the instrument under S. 35, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty. The word "amount" is qualified by the bracketed words "including duty and penalty," that is to be determined by the Court which is dealing with the matter for the purpose of S. 61. It is argued that in Cl. (2) nothing is said with regard to the declaration about the higher duty and penalty. Cl. (2) has to be read along with the proviso to Cl. (4) which says in clear language that the determination by the Court must be of both the duty and the penalty. It is said that the question of penalty is a matter within the discretion of the Collector under S. 40. It is to be noticed that the Collector's decision as to penalty is not final and is liable to be called in question or challenged by the Court of appeal or revision. So it is necessary that this Court should declare not only what the duty is, but also the penalty and we think that the penalty having regard to the provisions of S. 35(a) should be ten times the amount of proper duty or a portion thereof. S. 35(a) runs as follows :

... in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.

We have no option having regard to the proviso but to hold that the penalty is ten times Rs. 551-12-0, namely, Rupees 5,517-8-0. It must be distinctly understood that we are simply making this declaration as is required by S. 61, Stamp

Act, and the intimation of this declaration should be sent to the Collector of Nadia along with a copy of this judgment. It has been conceded before us that after having admitted the document in evidence, the Subordinate Judge was wrong in impounding the document and directing the defendant to deposit Rs. 551-12-0 as stamp duty and Rs. 5,517-8-0, as penalty by 28th July. It has been conceded by Dr. Mukherji, who appears for the Government that this was an irregular order and, as we have already stated, once having admitted the document, it was not open to the Subordinate Judge to make that order. It is however open to us now to say that this document is to be impounded and it must be sent to the Collector of Nadia for that purpose.

We now proceed to consider the merits of the appeal. For the appellant, as already indicated, it has been argued that this deed, Ex. A, was never acted upon, and this document was, after all, an illusory document created with the object of depriving the adopted son of his just rights. The appellant, however, is in a difficulty. It appears that the lady Basanta Kumari has been examined in this case, and in her examination, as appears from the record (unfortunately this document has not been printed), she states clearly that debsheba was being carried on in the manner mentioned in Ex. A, and that realisations and collections were being made and are applied for purposes of the Puja. We do not see any reason why we should discredit her statement. She also stated that there are books which would corroborate her statement. It is argued for the appellant that these books have not been produced. The answer to that is that the appellants did not pursue their cross-examination with reference to these books after the lady stated that though she had the books in her possession she was never asked to produce them before the Court.

It has next been argued that as no mutation was effected during the lifetime of Kshetra recording the name of the deity as proprietor the document must be taken to be unreal. The answer to that contention is that Kshetra did not live very long after the execution of this document. A number of supervisors were appointed to check the work of the shebais and the whole object was that these properties should be given to the

idol and collections made for debsheba and other purposes. The mere fact that there has been no mutation does not show the unreality of the transaction. It is not said that either of the executants was involved in debt. It seems to be an absolute dedication of the strictest kind in favour of the idols, and more cogent evidence should have been forthcoming if the appellant wanted to establish that this was an illusory document and the income of the property was not being strictly applied to debsheba purposes. On the statement of defendant 1 the Subordinate Judge was right in coming to the conclusion that the deed was being acted upon. It is important to notice in this connexion that the real ground on which this deed was attacked was undue influence and coercion, of which there is no vestige of evidence. This ground must therefore fail.

The next ground taken is that in any event the Court should have granted a decree for maintenance to the plaintiff, namely, the adopted son, and that it was not open to Kshetra or his wife to deprive the plaintiff of the maintenance which he was entitled to under the Hindu Law. It has been contended that under the Hindu law, an adult son is not entitled to maintenance, and our attention has been drawn to a passage referred to in the well-known treatise on Hindu law by the distinguished Hindu lawyer, Mr. Gopal Chandra Sarkar Sastri which has been revised by his son Mr. Rishindra Nath Sarkar, an advocate of this Court. At p. 684, the learned author says this:

In the Bengal school, however, a doubt may be raised as to the right of an adult son and consequently of his wife or widow and daughter. But it should be remembered that the Hindu law makes provisions for the maintenance of even an illegitimate son.

The right of maintenance under the Hindu law is founded on certain texts one of which is that of Manu:

वृद्धौ च मातापितरौ साध्वीभार्या सुतः शिशुः ।

अप्यकार्यशतं कृत्वा भर्तव्या मनुरब्रवीत् ॥

which translated means :

It is declared by Manu that the aged mother and father, the chaste wife, and an infant child, must be maintained even by doing a hundred misdeeds.

Manu cited in the Mitakshara while dealing with gifts. The qualifying words in regard to the issues of a man are "infant child." In view of this text of Manu it is difficult to say that an adult son is entitled to any maintenance. As a matter of fact so far back as 1869, the

eminent Judge, the late Dwarka Nath Mitter, J., laid down the following proposition :

We find no authority either in the Hindu law or in the Jain Shastras to support the position that a father is obliged to support a grown up son. It is alleged that the plaintiff was labouring under illness, and he is, therefore, entitled in justice and in equity to receive maintenance from his father, notwithstanding that he has arrived at majority. But illness was never made the ground of the plaintiff's action, and even if it had been, we do not see any reason why a temporary disorder of the stomach should render it obligatory on the defendant to support the plaintiff, when no such obligation exists in law : See 12 W R 494 (8).

That also seems to be the trend of the view taken in the other schools of Hindu law. So this ground regarding the right of the plaintiff to maintenance must fail. It is next contended that the lower Court should have determined in this suit the right of the plaintiff to the shebaitship as prayed for in relief Gha (p. 8, part 1, of the paper book) of the plaint. Before us the argument has taken this shape. It is said that in the recent Full Bench decision of this Court in 60 Cal 452 (9), this Court has held that even with regard to shebaitship, the course of succession must not be one opposed to Hindu law ; and the principle in 9 Beng L R 377 (10), which applies to secular property must also apply to the shebait; and it is said that the line of devolution after defendant 1 and Jatindra Nath Chakravarti, who has also been appointed shebait, is contrary to Hindu law. Therefore, the adopted son as heir would come in as shebait after them. With regard to this prayer it seems to us that the prayer is altogether premature. Cause of action has not arisen, for both Basanta Kumari and Jatindra Nath Chakravarty who are the legally appointed shebait are still alive. The question might arise at a future time after the death of these two persons when it would be open to the plaintiff, if so advised, to agitate the question with regard to his rights about shebaitship. The result, therefore, is that the plaintiff is entitled to a declaration that he is the validly adopted son of

8. Prem Chand Pepara v. Hoolas Chand Pepara, (1869) 12 W R 494 = 4 Beng L R App 28.

9. Manohar Mukerji v. Bhupendra Nath Mukherji, 1932 Cal 791 = 141 I C 544 = 37 O W N 29 = 56 O L J 468 = 60 Cal 452 (F B).

10. Jatindra Mohan Tagore v. Ganendra Mohan, (1872) 9 Beng L R 377 = 18 W R 359 = I A Sup Vol 47 = 2 Suther 692 = 3 Sar 82 (P O).

Kshetra and is his sole heir according to law; and the rest of the claim is dismissed, except with regard to the prayer for shebaitship which question is not determined in the present case and which is left open for future litigation if the plaintiff chooses to bring one when the occasion arises. The Subordinate Judge's decree is varied in this way. The appeal is allowed partially. There will be no order as to costs.

Patterson, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1936 Calcutta 564

R. C. MITTER, J.

Bengal Provincial Ry. Co., Ltd.—Defendant 1—Appellant.

v.

Rajani Kanta De and others—Respondents.

Appeal No. 1978 of 1933, Decided on 16th July 1935, from appellate decree of Addl. Sub-Judge, Burdwan, D/- 29th June 1933.

(a) Tort — Liability — Adjacent lands — Owner of land lawfully using his land—No negligence on his part—Neighbour is not entitled to relief if such act results in damage to him.

An owner is entitled to use his land in any way he pleases if he does not act in a negligent manner. If there is no negligence on his part, when a lawful act is done on his own property causing damage to his neighbour, the law would give the neighbour no relief.

[P 564 C 2, P 565 C 1]

(b) Tort—Liability — Lateral support—Adjacent land—Right of support from neighbour's land is available only in respect of land in unburdened and natural state — Building constructed on land—Owner has no right of support to building unless it has been acquired as easement.

The natural right of support from neighbour's land is available only in respect of land in unburdened and natural state. An owner has got no right for the support of his building or of his land burdened with the additional weight of his building unless such a right has been acquired as an easement. If there is no easement to have the lateral support of his building on his neighbour's land, the neighbour is within his rights to make excavations on his own land and provided that he does not act negligently he is not liable at all for damages caused to the building of his neighbour: *Wyatt v. Harrison*, 89 E R 320, Rel. on. [P 565 C 1]

Sitaram Banerjee—for Appellant.

Prokash Chandra Bhose — for Respondents.

Judgment.—This appeal is on behalf of the Bengal Provincial Railway Company Limited, defendant 1, against the judg-

ment and decree of the Additional Subordinate Judge of Burdwan dated 29th June 1933 in a suit brought by the plaintiffs for damages and for permanent injunction restraining the defendant company from digging burrow pits or deepening them. The plaintiffs have got a decree for damages amounting to Rs. 10 and their prayer for injunction has also been granted; hence this appeal by the company. The facts are these: the defendant company have burrow pits on their own land. The pit in question has been in existence from a very long time. The plaintiffs had their hut near the burrow pit on their land, but in the year 1927 or 1928 they replaced their hut by a masonry building. The building was raised close to the pit. In February 1930, the men of the defendant company deepened the pit, but at the time of the digging operations, admittedly no damage was caused to the plaintiffs' building. It is only after the rains had set in, in July 1930, that cracks appeared on the building. They claimed damages from the railway company on account of damage done to the building; and as they apprehend that further excavations would cause further damage to the building they have asked for permanent injunction restraining the defendant company from deepening the burrow pit or digging further burrow pits near about the plaintiffs' land in such a way as would endanger the stability of their building.

In the plaint the ground on which the claim was based was negligence, but there is no finding by either of the Courts below that the digging was in a negligent manner. The fact that there was no negligence is also supported by the fact that no cracks appeared on the building shortly or immediately after the excavation. They appeared after the rains had set in and the soil being of a sandy nature had been washed away to some extent. The case of negligence being out of the way, I do not see how the decrees made by the Courts below can be supported. Apart from cases coming within the principle in 3 H L 330 (1) an owner is entitled to use his land in any way he pleases if he does not act in a negligent manner. If there is no negligence on his part, when a lawful act of his done on his own property causes damage to his neighbour,

1. *Rylands v. Fletcher*, (1869) 3 H L 330=37 L J Ex 161=19 L T 220.

the law would give the neighbour no relief. The act of negligence therefore being out of the way, the plaintiffs' claim can only be supported if they had the right of lateral support from the defendants' land. There is a natural right of support from his neighbour's land, but that right is only in respect of land in unburdened and natural state. An owner has got no right for the support of his building or of his land burdened with the additional weight of his building unless such a right has been acquired as an easement. If there is no easement, to have lateral support of his building, on his neighbour's land, the neighbour is within his rights to make excavations on his own land, and provided that he does not act negligently, he is not liable at all for damages caused to the building of his neighbour. This proposition is well settled on the authorities. In 3 B & Ad 871, same as 39 E R 320 (2), Lord Tenterden, C. J. states the law in these terms :

The question reduces itself to this whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned. Whatever the law might be, if the damage complained of, were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration have been recently erected : and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rall. Ab. Trespass (1), pl. 1. The judgment will therefore be for the defendant.

In Clerk and Lindsell on Torts, Edn. 8, p. 349, it is said as follows :

Again, the right of support, apart from any easement to have a greater degree thereof, is limited to support afforded to land in its natural state, that is to say, to land on the one hand unburdened with the weight of buildings, reservoirs of water or other artificial erections which would tend to increase the natural down-

ward or lateral thrust. But if, in an action against the adjoining owner for removing the support afforded to the soil under the plaintiff's house and thereby causing the plaintiff's house to fall, it be proved that the land on which the house stood would have subsided appreciably even if it had been unburdened with the weight of the house, the plaintiff is entitled to recover in respect of the damage to the house, although it may be modern and no right of support for it has been acquired. An owner of a modern house which de facto enjoys the support of the adjoining soil, though not entitled as against the adjoining owner not to have that support withdrawn, is so entitled as against a wrongdoer.

The plaintiffs' case is that the building is quite a recent one erected in 1927 or 1928. On the principles mentioned above, I am clearly of opinion that the plaintiffs have no right to claim support from the defendants' land, of his land burdened by their building, and inasmuch as there is no evidence to show that their land would have subsided if in a natural state and unburdened with their building by reasons of the excavations made by the defendant, I do not see on what principle the plaintiffs are entitled to get damages from the defendant company for a lawful act done on their own land, an act which as owner they are entitled under the law to do. If the defendant company had been guilty of negligence in doing the particular act, the plaintiffs' case would have stood on a different footing. I hold, accordingly, that the Courts below have gone wrong in passing a decree in favour of the plaintiffs. On the principles noticed above, the plaintiffs' suit ought to be dismissed. The result is that this appeal is allowed, the decrees of the lower Courts are set aside, and the plaintiffs' suit dismissed with costs throughout. The cross-objection of the plaintiffs is dismissed but without costs.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 565

NASIM ALI AND HENDERSON, JJ.

Pulin Chandra Daw and others—Plaintiffs—Appellants.

v.

Abu Bakkar Naskar—Defendant—Respondent.

Appeal No. 1247 of 1933, Decided on 13th January 1936, from appellate decree of Sub-Judge, 2nd Court, Hooghly, D/- 23rd February 1933.

(a) Bengal Tenancy Act (1885), S. 178(3)(a) — Landlord and tenant—Kabuliyat provid-

2. Wyatt v. Harrison, (1882) 3 B & Ad 871=39 E R 320=1 L J K B 237.

ing for ejectment cannot prevent tenant from acquiring occupancy rights.

The right of the landlord to eject the tenant from his homestead arising out of the kabulyat cannot prevent the tenant from acquiring occupancy right in the homestead in accordance with the provisions of the Bengal Tenancy Act. [P 566 C 2]

(b) Bengal Tenancy Act (1885), S. 182—Homestead and agricultural holding—Homestead not forming part of agricultural holding—Rights in homestead are governed by Bengal Tenancy Act and not by Transfer of Property Act—Where provisions of S. 182 are fulfilled tenant cannot be ejected.

If a raiyat's homestead is a part of his agricultural holding there is only one tenancy and his rights in the homestead are the same as his rights in the holding itself. Where however the homestead is not a part of his agricultural holding the incidents of his tenancy or the homestead are regulated by Bengal Tenancy Act and not by the Transfer of Property Act in the absence of any local custom or usage. The requirements of S. 182 are firstly that the tenant of the homestead is a raiyat and secondly that he holds the homestead otherwise than as a part of his holding. Where both the elements are present a tenant cannot be ejected.

[P 566 C 2]

Basak and Phanibhusan Chakravarti for Appellants.

Gopendra Nath Das and Sambhunath Banerjee—for Respondent.

Nasim Ali, J.—This appeal arises out of a suit for ejectment. Plaintiff's case is that the defendant held the disputed land as a tenant under them on the basis of a registered kabuliyat executed by him in favour of their predecessor on 27th July 1915, that a notice to quit was served on him in accordance with the term of the kabulyat calling upon him to vacate the land on the 1st of Baisakh 1336, B. S. but he has failed to comply with the notice. The defence of the defendant is that he is a settled raiyat of the village in which the disputed land lies and that he has acquired an occupancy right in the disputed land under the provision of Section 182, Bengal Tenancy Act, as it is his homestead. The Courts below have held that the defendant has acquired occupancy right in the disputed land. They have accordingly dismissed the suit. Hence the second appeal by the plaintiffs.

Now it appears that the defendant took settlement of the disputed homestead from the plaintiff's predecessor for residential purposes by a kabuliyat in 1915. By this kabuliyat a tenancy at will liable to be determined by a notice to quit was created. It appears that the defendant was a cultivator at the time of the kabu-

liyat. It is not clear, however, whether he was a raiyat at that time. It has been found by the lower appellate Court that he acquired a raiyati in 1326 B. S. and became occupancy raiyat in respect of some agricultural lands of the village before the service of notice. Dr. Basak appearing on behalf of the plaintiffs contends that subsequent acquisition of the status of an occupancy raiyat by the tenant cannot take away the contractual right of the landlord to eject the tenant. Now, by sub-s. (3) (a) of S. 178, Bengal Tenancy Act, nothing in any contract made between a landlord and a tenant after the passing of the Act shall prevent a raiyat from acquiring, in accordance with this Act, an occupancy right in land. The right of the plaintiffs to eject the defendant from his homestead arising out of the kabuliyat of 1915 cannot therefore prevent the defendant from acquiring occupancy right in the homestead if he is entitled to acquire occupancy right in it in accordance with the provisions of the Bengal Tenancy Act of 1885. S. 182 of the Act is in these terms:

When a raiyat holds his homestead otherwise than as part of his holding as a raiyat the incidents of the tenancy of his homestead shall be regulated by local custom or usage and subject to local custom or usage by the provisions of this Act applicable to land held by a raiyat.

If a raiyat's homestead is a part of his agricultural holding there is no difficulty as there is only one tenancy and his rights in the homestead are the same as his rights in the holding itself. Where however, as in the present case, the homestead is not a part of his agricultural holding the incidents of his tenancy or the homestead are regulated by the provisions of the Bengal Tenancy Act and not by the provisions of the Transfer of Property Act in the absence of any local custom or usage. The requirements of S. 182, Bengal Tenancy Act, are: (1) that the tenant of the homestead is a raiyat; (2) that he holds the homestead otherwise than as a part of his holding.

Both the elements are present in this case. Dr. Basak however contends that in order to determine the incidents of the defendant's tenancy of the homestead the Court has to look to the contract which created that tenancy and it is not permissible to take into consideration any subsequent events which the landlords

did not contemplate at the time when the tenancy was created and over which they had no control. It is difficult to accept this contention in view of the general terms of the provisions of S. 182. The word "holds" in the section seems to point to the time when the dispute about the incidents of the tenancy of the homestead arises.

The rights derived from a contract have been abrogated with regard to the homestead land of a raiyat without any exception as to pre-existing contracts under the provisions of the Bengal Tenancy Act: See 44 C L J 302 (1).

As a protection to cultivating tenants the section is enacted, so that he may not be turned out of his homestead. I am not therefore prepared to hold that the decision of the Courts below is wrong. The appeal is accordingly dismissed with costs.

Henderson, J.—I agree.

D.S./R.K.

Appeal dismissed.

1. Sukh Lal v. Prosanna Kumar, 1926 Cal 1199 = 96 I C 541 = 44 C L J 302.

* A. I. R. 1936 Calcutta 567

EDGLEY, J.

Manmatha Kumar Saha—Defendant—Appellant.

v.

Exchange Loan Co., Ltd.—Plaintiff—Respondent.

Appeal No. 87 of 1935, Decided on 5th June 1936, from appellate decree of Sub-Judge, 3rd Court, Dacca, D/- 19th June 1934.

* Contract — Minor — Fraudulent representation of full age—Person induced to contract with minor—Minor can avoid contract—Setting up of defence of minority is allowed—No estoppel under S. 115, Evidence Act—Minor not allowed to retain benefit of contract—Relief for restitution arises under equity—Interest on loan advanced to minor cannot be claimed—Relief for interest is relief ex contractu and is void.

Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract; and, though S. 115, Evidence Act, is general in its terms, it must be read subject to the provisions of Contract Act, declaring a transaction entered into by a minor to be void. But the minor defendant should not be allowed to retain the benefit which he has received as a result of his fraudulent misrepresentation and that on equitable principles in a suit properly framed he might be called upon to refund the consideration money which has been received by him. It is however clear that his liability in this respect arises not ex contractu but on equitable considerations and

the plaintiff cannot therefore in any event claim interest on the loan, because the liability to pay interest arises on one of the stipulations of the contract: 1928 Lah 609 (F B), Foll.; 9 I C 110, Disting.; Leslie v. Sheill, (1914) 3 K B 607 and 1916 P C 242, Not foll.; 25 Cal 371; 26 Cal 381 and 30 Cal 539 (P C), Expl.

[P 569 C 1, P 570 C 2]

S. C. Basak and Nabadwip Chandra Saha—for Appellant.

Bama Prasanna Sen Gupta—for Respondent.

Judgment.—In the suit out of which this appeal arises the plaintiff Company sued the defendants on a promissory note alleged to have been executed by defendant 1 who alone contested the suit. It was said that defendant 1 had borrowed the sum of Rs. 300 from the plaintiff company and had agreed to pay interest at the rate of 3 per cent. per mensem. The total amount claimed was Rs. 624. The execution of the promissory note was admitted, but the main defence was to the effect that, at the time of the execution of this document, defendant 1 was a minor. The suit was decreed by both Courts. The findings of the lower appellate Court are to the effect that the appellant was a minor at the time when he executed the promissory note, that he knew that the period of his minority had been extended, that the plaintiff company did not know that defendant 1 was a minor and that this defendant obtained the loan from the plaintiff company by falsely and fraudulently representing that he was not a minor. Defendant 1 has now appealed to this Court and the main contention urged on his behalf is that he was incompetent under the law to contract at the time when he executed the promissory note and that even if it be admitted that he obtained the loan upon a fraudulent misrepresentation of facts, he is nevertheless under no liability to the plaintiff company in respect of this transaction. The first point which arises for consideration in connexion with this appeal is whether, under S. 115, Evidence Act, the minor is estopped, by reason of his representation to the effect that he was a major, from pleading his minority in order to avoid the contract.

The question of the applicability of S. 115, Evidence Act, in the case of minors was considered in 26 Cal 381 (1). In that case Maclean, C. J. held that this

1. Brohmo Dutt v. Dharmo Das Ghose, (1899) 26 Cal 381 = 3 O W N 468.

section had no application to the case of a minor on the ground that the term "person" in S. 115 meant a person who is of full age and competent to enter into a contract and that, as a minor cannot be estopped by a deed or by the recitals in a deed, it would be incongruous to hold that he could be estopped by a parole declaration. In agreeing with the Chief Justice, Ameer Ali, J. stated :

It follows therefore that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract, he cannot be made liable upon the same contract by means of an estoppel under S. 115. I therefore agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff.

Brohmo Dutt's case (1) came before the Judicial Committee of the Privy Council on appeal in 1903: 30 I A 114 (2). In deciding that appeal their Lordships of the Judicial Committee held that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Contract Act, and where he purports to do so, his alleged contract is void. The question of estoppel under S. 115, Evidence Act, was raised before the Judicial Committee, but Sir Ford North in his judgment left the question open as is indicated in the following passage :

The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties.

The learned advocate for the respondent company places some reliance upon the decision of Caspersz and Chatterjea, JJ. in 15 C W N 239 (3). In that case the decision of the appeal apparently turned upon the question whether Bijoy Gobinda Saha Choudhury, one of the plaintiffs' vendors, was a minor at the time when he conveyed certain property to the plaintiffs. With regard to this point the learned Judges remarked that the conduct of Bijoy in connexion with this transaction might amount to misre-

presentation and legal fraud on his part. They go on to say:

If there was misrepresentation by Bijoy operating to deceive, and if the plaintiffs were deceived by it, we think that Bijoy would be bound by the transaction. There should be clear finding on the point.

It appears from the judgment in *Surendra Nath Roy's* case (3) that the learned Judges relied mainly in support of their decision upon some observations of the Court of appeal in 25 Cal 371 (4). It appears however from the report in 25 Cal 371 (4) that no question relating to the applicability of S. 115, Evidence Act, arose for decision in that case. Jenkins, J. who tried the case in the Court of first instance held that a certain money-lender named Luckhi Narayan had been deceived into making a loan by the defendant's fraudulent misrepresentation. He refused to make a personal decree against the defendant for the repayment of the money advanced, but gave the plaintiff an ordinary mortgage decree and he held that the plaintiff's right to succeed notwithstanding the defendant's infancy, arose from the applicability of a principle of equity which treats fraud as a bar to the plea of disability. Jenkins, J.'s line of reasoning was approved by the Court of appeal consisting of Maclean, C. J. and Macpherson and Trevelyan, JJ. and in upholding Jenkins, J.'s judgment Maclean, C. J. made the following observations:

There is not, so far as I can discover, any distinction between the law in India and the law in England upon this subject. In my judgment, there is a current of cases decided in the Courts of Equity in England, dating back for 150 years or more, which show that, in equity, an infant cannot take advantage of his own fraud. I think it is established that in cases of fraud by an infant the protection which the law throws around him is taken away: in other words, that the defence of infancy cannot be successfully pleaded in defence of a fraud perpetrated by the infant.

His Lordship then went on to say:

I think the cases establish that, in a case like the present, the defendant, though at the time when he entered into the contract he was an infant, is not entitled to take advantage resulting from his own fraud.

It must be remembered that the case in 15 C W N 239 (3) was clearly distinguishable on the facts, from the case out of which the present appeal arises and, having regard to the line of reasoning which seems to have been adopted by the learned Judges in that case, it can hardly

2. *Mohori Bibi v. Dharmodas Ghose* (1903) 30 Cal 539=30 I A 114=8 Sar 374 (P C).

3. *Surendra Nath Roy v. Krishna Sakhi Dassi*, (1911) 9 I O 110=13 C L J 228=15 C W N 239.

4. *Saral Chand Mitter v. Mohun Bibi*, (1898) 25 Cal 371=2 C W N 201.

be taken to go further than to reiterate the general principle laid down in *Saral Chand Mitter's* case (4) to the effect that an infant is not entitled on equitable principle to take any advantage from his own fraud. In 1928 the leading cases decided by the Courts in India were reviewed by a Full Bench of the Lahore High Court in 9 Lah 701 (5). One of the questions referred to the Full Bench in that case was whether a minor, who, by falsely representing himself to be a major, had induced a person to enter into a contract was estopped from pleading his minority to avoid the contract. After an exhaustive review of the leading cases on this point, including the decisions of this Court, the learned Chief Justice observed:

It will be seen from the foregoing discussion that not only the English law, but also the balance of the judicial authority in India, is decidedly in favour of the rule that, where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract; and though S. 115, Evidence Act, is general in its terms, I consider for the reasons which I have already given that it must be read subject to the provisions of the Contract Act, declaring a transaction entered into by a minor to be void. My answer to the first question referred to us is, therefore, in the negative.

This decision of the Lahore High Court was cited with approval by Buckland, J. in 58 Cal 224 (6). I am entirely in agreement with the views expressed on this point by the learned Chief Justice of the Lahore High Court and it follows that, in my opinion, the minor defendant is not estopped by S. 115, Evidence Act, from pleading his minority to avoid the contract in respect of which he was sued. The further question arises, however, for consideration as to whether the minor defendant is entitled to retain any benefit which he has received under the contract or, in other words, whether he should not be compelled to refund the consideration money obtained by him through his fraudulent misrepresentation. Clearly his liability, if any, would not be ex-contractu, but could only arise with reference to principles of equity. On behalf of the appellant some reliance was placed upon the decision of this Court in 24 Cal 265 (7),

in which it was held that in a case where an infant had obtained a loan upon a false representation that he was of age, no suit to recover the money could be maintained against him. The correctness of that decision was, however, doubted by the Court of Appeal in 25 Cal 371 (4) in which the principle was definitely adopted that an infant is not entitled to take any advantage resulting from his own fraud. The question as to a minor's liability in respect of compensation was raised in 26 Cal 381 (1), but it was found in that particular case that the defendant had not been actually misled. In this connection Maclean, C. J. stated:

Then, we are asked to exercise the discretionary powers vested in us under Ss. 28 and 41, Specific Relief Act. That is a matter for the discretion of the Court; the learned Judge in the Court below has exercised his discretion adversely to the appellant, and I see no reason which would justify us in differing from that conclusion. On the contrary I do not think that in a case of this class where a man, who has been told that the person with whom he is dealing is a minor, still chooses to lend him money, "Justice requires" that it should be returned to him.

When this case was considered on appeal by the Judicial Committee of the Privy Council, the question as to the liability of the minor to return the money advanced to him was further considered and on this point Sir Ford North's observations were as follows:

Another enactment relied upon as a reason why the mortgage money should be returned is S. 41, Specific Relief Act (1 of 1877), which is as follows: "S. 41. On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." S. 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the appellate Court in the exercise of such discretion, came to the conclusion that, under the circumstances of this case, justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised.

It would appear, therefore, that the Judicial Committee have in effect recognised the principle that the Courts in India have an equitable discretion to direct the refund of money which an infant may have obtained by his own fraud provided the lender is actually deceived by the fraud perpetrated by the minor. It may of course be argued that jurisdiction to order restitution only exists in cases in

5. *Khan Gul v. Lakha Singh*, 1928 Lah 609 = 111 I C 175 = 80 P L R 60 = 9 Lah 701 (F B).
6. *Sarada Prosad Das v. Binay Krishna Dutta*, 1931 Cal 893 = 132 I C 84 = 58 Cal 224.
7. *Dhanmull v. Ram Chunder Ghose*, (1897) 24 Cal 265 = 1 C W N 270.

which the minor invokes the order of the Court as a plaintiff, but as Sir Shadi Lal, C. J., has pointed out in 9 Lah 701 (5), cited above :

It is difficult to understand why the granting of an equitable remedy should depend upon a mere accident; namely whether it is the minor or his adversary who has taken the initiative in bringing the transaction before the Court. The material circumstances in both cases are exactly the same. A contract has been entered into with an infant and as it is an invalid transaction it must be cancelled.

His Lordship goes on to say :

All that can reasonably be said is that the Court, in deciding whether relief against fraud practised by an infant should or should not be granted, will consider along with other circumstances of the case the fact that the infant is a defendant and not a plaintiff. But there is no warrant either in principle or in equity for the general rule that the relief shall never be granted where the infant happens to be a defendant.

It is of course true that the Judicial Committee of the Privy Council decided 30 I A 114 (2) before the decision of the Court of appeal in England in (1914) 3 K B 607 (8). In that case the Court of appeal adopted the view that to direct an infant who had obtained a loan on a false representation as to his age to refund the amount of the advances would be an indirect way of enforcing a void contract. This however is not the view which appears to have been generally adopted by the Courts in India and as pointed out by Sir Shadi Lal, C. J. in 9 Lah 701 (5) cited above :

It must be remembered that, while in India all contracts made by an infant are void, there is no such general rule in England. For instance, a contract for necessities is not affected by the Infants' Relief Act, 1874, and can be validly entered into by an infant. There should therefore be greater scope in India than in England for the application of the equitable doctrine of restitution.

It is however argued by the learned advocate for the appellant that the decision of the English Court of appeal in (1914) 3 K B 607 (8) should be adopted as the law of India having regard to certain observations made by the Judicial Committee of the Privy Council in 21 C W N 257 (9). The appeal in question was from the Supreme Court of the Straits Settlement and the observation upon which reliance is placed is as follows :

8. R. Leslie v. Sheill, (1914) 3 K B 607=83 L J K B 1145=111 L T 106=30 T L R 460=58 S J 453.

9. Mahomed Syedol Ariffin v. Yeoh Ooi Gark, 1916 P C 242=39 I C 401=43 I A 256=21 C W N 257 (PC).

A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in (1914) 3 K B 607 (8), would apply, and such a case would fail.

It appears however from the report that in 21 C W N 257 (9) the sole question for consideration in the appeal was whether or not a certain statement should be treated as admissible in evidence. This being the case, as pointed out by Sir Shadi Lal, C. J. in 9 Lah 701 (5) the observations of the Privy Council 21 C W N 257 (9), must be regarded as obiter dicta and though entitled to great respect, are not absolutely binding on the Courts in India. Further, these observations certainly cannot be taken to override what appears to have been an express recognition by the Judicial Committee in 30 I A 114 (2) of the principle that in appropriate cases the Courts in this country are empowered to order restitution by minors on equitable grounds. In my opinion therefore the minor defendant should not be allowed to retain the benefit which he has received as a result of his fraudulent misrepresentation and I consider that on equitable principles in a suit properly framed he might be called upon to refund the consideration money which has been received by him. It is however clear as stated above that his liability in this respect arises not *ex contractu* but on equitable considerations and the plaintiff could not therefore in any event claim interest on the loan, because the liability to pay interest would arise on one of the stipulations of the contract.

It appears however from the pleadings in the case out of which this appeal arises that the plaintiff has based his claim on the contract and that he has not put forward an alternative claim for restitution of the consideration money. O. 7, R. 7, Civil P. C., requires that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. The circumstances of the case out of which this appeal arises indicate that the defect in the plaint such as it is, arose from a bona fide misunderstanding of the law in this subject and, this being the case, I think the plaintiff should now be allowed to amend his plaint, if so advised. It is urged that an amendment of the plaint by allowing the plaintiff to set up alternative case for restitution would, in effect, alter the

nature of the suit. I find however that a similar question arose in 25 Cal 371 (4), cited above. In the Court of first instance Jenkins, J. had allowed the plaintiff by amendment to set up an alternative case and, with regard to this matter, the Court of appeal held that it was the intention of the legislature to afford ground for a final decision upon the subject in dispute so as to prevent further litigation and that Jenkins, J. was perfectly right in allowing, in the manner he did, the amendment of the plaint.

Having regard to the considerations mentioned above, this case will be remanded to the lower appellate Court for re-hearing after allowing the plaintiff to amend his plaint if he so desires. It will then be for the lower appellate Court, if necessary, after allowing the appellant also to amend his pleadings and taking such further evidence as may be necessary, to re-hear the appeal and also to look carefully into the conduct of the plaintiff Company and ascertain whether a case for restitution of the consideration money on equitable grounds has been made out. The judgment and decree of the learned Subordinate Judge are therefore set aside and this appeal is remanded to the lower appellate Court for re-hearing in accordance with the directions contained in this judgment. Costs will abide the final result.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 571

R. C. MITTER, J.

Kshirode Chandra Pal Choudhury and others—Judgment-debtors—Appellants.

v.

Brahmanath Pal Choudhury and another—Decree-holders—Respondents.

Appeal No. 572 of 1935, Decided on 9th June 1936, from appellate order of Addl. Sub-Judge, Nadia, D/- 25th September 1935.

(a) Execution — Death of one of two decree-holders — Surviving decree-holder can continue execution for benefit of himself and representatives of co-decree-holder.

In a case where the application for execution is by two persons and one of them dies, the execution proceedings cannot be said to have terminated automatically. The surviving decree-holder can continue the same for the benefit of himself and the legal representatives of his co-decree-holder and all that he is required to do is to state to the Court the fact of death

of his co-decree-holder and the names of the legal representatives : 1926 Cal 957, *Disting.*
[P 572 C 1]

(b) Civil P. C. (1908), S. 38, O. 21, R. 5 — Execution — Munsif transferring decree for execution to Sub-Judge in same district, though no express prayer by decree-holders — Irregularity in manner of transfer — Decree-holders acquiescing in it — Sub-Judge is not prevented from having seisin over execution.

A Munsif transferred a decree for execution to the Subordinate Judge in the same district, though there was no express prayer for the transfer by the decree-holders. There was some irregularity in the manner of transfer but the decree-holders acquiesced in it :

Held : that the Munsif could transfer the decree as both the Courts were situate in the same district, and the irregularity in the manner of transfer did not prevent the Subordinate District Judge from having seisin over the execution.
[P 572 C 2]

*Panchanan Ghose and Sourindra Narain Ghose—*for Appellants.

Hara Krishna Pramanik — for Respondents.

Judgment.—This appeal has been preferred by the judgment-debtors against whom the respondents had recovered a decree for money in the Court of the Munsif at Ranaghat in the year 1930. The question involved in this appeal is a question of limitation, namely, whether the application for execution made on 5th February 1935 is barred by time. In 1931, the decree-holders, two in number, namely Brahma Nath Pal Choudhury and Pratap Chandra Pal Choudhury, applied for execution of the decree in the Court of the Munsif at Ranaghat in the District of Nadia and some immoveable properties of the judgment-debtors were attached. Two claims were preferred by two persons and were registered by the said Munsif on 6th May and 23rd May 1931 respectively. Another set of persons had obtained a decree against the same judgment-debtors and they applied for execution in the Court of the Subordinate Judge at Nadia. Some of the immoveable properties attached were common in these two execution cases, which were proceeding simultaneously. One of the claimants who filed his claim in the Court of the Munsif at Ranaghat also filed a claim in the Court of the Subordinate Judge at Nadia. On 30th June 1931 the Munsif of Ranaghat being apprised of these facts transferred the execution case as also the claim cases pending before him to the Court of the Subordinate

Judge at Nadia, but not at the instance of the decree-holders.

The Subordinate Judge registered the claim cases so transferred to him on 26th August 1931 and the execution case on 6th February 1932. In the meantime Protap Chandra Pal Choudhury, one of the decree-holders, had died on 16th July 1931. The said fact being brought to the notice of the Subordinate Judge on 6th February 1932 he on the same date dismissed the execution case. The present application is within three years of this date and would be in time if Cl. 5, Article 182, Lim. Act, is applicable. The learned advocate for the appellants raised two points. He says firstly that the execution was at an end when one of the decree-holders Pratap Chandra, died on 16th July 1931. Hence he says that the order dated 6th February 1932 has no value in the eye of the law. His second contention is that the Court of the Subordinate Judge at Nadia was not the proper Court within the meaning of Cl. 5 of Art. 182. He says that the Munsiff of Ranaghat had no power to transfer the execution case to that Court. In support of his first contention he relies upon the case in 30 C W N 735 (1). I think that case is distinguishable. There a sole decree-holder had died and in the interval between his death and the application of his legal representatives to continue the execution certain funds were received by the executing Court in another man's execution. A claim for rateable distribution by the said legal representatives was negatived on the ground that at the date of the receipt of assets by the executing Court there was no execution at their instance pending, there being no provision for substitution of legal representatives in execution proceedings. In the case before me the application for execution was by two persons and on the death of one of them the execution proceedings cannot be said to have terminated automatically. The surviving decree-holder could continue the same for the benefit of himself and the legal representatives of his co-decree-holder and all that he was required to do was to state to the Court the fact of death of his co-decree-holder and the names of the legal representatives. I accordingly overrule the first point.

The second point has been formulated by the learned advocate for the appellant in the following way: He says that a Court which has passed a decree can transfer a decree for execution to another Court, but cannot transfer an execution case pending before it to another Court. Such a transfer, the transfer of an execution case, says he, can only be made by the District Judge or the High Court, as the case may be, under S. 24 of the Code. He further contends that even in the case of transfer of a decree for execution by another Court that Court which passed the decree can do so only on the application of the decree-holder. He accordingly urges that the Subordinate Judge had no jurisdiction to entertain and proceed on with the execution case transferred to him by the Munsif at Ranaghat. He was not, says he, the proper Court, and the order passed by him on 6th February 1932 cannot be taken to be a fresh starting point for limitation. There cannot be any doubt that the Munsif of Ranaghat could have transferred this decree or execution to the Court of the Subordinate Judge at Nadia directly as the two Courts are situate in the same district (O. 21, R. 5). In this case before me the Munsif of Ranaghat had in substance transmitted the decree for execution to the Subordinate Judge of Nadia. The decree-holders had acquiesced in the transfer, though the transfer was not made on an express prayer made by them. There may be some irregularity in the manner of transfer, but in my judgment that did not prevent the Subordinate Judge of Nadia from having the seisin over the execution. In accordance with the provisions of S. 38 of the Code he could execute it. I accordingly hold the application for execution on transfer was pending in a proper Court and the decree-holders before me have the right to call in their aid Cl. 5 of Art. 182, Lim. Act. I hold accordingly that the present application for execution is in time and dismiss this appeal with costs, hearing fee two gold mohurs.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 573

R. C. MITTER, J.

Abdul Latif—Appellant.

v.

J. R. Percival, Receiver and others—Respondents.

Appeal No. 555 of 1935, Decided on 29th May 1936, from appellate order of Dist. Judge, Chittagong, D/- 8th July 1935.

(a) Provincial Insolvency Act (1920), Ss. 37 and 43—Order appointing receiver under S. 37, need not be passed simultaneously with order annulling adjudication under S. 43.

Where adjudication is annulled under S. 43, it is not necessary that order vesting the property in a person appointed by the Court should be made simultaneously or at the time of making the order annulling adjudication. The insolvency proceedings do not terminate with the annulment, nor can it be said that the insolvency Court loses seisin of the matter and cannot make any other order thereafter in the proceedings. The order under S. 37 is for the protection of the creditors and can be made at any time after the annulment order: 1933 *Pat* 84, *Foll.*; 1934 *Lah* 468, *Ref.* [P 574 O 2]

(b) Provincial Insolvency Act (1920), S. 37—Order vesting property in receiver under S. 37—Receiver becomes legal owner and trustee of property—Creditors must come in administration of assets by receiver and cannot pursue their remedy of original civil law.

A person in whom property is vested under S. 37 is not the representative of the judgment-debtor insolvent but is a trustee for the creditors and in such a character he has the power and is under the duty to administer the assets vested in him fairly and equitably amongst all creditors and in this matter he has to guide himself by the rules of administration contained in the Insolvency Act. A creditor, therefore, has no right to pursue his remedy by ordinary civil law but must come in the administration of assets held by the receiver under S. 37: 1931 *All* 71, *Dissent.* [P 576 C 1]

(c) Provincial Insolvency Act (1920) S. 37—Receiver appointed under S. 37—Execution by creditor against insolvent—Objection by Receiver to execution—Objection does not fall under S. 47 but under O. 21, R. 58, Civil P. C. (*Obiter*).

Obiter.—A receiver under S. 37 is not the representative of the judgment-debtor within the meaning of S. 47, Civil P. C., and an objection to an execution by attachment by a creditor, at the instance of such a receiver, does not lie under S. 47, Civil P. C., but under O. 21, R. 58, Civil P. C.: 1934 *Lah* 468, *Ref.* [P 574 O 1]

Narendra K. Das and Durgesh Prosad Das—for Appellant.

Anil Kumar Das Gupta—for Respondents.

Judgment.—The appellant before me got a decree for money against one Abdul Hamid on 4th November 1933. Later on, on 22nd December 1933, the said Abdul Hamid was adjudicated an insolvent on the application of another creditor and the respondent, Mr. Percival, was appointed Receiver. He however failed to apply for his discharge with the result that on 15th August 1934 his adjudication was annulled. On that date, however, the Court did not vest his properties in any person, but later on a creditor moved the learned District Judge for making an order under S. 37, Provincial Insolvency Act, for vesting his properties in a person to be appointed by him. The learned District Judge on 18th September 1934, made such an order appointing Mr. Percival, as the person in whom the properties are to vest. The appellant before me filed an application for execution of his decree against Abdul Hamid on 28th January 1935, in the 4th Court of the Munsif at Chittagong. In the said application he prayed for sale of some immoveable properties which according to the purport of the aforesaid order of the learned District Judge dated 18th September 1934, had vested in Mr. Percival. Mr. Percival filed an objection under S. 47, Civil P. C., contending that the execution could not proceed, but the appellant was bound to come and take dividends from him in the usual course of administration of Abdul Hamid's affairs. This objection has been upheld by both the Courts below and the execution dismissed. The appellant challenges the correctness of these orders on two grounds:

His first ground is that the order passed by the learned District Judge on 18th September 1934, vesting Abdul Hamid's properties in Mr. Percival is without jurisdiction as the order annulling adjudication had already been made before. The contention is that a vesting order under S. 37 (1) can only be made at the time of the order of annulment and not later on. The second point is that, even assuming the vesting order so made was a good order, the appellant is not bound in law to recover his decretal dues through dividends to be paid by Mr. Percival in the course of his administration. He says that the insolvency proceedings ended with the order of annulment and that he can now pursue his ordinary remedies for realizing his decree, that is by execution, which had only been

suspended by reason of the adjudication, with the only difference that he has to make Mr. Percival as an additional party (which he has not done) as the properties against which he wants to proceed are vested in him. He says that he is not bound to come in the administration of the assets held by the person in whom the insolvent's properties had vested by virtue of an order under S. 37. The contention has been carried further by the advocate for the appellant who urges that such a person has not right to administer, he cannot admit proofs and distribute the assets by declaring dividends. I have some doubts as to whether an appeal lay to the lower appellate Court or a second appeal lies here, but I need not pursue the point in detail as no preliminary objection has been taken. I consider Mr. Percival's position to be like that of a claimant who prefers his claim under O. 21, R. 58 of the Code and not that of a representative of the judgment-debtor Abdul Hamid and his objection to the execution was not really an objection under S. 47 of the Code. But I need not pursue the point further as no preliminary objection has been taken either to the competency of the appeal in the lower appellate Court or in this Court. Some support is lent to my view by the course of proceedings in 15 Lah 698=1934 Lah 468 (1), a case to which I will refer later on in connection with the first point raised before me by the appellant.

I shall now deal with the two points raised by the appellant. Regarding the first point I do not find anything in the language of either S. 43 or 37, Provincial Insolvency Act, which would suggest that the order of vesting property in a person appointed by the Court must be made at the time of making an order annulling the adjudication. S. 43 is one of the sections defining the circumstances under which the adjudication is to be annulled. A failure on the part of the insolvent to apply for discharge in time or to appear in support of his application for discharge does not automatically annul the adjudication. It requires an order of the Court. The annulment of the adjudication under the conditions defined in S. 43 is intended as a punishment to the insolvent. This is indicated by sub-s. 2 of S. 43. The protection conferred on him by reason of his

adjudication is withdrawn, but it does not necessarily follow that he is to get back from the control of the Court his assets. An order annulling adjudication may be made in a variety of circumstances, e. g. (a) when a composition is approved by the Court, (b) when the Court is convinced that the man ought not to have been adjudicated at all, (c) when the debts are paid in full, (d) when the insolvent fails to apply for discharge in time or to prosecute his application for discharge. In the second and third of these cases it is but just that the assets still left in the hands of the Receiver should be returned to him. In the first case the bankruptcy proceedings continue only in another form, and in the fourth case unless these are special circumstances the Court ought to release from its hold the assets of the insolvent, but should act in such a way as would protect his creditors. The vesting of the property in a person appointed by the Court as provided in S. 37 of the Act is designed to carry this object into effect. S. 37 merely states the effect of an annulment and an adjudication can be annulled under a variety of circumstances which I have indicated above. The insolvency proceedings do not automatically terminate with the annulment, and it cannot be said that by an order passed under S. 43 of the Act the Judge loses seisin of the matter and cannot thereafter make any order in those proceedings. I fail to see why a vesting order under S. 37 cannot be made after the date of the annulment order.

If there be any doubt on this matter or if the law be that such vesting order has to be made at the time of the order annulling adjudication, I do not see what would prevent the Court from exercising its inherent powers in supplying an omission later on for the ends of justice or to prevent abuse of process of the Court. That power has been inherent in Courts all along and S. 151, Civil P. C., has simply recognized it. It has not created it. In any view of the matter as in the view of the Patna and Lahore High Courts the powers defined in S. 151 of the Code have been conferred on insolvency Courts by the provisions of S. 5 (1), Provincial Insolvency Act: 12 Pat 163 (2); 15 Lah 698 (1). The learned District Judge while following 12 Pat 163 (2) re-

1. Ishar Das v. Fatema Bibi, 1934 Lah 468=153 I C 993=36 P L R 499=15 Lah 698.

2. Chouthamall v. Jokhi Ram, 1933 Pat 84=141 I C 836=13 P L T 775=12 Pat 163.

marked that the decision in that case was in conflict with the earlier decision of the same Court which arose out of the same insolvency: 9 Pat 945 (3). I do not find any conflict. The facts were that a creditor presented on 24th February 1926 an application for adjudicating Gurudat insolvent. That application was dismissed by the first Court on 12th February 1927, but on appeal the High Court on 8th November 1927 passed the adjudication order. In the meantime two creditors of Gurudat, Creditors Nos. 2 and 3, who had already obtained money decrees, levied execution against him in the Court of the Subordinate Judge of Chaibassa. Those applications were made on 16th June 1927, and a debt, the amount of which had not been ascertained then due to Gurudat from the B. N. Railway Co., was attached. The said debt was sold in execution and purchased by Jokhiram for Rs. 5,750 on 1st April 1927. This sum of Rs. 5,750 was paid to the executing Creditors Nos. 2 and 3. The debt due from the B. N. Railway to Gurudat was later on found to be for Rs. 6,095-15-0. On 17th July 1928 the Subordinate Judge of Chaibasa (the executing Court) wrote to the said Railway Company to pay the said sum to Jokhiram, the purchaser.

About a month before, that is, on 14th June 1928, the adjudication was annulled under S. 43, Insolvency Act. On that no vesting order under S. 37 was made, but it was made later on on 1st August 1928, by which the insolvent's properties were vested in a Receiver. Thereafter a question arose whether Jokhiram, the purchaser at the execution sale, could get the said sum of Rs. 6,095 odd, the money that the B. N. Ry. Co., owed to Gurudat. The District Judge found that Jokhiram was a benamidar of Creditors Nos. 2 and 3 and by an order dated 17th January 1929 directed the Receiver to take the said sum and distribute it among all the creditors of Gurudat. This order was the subject-matter of the appeal by Jokhiram in the first case reported in 9 Pat 945 (3). Although the question of jurisdiction of the Insolvency Court to make the vesting order after the order annulling adjudication was raised, the said question was not decided by the Patna High Court in that appeal. The said Court only decided that the title to the said sum of Rs. 6,095

odd had passed to Jokhiram by reason of the execution sale by reason of the provision of S. 51 of the Act, and they held that this sum of Rs. 6,095, as due from the Railway Company did not vest in the Receiver under S. 37 as it was not at the date of the vesting order the property of Gurudat but had validly passed to Jokhiram. The question whether the sum of Rs. 5,700 paid by Jokhiram, as the price for purchasing at the execution sale, the said debt due from the Railway Company to Gurudat had vested in the Receiver appointed under S. 37 was not decided in 9 Pat 945 (3), but was the subject-matter of appeal No. 217 filed by another creditor of Gurudat, namely Tejmal Marwari, and was the subject-matter of the decision of the Patna High Court in the second case reported in 12 Pat 163 (2). After the disposal of the appeal of Jokhiram in the High Court [9 Pat 945 (3)] Tejmal made an application to the District Judge asking him to realise the said sum of Rs. 5,700 from creditors Nos. 2 and 3. This application was rejected, the District Judge holding that no proceeding was pending and that the Receiver in insolvency, that is the Receiver in whom the property had vested under S. 28 of the Act, and who is the person mentioned in S. 51 had become functus officio, as the annulment of the order of adjudication had terminated the insolvency proceedings. Tejmal filed the appeal before the High Court and contended that the insolvency proceedings were still continuing as a vesting order had been made under S. 37. To meet that contention the respondents' Advocate, Sir Sultan Ahmed, contended that the said vesting order was ultra vires as it had not been passed simultaneously with the order of annulment of adjudication. This contention was overruled. The question which is involved in the case before me was therefore decided in 12 Pat 163 (2) and not in 9 Pat 945 (3) and I accordingly do not see any conflict between the two. I am in complete agreement with the reasons given by Mohammad Noor, J. in 12 Pat 163 (2) and I follow the said decision. I accordingly overrule the first point.

I cannot also accept the second contention of the appellant, although it has for its support the case in 53 All 313 (4). In that case it was held that the proceed-

3. Jokhiram Surjamal v. Chouthmal Bhagirth, 1931 Pat 70=130 I C 38=9 Pat 945.

4. Panna Lal v. Official Receiver, 1931 All 71=134 I C 848=1931 A L J 18=53 All 313.

ings in insolvency terminates on annulment of adjudication and the person in whom the property is vested under an order passed under S. 37 has no power to admit proof of debts, distribute dividends and do any act of administration of a nature which a Receiver in insolvency can do in the normal course in a pending insolvency. It was accordingly held that a creditor after annulment has the right to pursue his remedy for realising his money under ordinary Civil Law. In my view the object of annulment under S. 43 is punishment of the insolvent; the protection offered to him by reason of his insolvency is withdrawn. It is not to put him in a position of advantage. The object of the vesting order under S. 37 is to protect all the creditors, who would have been treated fairly and equally by the Court if the insolvency proceedings went on in normal course. The vesting order clothes the appointed person with legal ownership. He can sell the properties vested in him and turn them into cash assets. If one creditor were free to execute his decree he would be in a position to take all the assets from his hands if his decree exceeded or equalled them. That would deprive the other creditors. Such a course, if open, would afford no protection to all the creditors and would defeat the end that the legislature had in view in enacting S. 37. An annulment order does not terminate the insolvency proceedings absolutely and completely. I hold accordingly that the person in whom the property is vested under S. 37 is in the position of a trustee for the creditors and in such a character he has the power and is under the duty of administering the assets vested in him fairly and equally amongst all the creditors and in this matter he has to guide himself by the rules of administration contained in the Insolvency Act. I accordingly overrule the second point also and dismiss this appeal, but without costs.

V.B./R.K.

*Order accordingly.***A. I. R. 1936 Calcutta 576**

R. C. MITTER, J.

Sachindra Nath Chakravarty — Petitioner.

v.

Trailakya Nath Chakravarty and another—Opposite Parties.

Civil Rule No. 1392 of 1935, Decided on 27th April 1936.

(a) Bengal Tenancy Act (8 of 1885), S. 26-F (1) — Application accompanied by deposit within period of limitation—There is sufficient compliance with S. 26-F.

When a landlord or the whole body of landlords or some of the co-sharer landlords apply for pre-emption under sub-s. (1), S. 26-F, he or they, as the case may be, must deposit in Court with the application the price of the property as stated in the notice of transfer and ten per cent compensation. When such an application is made some days before the last date unaccompanied by such a deposit, but the deposit is made later on, but within the period of limitation, there is sufficient compliance with the statute: 61 C L J 27 and 1935 Cal 889, *Dissent*. [P 578 C 1]

(b) Bengal Tenancy Act (8 of 1885), Ss. 26-F (1), 148-A (2) and 188—Co-sharer landlord applying for pre-emption need not invite other co-sharer landlords to join — It is for Court to call upon them to do.

Where some of the co-sharer landlords apply for pre-emption under sub-s. (1), S. 26-F, the remaining co-sharers must be made opposite parties either in the application as originally filed or by an application for amendment made within one of the two periods of time mentioned in sub-s. 4 (a) of S. 26-F. It is not necessary that the co-sharer landlord applicant must invite the remaining co-sharer landlords made opposite parties by him to come forward and join in his application for pre-emption, nor is he required to give his consent to their so joining. All that he is required to do is to place his co-sharer landlords, so far as the proceedings are concerned, in a position to join in the pre-emption if they like. It would be for the Court to call upon the said co-sharer landlords opposite parties to join in the application for pre-emption by inserting such a direction in the summons. The absence of an express statement in his application for pre-emption, to the effect that he has no objection to his co-sharers joining in his application for pre-emption or that he would be willing to treat them as co-applicants, is not required, and its absence would not make his application for pre-emption, if it is otherwise good, a bad one: 1936 Cal 231 and 388, *Ref*. [P 578 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 26-F (1) and (4) (a)—Time within which service of application to be effected and effect of non-service considered.

Co-sharer landlords opposite parties must apply to be joined as co-applicants within two periods, whichever gives them the longest time, i. e., within two months of the service of notice of the transfer on them or within one month of the application made by their co-sharer under S. 26-F (1) where the notice of transfer has been served on them. The period of one month must be counted from the date of the filing of the application under S. 26-F (1) and not from the date of the service thereof. If the service of the summons be delayed beyond a month by reason of the acts or defaults of the applicant for pre-emption, his application for pre-emption would be thrown away on the ground of non-compliance with S. 188. The co-sharer landlords opposite parties cannot complain of such a course or of

losing their right of pre-emption in such a case, for it must be taken from their not making an independent application under S. 26-F (1) that they had no objection to the transferees possessing the holding but had objection only to their co-sharer possessing it alone by the exercise of the right of pre-emption. If the summons be not served within the period of one month of the filing of the application under S. 26-F (1) by an act of omission or mistake of the Court or of its officers the application of the co-sharer applicant under S. 26-F (1) would be a good one, but the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injury done to them by its acts or defaults or those of its officers: 1936 Cal 343, Ref.

[P 578 C 2; P 579 C 1]

(d) Bengal Tenancy Act (8 of 1885), Ss. 26-F(1), (4)(a) and 188—Time for payment of deposit cannot be extended beyond that fixed for application, but deposit may not accompany application.

Where a co-sharer landlord opposite party's application to become a co-applicant is in time, the deposit should ordinarily accompany such an application, but if it is not put in along with the application it is not fatal, but it must be deposited within the period of limitation prescribed in S. 26-F, sub-s. (4), Cl. (a), for such an application. In the case where there is no dispute as to the respective shares of the landlords who are the original applicants for pre-emption, and who later on wish to become a co-applicant, the amount to be deposited by such a co-applicant can be easily ascertained by him. It must be according to the proportion that his share bears to the share of the other co-sharer landlords who want to pre-empt, for it is on that proportion that the final order for pre-emption must define their respective shares in the pre-empted holding. If there is a dispute as to the shares or right of any of such co-applicants, or if he feels uncertainty or doubt about the amount he has to deposit, the Court has to determine the amount to be paid by him. The Court must be moved in such a case in time, and when so moved a duty would be cast on the Court to determine the amount in time. After determining it, it can extend the time for deposit but not beyond the period of time indicated in Cl. (a), sub-s. (4). The whole scheme in the matter of deposits, whether the application is under S. 26-F (1) or S. 26-F (4), is that the deposit to be made by applicant or the co-applicants for pre-emption must be made within the time limit imposed by statute for making such applications. In both these classes of applications there must be the same exceptions when prejudice is caused by the mistakes, acts and defaults of the Court itself or of its officers.

[P 579 C 1, 2; P 580 C 2]

Bhupendra Nath Roy Choudhury—for Petitioner.

Prokash Chandra Pakrasi — for Opposite Parties.

Order.—The two petitioners before me and sixteen other persons are the immediate landlords of an occupancy holding. The tenants transferred their holding to certain persons for a price of

Rs. 90 by a registered conveyance. The notices of transfer required to be filed with the registration officer under S. 26-C, Tenancy Act, were served on all the landlords on 5th March 1935. Two of these landlords, namely, the two petitioners before me, made, on 2nd May 1935 an application for pre-emption under S. 26-F (1). They made the transferees and the remaining landlords opposite parties to their application for pre-emption. In the said application they stated that they had one anna nine gundas and two krants share in the landlords' interest and the landlords opposite parties had the remaining shares therein. Notice of this application was served on the co-sharer landlords on 22nd May 1935. On 1st June 1935, two of them, namely the opposite parties before me, appeared and made an application. They have 5 as 6 gundas 2 karas and 2 krants share, that is one-third share, in the landlords' interest. In the said application they stated that the petitioners before me have a small share and if they are allowed to pre-empt the whole, they would suffer great loss. They, the said opposite parties, then went on to state that they have not been able to collect the money which they are required by law to deposit for enabling them to join in their co-sharer's application for pre-emption. They then state as follows: "Accordingly these opposite parties after depositing the money according to their share will join in the application for pre-emption." The prayer is for some time to make the said deposit. On this application the Court made the following order on 1st June 1935:

Notice duly served. Opposite parties Nos. 8 and 9 co-sharer land-lords (the opposite parties before me) want time to join the petitioners in their claim for pre-emption by depositing the requisite money. Case adjourned to 21st June 1935 for hearing. Opposite parties Nos. 8 and 9 may deposit the requisite amount and join as co-petitioners by the next date.

The opposite parties deposited on 21st June Rs. 33 by a challan. The challan shows that Rs. 30 was deposited on account of the price (being one-third thereof) and Rs. 3 as compensation. No formal application was made at a later stage by them praying for becoming co-applicants for pre-emption. The transferees did not contest the application for pre-emption. The contest is between two sets of landlords, namely the petitioners and opposite parties before me, and if the opposite

parties succeed they would be entitled to have two-third shares in the holding and the petitioners one-third share, because the proportion of their shares in the landlords' interest is 2 to 1. In fact the said parties have been allowed by the learned Munsiff to pre-empt according to the said proportion. The petitioners contended before the lower Court and also before me that the opposite parties cannot be allowed to pre-empt for two reasons, namely : (a) that they never made any application for becoming co-applicants for pre-emption, and (b) that the deposit made by them was out of time, the learned Munsiff having no power to extend the time for deposit beyond 2nd June 1935, i. e., beyond one month of the filing of the petitioner's application for pre-emption. Before I deal with these points and the reason given by the learned Munsiff for overruling them it is necessary to examine in some detail the provisions of the statute on the subject. When a landlord or the whole body of landlords or some of the co-sharer landlords apply for pre-emption under sub-s. 1 of S. 26-F, he or they, as the case may be, must deposit in Court with the application the price of the property as stated in the notice of transfer and ten per cent compensation. When such an application is made some days before the last date unaccompanied by such a deposit, but the deposit is made later on but within the period of limitation, a question may be and has been raised in some of the reported cases, as to whether there is sufficient compliance with the statute. On this point there is a divergence of judicial opinion [see 39 C W N 232 (1); 61 C L J 27 (2)]. I am not called upon in this case to decide this point, and if I had been, I would be inclined to the view expressed by Mitter, J. in the case in 61 C L J 27 (2).

In the case where some of the co-sharer landlords apply for pre-emption under sub-s. 1 of S. 26-F, the remaining co-sharers must be made opposite parties, either in the application as originally filed or by an application for amendment made within one of the two periods of time mentioned in sub-s. 4 (a) of S. 26-F. This is my view of the effect of S. 188. The words

"giving opportunity of joining in the proceedings" occurring in that section mean this: It is not necessary that the co-sharer landlord applicant must invite the remaining co-sharer landlords made opposite parties by him to come forward and join in his application for pre-emption, nor is he required to give his consent to their so joining. All that he is required to do is to place his co-sharer landlords so far as the proceedings are concerned in a position to join in the pre-emption if they like. It would be for the Court to call upon the said co-sharer landlords opposite parties to join in the application for pre-emption by inserting such a direction in the summons. This is in my judgment the effect of the cases in 39 C W N 1178 (3), 40 C W N 506 (4) and of S. 148-A (2). The absence of an express statement in his application for pre-emption to the effect that he has no objection to his co-sharers joining in his application for pre-emption or that he would be willing to treat them as co-applicants is not required and its absence would not make his application for pre-emption, if it is otherwise good, a bad one. It is not necessary in this case to consider the provisions of sub-s. (3) of S. 26-F.

Whether the landlord applying for pre-emption can be required to deposit under this sub-section as a condition precedent to pre-emption sums of money on heads other than those expressly mentioned therein need not be considered in this case. The said question has been considered in 38 C W N 849 (5). The matters that have to be next considered are the rule and procedure to be followed by a co-sharer landlord opposite party wishing to join in his co-sharer's application for pre-emption. Co-sharer landlords opposite parties must apply to be joined as co-applicants within two periods whichever gives them the longest time i. e., within two months of the service of notice of the transfer on them or within one month of the application made by their co-sharer under S. 26-F (1). I am here considering only the case where the notice of transfer has been served on

3. Muhammad Garib Hossain Mia v. Sm. Halimannessa Bibi, 1936 Cal 231=62 I C 355=68 Cal 102=39 C W N 1178

4. Gajendra Nath Mandal v. Kunja Behary Mistry, 1936 Cal 388=40 C W N 506.

5. Secy. of State v. Sukh Chand Saw, 1934 Cal 749=152 I C 557=38 C W N 849=59 C L J 471.

1. Girish Chandra Ghose v. The Jadapur Estate Ltd., 1935 Cal 989=156 I C 413=60 C L J 576=39 C W N 232.

2. Sidheswara Prosad Choudhury v. Gendu Mia, (1935) 61 C L J 27.

them. The period of one month must be counted from the date of the filing of the application under S. 26-F (1) and not from the date of the service thereof. The latter interpretation of sub-s. 4 (a) of S. 26-F cannot in my judgment be adopted for that would be introducing into the statute words which are not there. I fail to see how hardship would result by adopting the former construction. If the service of the summons be delayed beyond a month by reason of the acts or defaults of the applicant for pre-emption, his application for pre-emption would be thrown away on the ground of non-compliance with S. 188. The co-sharer landlords opposite parties cannot complain of such a course or of losing their right of pre-emption in such a case, for it must be taken from their not making an independent application under S. 26-F (1) that they had no objection to the transferees possessing the holding but had objection only to their co-sharer possessing it alone by the exercise of the rights of pre-emption.

If the summons be not served within the period of one month of the filing of the application under S. 26-F (1) by an act of omission or mistake of the Court or of its officers the application of the co-sharer applicant under S. 26-F (1) would be a good one, but the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injury done to them by its acts or defaults or those of its officers: [40 C W N 680 (6).] If according to the principle discussed above a co-sharer landlord opposite party's application to become a co-applicant is in time, the further question of deposit in Court of his share of the price of the holding as stated in the notice of transfer and ten per cent compensation has to be considered. This deposit should ordinarily accompany such an application but if it is not put in along with the application it is not fatal, but it must be deposited within the period of limitation prescribed in S. 26-F, sub-s. 4, Cl. (a) for such an application. In the case where there is no dispute as to the respective shares of the landlords who are the original applicants for pre-emption and who later on wish to become a co-applicant, the amount to be deposited by such a co-

applicant can be easily ascertained by him. It must be according to the proportion that his share bears to the share of the other co-sharer landlords who want to pre-empt, for it is on that proportion that the final order for pre-emption must define their respective shares in the pre-empted holding. If there is a dispute as to the shares or right of any of such co-applicant, or if he feels uncertainty or doubt about the amount he has to deposit, the Court has to determine the amount to be paid by him. The Court must be moved in such a case in time and when so moved a duty would be cast on the Court to determine the amount in time. After determining it it can extend the time for deposit but not beyond the period of time indicated in Cl. (a) of sub-s. 4. The whole scheme in the matter of deposits whether the application is under S. 26-F (1) or 26-F (4) seems to me to be that the deposit to be made by applicants or the co-applicants for pre-emption must be made within the time limit imposed by statute for making such applications. In both these classes of applications there must be the same exceptions when prejudice is caused by the mistakes, acts and defaults of the Court itself or of its officers. It is now necessary to examine the reasons given by the learned Munsif in support of his order. His reasons are as follows:

(i) The application of the opposite parties dated 1st June 1935 must be considered to be an application for joining as co-applicants; (ii) that the deposit made by the opposite parties was in time as it was made within one month of the date of the service of the notice of the application for pre-emption made by the petitioners, which is the time up to which the Court can extend time for such deposit; (iii) that even if the law does not empower the Court to extend time up to the aforesaid period, but only up to a month from the date of the filing of the application for pre-emption under S. 26-F (1), the petitioners' application under that sub-section was not a proper one, as S. 188 had not been complied with, as they did not embody in their application an invitation to the opposite parties and their other co-sharers to come and join in their application. The last mentioned reason is not obviously sound. If the petitioners' application for pre-emption has not complied with the provi-

sions of S. 188, their application will then have to be dismissed on that ground, but the so-called defect cannot nullify the provisions of S. 26-F (4) (b) by authorising the Court to receive as a good deposit an amount of money put in beyond the periods of time mentioned in S. 26-F (4) (a), mistake and omission of the Court itself or of its officer being out of the question. I have also indicated in the earlier part of my judgment the scope of S. 188, and I hold that the petitioners' application for pre-emption was a defective one.

The first reason given by the Court below may or may not be sound. It depends upon the construction of the application made by the opposite parties on 1st June 1935. The words of the application imply that it is merely an application for time. Even if it be considered to be an application by the opposite parties becoming co-applicants for pre-emption, it does not help them; for in my judgment their deposit of a part of the amount of the price of the property sold and compensation was made too late. This leads me to consider the second ground given by the learned Munsiff. In the case before me the opposite parties did not ask the Court to determine the amount they will have to put in and that amount was never determined by the Court. They had no doubt in the matter, for without the Court naming any amount they deposited Rs. 33 on 21st June 1935. The learned Munsiff held that limitation for an application to become co-applicant runs from the date of the service on them of the petitioners' application for pre-emption; the other case, namely the application of the co-applicant must be within two months of the service of the notice of transfer on them need not be considered in this case. The reason given is that a deposit can only be made by co-applicants after the Court determines the amount and makes an order requiring the amount so determined to be deposited. The learned Munsiff says that the Court would not be in a position in many cases to determine the amount within one month of the filing of the application for pre-emption under S. 26-F (1) by a co-sharer. Says the learned Munsiff, that the notices of the said application may be served on the co-sharer either on the 30th day from the date of filing of the application under S. 26-F (1) or even beyond a month there-

of. In the last mentioned case, as I have indicated above, there is no difficulty. If the service was delayed by the applicant under S. 26-F (1), his application will have to be dismissed; if the mistakes or omissions of the Court or its officers were responsible, the Court would relieve against the prejudice caused. If the notice is served within one month of the date of the filing of the application for pre-emption the intending co-applicant can himself in most cases calculate the amount and put it in time. If he feels any doubt or uncertainty, or if shares in the landlord's interest are in dispute, he can at once apply to the Court to fix the amount, which the Court can do immediately without making any final adjudication about the shares, and subject to that adjudication later on. On this part of the case the learned Munsiff says that a determination of the amount cannot be made till the Court has made up its mind as to whether the several landlords wishing to pre-empt should be given on pre-emption equal shares in the pre-empted holding or shares in proportion to their respective shares in the landlord's interest. If that be the criterion, the Court would not be in a position to determine the amount till the case is fully heard and the stage of sub-s. 5 of S. 26-F has been reached. That would in most cases extend the time much beyond a month of the service of the notice of the application made under S. 26-F (1). I do therefore hold that a Court cannot extend the period for making a deposit by a co-applicant beyond the period of time mentioned in Cl. (a), sub-s. 4 of S. 26-F.

I accordingly make this Rule absolute and dismiss the opposite parties' claim for pre-emption. The result is that the lower Court is directed to pass an order for pre-emption only in favour of the petitioners before me, after requiring them to deposit such further sums of money that they may be liable to put in under the provisions of sub-s. 3 of S. 26-F.

The contesting parties to bear their respective costs throughout.

V.B./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 581

EDGLEY, J.

Shambhu Chandra Haldar — Defendant—Appellant.

v.

Kanai Lal Goswami and others—Plaintiffs—Respondents.

Appeal No. 395 of 1935, Decided on 2nd June 1936, against decree of Dist. Judge, 24-Parganas, D/- 12th January 1935.

Ejectment—Notice—Notice is to be strictly construed—Notice of ejectment undertaking to compensate tenant for his constructions—Lease deed not containing clause of compensation—Notice held waived right of landlord to eject without payment of compensation—Compensation clause in notice is not surplusage.

Notice of ejectment of a tenant under S. 106, T. P. Act, must be construed very strictly.

Upon a strict construction of a notice of ejectment it appeared that the landlords plaintiffs undertook either to give or tender to the tenant defendant the reasonable price of the materials of the tenant defendant's structures before compelling the latter to give up possession of the demised land, although according to the terms of the lease the landlords plaintiffs were not in any way bound to do this :

Held : that the clause in the notice with regard to the payment of compensation money was not a mere surplusage. The landlords plaintiffs must be deemed to have waived any express rights which they may have had under the terms of the lease and that, it not having been suggested that the landlords plaintiffs either paid the tenant defendant the price of the materials of the structures or even tendered to him any reasonable amount as representing such price, the landlords plaintiffs were not entitled to evict the tenant defendant by reason of the notice. [P 581 C 2 ; P 582 C 1]

Prafulla Kamal Das and Radhika Ch. Chatterjee—for Appellant.

Bijan Kumar Mukherjee and Manilal Bhattacharjee—for Respondents.

Judgment.—In the suit out of which the present appeal arises the plaintiffs sued the defendant for ejectment from a certain plot of land. It was decided by both the Courts below that the defendant had been properly and legally ejected and it was decided that the plaintiffs should get khas possession of the land in suit subject to the payment to the defendant of the sum of Rs. 700 as compensation for the cost of the materials of the structures which had been erected by the defendant on the suit land.

The first point urged by the learned advocate for the appellant in this case is that the defendant has not been validly

ejected owing to the fact that, according to the terms of the notice, whatever the plaintiffs' rights may have been under the terms of the kabuliyat they had nevertheless undertaken not to eject the defendant until they had compensated the latter for the cost of the materials of the structures in the suit land. It was therefore contended that they had waived their right to eject the defendant until such compensation had been paid or at any rate tendered to the defendant. The kabuliyat appears to have created a monthly tenancy in favour of the defendant and, according to its terms the defendant was entitled to hold the demised land from month to month on payment of rent at the rate of Rs. 7-8-0 per mensem, but it was agreed that the defendant would, upon the receipt of a proper notice, vacate the demised land and thereupon the plaintiffs would be required to pay him compensation in respect of the materials of the structures which he had erected on the land according to the condition at the time of ejectment. The notice Ex. 4, which was served upon the defendant required him to vacate the demised land in accordance with the terms of the kabuliyat on or before the last day of the month of Aswin 1337. The notice then goes on to say :

You are also further informed that if, according to the terms of the kabuliyat, you will take from us the present day price of the materials bricks, wood of the structures etc., erected by you then, after receipt of such price, from us you will give up possession of the land with the structures, etc.

It is argued by the learned advocate for the appellant that inasmuch as the price of the materials had not even been tendered to the defendant, the notice, Ex. 4, became ineffective. It is urged on the other hand by the learned advocate for the respondent that the clause in the notice with regard to the payment of compensation money should be regarded as a surplusage and should not be deemed to be a waiver on the part of the plaintiffs of their right to eject the defendant at the end of Aswin 1337.

There can be no doubt that inasmuch as the notice might have the effect of depriving the defendant of his right to occupy the land in suit according to the terms of the lease it must be very strictly construed. It is not contended that the defendant was not willing to receive compensation. It, therefore, follows that

under a strict construction of the notice the plaintiffs undertook either to give or tender to the defendant the reasonable price of the materials of the defendant's structures before compelling the latter to give up possession of the demised land. Undoubtedly according to the terms of the lease the plaintiffs were not in any way bound to do this, but it cannot be contended that they were not at liberty to waive any express rights which they may have had under the terms of the lease and in this particular case they appear to have done so. It has not been suggested that the plaintiffs either paid the defendant the price of the materials of the structures or even tendered to him any reasonable amount as representing such price. This being the case I am of opinion that the plaintiffs are not entitled to evict the defendant by reason of the notice Ex. 4.

With regard to the question as to the adequacy of the price of the materials, there is a clear finding of fact in the Courts below that the value of these materials would be Rs. 700. The first Court arrived at this valuation after considering the evidence of certain competent valuers and I am of opinion that this finding is based on adequate material. If, therefore, in this case an adequate notice had been given it would have been competent for the plaintiffs to evict the defendant by paying him the sum of Rs. 700 as compensation.

Having regard to the fact that the notice Ex. 4 is inadequate for the purpose of ejecting the defendant, this appeal must be allowed. The judgments and decrees of the Courts below are set aside and the plaintiffs' suit will stand dismissed, subject to their right to eject the defendant at any time hereafter on serving him with a proper notice and paying him the sum of Rs. 700 as compensation for the materials of the structures. I make no order as to the costs of this appeal. The parties will bear their own costs in the Courts below.

B.D./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 582**

GUHA AND BARTLEY, JJ.

Dr. Ferdinand Perier, S. J. Archbishop,
Calcutta—Plaintiff—Appellant.

v.

Kumar Krishna Nandy Choudhury—
Defendant—Respondent.

Letters Patent Appeal No. 4 of 1936,
Decided on 8th April 1936, against judgment of M. C. Ghose, J., D/- 7th January 1936.

(a) Estoppel—Proceedings under S. 26-F, Ben. Ten. Act—Landlord exercising his right to pre-emption—Question whether tenancy at fixed rate of rent expressly left open—Suit by tenant for declaration that tenancy was one at fixed rate of rent—Kobala not reciting fixity of rent—Payment of landlord's fee at time of registration of kobala—No question of estoppel arises.

Where in a proceeding under S. 26-F, Ben. Ten. Act, when the landlord wanted to exercise his right to pre-emption, he is met with an objection that the tenancy was at a fixed rate of rent, and the application is allowed, leaving the question of the status of the tenant whether he was tenant at fixed rate of rent is expressly left open, the fact that in the kobala by which the purchaser purchased the holding, there was no mention of the fixity of rent, and that the purchaser paid the landlord's fees at the time of the registration of the kobala, does not give rise to any estoppel against the purchaser in a suit by the latter for a declaration that he was a tenant at fixed rate of rent in respect of the holding and Ss. 26-D and 26-F, Ben. Ten. Act, have no application. [P 583 C 2]

(b) Civil P. C. (1908), S. 100—Question whether presumption that tenancy was fixed rate one can or cannot arise from tenant having held at uniform rate of rent and other circumstances is question of fact.

The question whether a tenant has held at a uniform rate for a number of years, and the further question whether a presumption could or could not arise, from a tenant having held at uniform rate for a very long period and from other circumstances, that the tenancy was one of which the rent was fixed, are questions of fact and the decision of the final Court of fact must be taken to be conclusive between the parties concerned: 1927 P C 102, *Disting.*; 1925 Cal 632, *Ref.* [P 584 C 1, 2]

*D. N. Bagchi and Jitendra Nath Bagchi—*for Appellant.

*Amarendra Nath Bose and Hira Lal Chakravarty—*for Respondent.

Judgment.—This is an appeal under the Letters Patent in a suit instituted by the plaintiff appellant for declaration that he was a tenant at fixed rate of rent in respect of the lands in suit. In view of an order passed in accordance with the provisions contained in Ss. 26-D and 26-F, Ben. Ten. Act, the plaintiff in

the suit prayed for the further declaration that those provisions of the law had no application to the lands in suit, and for recovery of possession of the lands, inasmuch as there was an order for pre-emption in favour of the defendant landlord. It would appear that the plaintiff purchased the lands in suit from a tenant under the defendant; the landlord defendant having applied under Ss. 26-D and 26-F, Ben. Ten. Act, for exercise of the right of pre-emption, in the matter of the purchase made by the plaintiff, the application was allowed; in the order passed on the application for pre-emption made by the landlord the question of status and nature of the tenancy purchased by the plaintiff was not determined and was expressly left open. As has been mentioned already, the case of the plaintiff before the Court, so far as the suit giving rise to this appeal was concerned, was that he had purchased the lands in suit, appertaining to a tenancy at a fixed rate of rent, and that the landlord had no right to exercise any right of pre-emption in regard to the same. The plaintiff's claim in suit was resisted by the defendant landlord, who asserted that the tenancy in question was an ordinary occupancy holding, and not a holding at a fixed rate of rent.

The questions for determination in the suit, so far as they are relevant for the purpose of this appeal, were those indicated by Issue 6 raised on the pleadings of the parties concerned: What is the status of the plaintiff? Is the plaintiff an occupancy raiyat or a raiyat at fixed rate in respect of the lands in suit? The plaintiff's suit was dismissed by the trial Court. On appeal by the plaintiff, the learned Subordinate Judge in the lower appellate Court, on a consideration of the evidence in the case came to the conclusion that the rent of the holding to which the lands in suit appertained, was fixed in perpetuity. It was held on evidence that the defendant in the suit had failed to rebut the presumption of fixity of rent arising from payment of rent for a long period at an unvarying rate. A decree was passed in favour of the plaintiff declaring that the plaintiff's interest in the land in suit was that of a raiyat at fixed rate and that the provisions of Ss. 26-D and 26-F were not applicable to the lands in suit; the defendant was permanently restrained from taking possession of the

lands in suit. The decree passed by the lower appellate Court was set aside on appeal to this Court; and the learned Judge of this Court against whose decision this appeal is directed, dismissed the plaintiff's suit.

The first ground on which the decree of the Subordinate Judge in the Court of appeal below, passed in favour of the plaintiff appellant before us, was set aside was that the plaintiff's action in depositing the landlord's fees under S. 26-D, Ben. Ten. Act, estopped him from claiming against the defendant that the holding in suit was not an occupancy holding. In view of the position indicated already, that the question of status of the plaintiff, whether he was a tenant at a fixed rate of rent, having been expressly left open, as mentioned in the order recorded in the proceeding in which the defendant wanted to exercise his right of pre-emption as a landlord, the question of estoppel as discussed by the learned Judge of this Court in his judgment, did not, and could not, arise. On the findings arrived at by the Court of appeal below, there was no case of estoppel operating against the plaintiff in the matter of his claim in the suit in which the appeal has arisen. As has been noticed by the learned Subordinate Judge in his judgment, the fact that in the kobala by which the plaintiff purchased the lands in suit, there was no mention of fixity of rent, that the plaintiff paid the landlord's fees at the time of registration of the kobala, did not give rise to any estoppel against the plaintiff. The rights of the parties concerned had to be determined in respect of the lands in suit, and the question of fixity of rent as raised in the suit which was left open in the previous proceeding under Ss. 26-D and 26-F, Ben. Ten. Act, had to be determined on materials on record, apart from the position that there was payment of landlord's fees at the time of the registration of the kobala by which the plaintiff had purchased the lands in suit.

The nature of the tenancy and the incidents of the same could not be changed by an act or declaration of the plaintiff; and there was, in our opinion, no admission by the plaintiff which induced the defendant to alter his condition, as mentioned by the learned Judge of this Court in his judgment. It may be mentioned that the learned advo-

cate for the defendant-respondent did not rest his case before us on estoppel operating against the plaintiff-appellant, and did not make any serious attempt to support the decision appealed against, on the ground of estoppel.

The question for consideration next is whether the learned Judge of this Court was right in holding against the decision of the final Court of fact, that the holding in the case before us, was not held at a fixed rate of rent. It is well settled, that even in cases where presumption under S. 50, Ben. Ten. Act, as to fixity of rent, does not arise directly, as in the case before us the Court would be justified to act on presumption similar to the one arising under that section, if the facts justify the same. A presumption that a tenant holds at a fixed rate may arise on facts, as in the case of uniform payment of rent for a number of years; and in cases not coming within the purview of S. 50, the Court is entitled to consider the facts in view of all the circumstances, and determine whether it was a just inference that a particular holding bears a fixed rental. According to the Court of appeal below on the evidence in the case the presumption arose that the status of the plaintiff was that of a tenant holding at rent fixed in perpetuity; and it was for the defendant landlord to rebut that presumption. The question whether a tenant has held at a uniform rate for a number of years is a question of fact, and not of law, and not an inference of law drawn from facts; on such a question the finding of the Court of first appeal is conclusive. The Court of appeal below came to the definite conclusion on evidence in the case, that the origin of the tenancy in question, to which the lands in suit appertained, was unknown; that there was no enhancement of rent for a very long period; that there were other circumstances from which it could reasonably be presumed that the rent of the holding was fixed in perpetuity; and that the defendant had failed to rebut the presumption of fixity of rent arising from payment of rent for a long period at an unvarying rate.

The findings arrived at by the Subordinate Judge in the Court of appeal below were binding on this Court in second appeal. It may be noticed in this connexion that the observations of their Lordships of the Judicial Committee in

54 I A 178 (1) the question whether the tenancy was permanent or precarious, in the case before the Judicial Committee, seemed to their Lordships to be a legal inference from facts, and was not a question of fact, has no application to the case before us, seeing that the question before the Court was simply whether a presumption could or could not arise from a tenant having held at uniform rate for a very long period and from other circumstances that the tenancy was one of which the rent was fixed. Such a question must be a question of fact; and the decision of the final Court of fact must be taken to be conclusive between parties concerned. See in this connexion 29 C W N 500 (2). The presumption of fact as to fixity of rent was drawn in the case before us, from evidence on record by the Court of appeal below, and that presumption had not been rebutted. In the above view of the main question arising for consideration in this appeal, the decision of the Subordinate Judge in the Court of appeal below, could not be interfered with. The above conclusions arrived at by us dispose of this appeal. It was however raised before us on behalf of the defendant-respondent that two other questions arose for consideration in the case before us, namely :

I. That in view of the provisions contained in S. 26-F (5), Ben. Ten. Act, the plaintiff had no subsisting interest in him, on which the claim in suit in the present case, could be based. The suit was, therefore, not maintainable.

II. That regard being had to the final decision in a proceeding under S. 106, Ben. Ten. Act, the suit was not maintainable, and that the said decision operated as a complete bar to any relief being granted to the plaintiff in the suit.

There is nothing contained in the issues raised for determination in the suit, and in the judgments of the Courts at the previous stages of the litigation, from which it could possibly be said that the points now sought to be raised before us, relating to the maintainability of the suit in which this appeal has arisen, was raised by the defendant at any previous stage of the litigation. We are unable to

1. Dhannammal v. Motisagar, 1927 P O 102=101 I C 355=54 I A 178=8 Lah 573 (P O).

2. Alimuddin Mollah v. K. S. Bannerji, 1925 Cal 632=86 I C 316=29 C W N 500=41 O L J 135.

give effect to any of the contentions raised before us for the first time, and we are not at all satisfied that there is any substance involved in them. In the result, the appeal is allowed. The decision of the learned Judge of this Court, against which this appeal is directed, is set aside; and the decree of the Subordinate Judge in the Court of appeal below, passed on 30th November 1933, in favour of the plaintiff-appellant, is restored. The plaintiff-appellant is entitled to get his costs in the litigation throughout from the defendant-respondent.

V.B./R.K. *Appeal allowed.*

A. I. R. 1936 Calcutta 585

COSTELLO AND PANCKRIDGE, JJ.

Siva Mohan Kundu Choudhury and others—Defendants—Appellants.

v.

Sm. Bechumoyee Dasi—Plaintiff and others—Defendants—Respondents.

Appeals Nos. 111 and 112 of 1934, Decided on 21st November 1935.

Res judicata—Bar of—Suit by daughter claiming certain property as sole daughter of her father, on ground that he died intestate and without male issues—Father found to have executed will—Decision in previous suit to which executors of will were not made parties does not operate as res judicata—Plaintiff praying for revocation of will on ground that it is forgery—She must take recourse to proceedings under testamentary jurisdiction.

Where a suit is instituted by a daughter, on the death of her mother, claiming certain property as the sole daughter of her father, on the ground that he died intestate and without any male issue, but it is found during the trial of the suit that the father had executed a will of which probate was taken, a decision in a previous suit to which the plaintiff's mother and the defendants were parties, but in which the executors of the will, as representative of the estate of the testator, were not impleaded, does not operate as *res judicata*, so as to estop the defendants from putting forward the will in defence to the suit. If the plaintiff alleges that the will is a forgery and prays that it should be revoked, she must take recourse to proceedings properly constituted and brought under the testamentary jurisdiction. [P 588 C 1, 2; P 589 C 1]

H. D. Bose, T. Chatterjee and G. P. Kar—for Appellants.

S. M. Bose and B. N. Ghosh—for Respondent (Bechumoyee).

S. N. Banerjee and S. R. Das—for Manabendra and Radhakanta.

B. C. Ghose and A. K. Roy (Jr.)—for Deity Defendants.

S. B. Dutt—for Bharat Chandra.

S. K. Basu—for Jadugopal.

Costello, J.—These appeals are from a judgment dated 17th August 1934, whereby the learned Judge in the Court below made a decree in favour of the plaintiff Srimati Bechumoyee Dasi declaring that she is entitled to a one-twelfth share in certain properties and in the business referred to in Schs. B and C annexed to her plaint and to a one-fourth share in properties and in the business mentioned in Schs. D and E. The decree made by the learned Judge also included an order for partition and all other necessary reliefs in that connexion. The suit was instituted by the plaintiff on 19th August 1931 and by the plaint it was averred that one Kissori Mohan Kundu Choudhury, who was during his life time and at the time of his death governed by the Bengali School of Hindu Law, died intestate on 12th March 1880 without any male issue but leaving his widow Srimati Manorama Dassi and the plaintiff who is the only daughter of Kissori Mohan and his wife Manorama.

The plaintiff Bechumoyee Dassi claimed that on the death of her mother on 23rd January 1931 she as the sole daughter of Kissori Mohan Kundu Choudhury became entitled to the whole of his estate. The plaintiff set forth the list of properties which are comprehended in the schedules to which I have already referred. It is to be observed that by the plaint in the suit the plaintiff founded her claim solely upon the basis that her father had died intestate and that after the death of her mother, who inherited a Hindu widow's right in the property of her husband, the plaintiff became entitled to the whole of her father's estate. The statements in the plaint were verified by Ratnamay Srimany who is described as the constituted attorney of the plaintiff. We are informed that he is in fact the son of the plaintiff. The facts as stated in the plaint did not represent the real state of affairs for it was not the fact that Kissori Mohan Kundu Choudhury had died intestate; on the contrary he had not only made a will but probate of that will had been granted by this Court as long ago as the month of April in the year 1880. By that will broadly speaking, Kissori Mohan gave the bulk of his property to two of his brothers, and made certain provisions for the maintenance of his widow and the maintenance of his daughter, the plaintiff. There were also

certain provisions in the will requiring the principal beneficiaries to make provision for certain Debutter dispositions.

In the year 1912 the widow of the testator Manorama Dasi instituted a suit in which she averred that the maintenance provided for her by the terms of her husband's will are insufficient, and she claimed that she was entitled to receive at the hands of her brothers-in-law, as executors and beneficiaries under the will, a larger sum for her maintenance. As an outcome of the proceedings she received, at any rate she was declared to be entitled to a sum of Rs. 235 monthly for her maintenance. The importance of that suit is this: that so far from any question arising as to whether or not Kissori Mohan had left a will, in that suit the will was actually referred to if not in fact relied upon. What we are concerned with however is another suit, a suit which came before the Court at Hooghly. We are concerned with that suit for this reason: In reply to the plaint filed by the plaintiff in the present suit, the defendants put in a written statement in which they stated in para. 3 that:

With reference to para. 1 of the plaint they deny that Kishori Mohan Kundu Choudhury (hereinafter referred to as the testator) died intestate. Prior to his death and on 28th Falgoon 1286 B. S. corresponding with 10th March 1880 the testator made and published his last will in the Bengalee language and character whereby he gave and bequeathed his entire estate absolutely unto his uterine brothers Hiramohan Kundu Choudhury and Nagendra Mohan Kundu Choudhury subject to certain legacies and annuities therein mentioned. The widow of the testator is named in the said will as Ramani Dassi.

Paragraph 4 of the written statement is as follows:

The said will was duly proved and on 7th April 1880 probate thereof was granted to the said Hiramohan Kundu Choudhury and Nagendra Mohan Kundu Choudhury, both since deceased as the executors thereof, by this Hon'ble Court in its testamentary and intestate jurisdiction.

In para. 9 the defendants said:

Until the death of the said Sm. Manorama Dasi, as mentioned in the plaint, the plaintiff all along lived with her in the family dwelling house of the testator at Mohiary in the district of Howrah and she has all along been aware of the existence of the said will and of the provisions made thereunder for her and her heirs and also of the said suit No. 273 of 1912 as well as of the various proceedings had and decrees and orders made therein.

There is therefore a definite allegation that the plaintiff was aware—indeed she must have been aware—of the existence of

the will made by her father and the fact that probate of that will had been granted by this Court. It would be superfluous for us to make much comment upon the conduct of the plaintiff and her advisers, in putting on the file of this Court a plaint which obviously must have been drafted with the definite design of suppressing from the knowledge of the Court the fact that Kissori Mohan Kundu Choudhury had made a will and that that will had been duly admitted to probate. On the facts, as they now appear and so far as the present case is concerned, one need only express astonishment that any one should have been found or procured to verify statements which are manifestly untrue. It is a little difficult to understand how the plaintiff or her advisers could have imagined that upon the plaint as it was originally drafted the plaintiff could possibly succeed in her suit, because the fact that there had been a will and that will had been duly proved was bound to be urged against her either before or at the trial of the suit.

Actually, as I have pointed out, the existence of the will and the fact of the probate was brought to the attention of the Court in the written statement put in by the defendants. Thereafter the plaintiff was permitted to file a pleading that was described as a "written statement on behalf of the plaintiff." That document was verified on 4th May 1934. It is the contents of that pleading which have given rise to such difficulty, as there is in the way of a proper determination of the suit and this appeal. In my opinion what was intended was that the plaintiff should merely have an opportunity of making answer to the defendants' contention in the matter of probate of the will, and though that pleading was called "written statement on behalf of the plaintiff" it was to all intents and purposes what under English procedure would be a "reply" to the defence put in by the defendants. In my view it was never intended by the plaintiff that this pleading should constitute something in the nature of a further statement of claim, or as an amendment of the original claim. In this "written statement" the plaintiff stated that Kissori Mohan Kundu Choudhury never executed a will. That might have been by way of traversing the defendants' pleading. Then the plaintiff states:

The will set up is a forgery. With full knowledge of the fact that the will was a forgery, probate was obtained from this Hon'ble Court by means of fraud. Probate was never granted to Nagendra Mohan Kundu Choudhury.

It appears that the whole of para. 1 of the written statement was intended to plead in effect that if there was a will it was not genuine and probate of it ought never to have been granted. In para. 2 the plaintiff said :

The plaintiff submits that if necessary the grant of probate may be revoked on the grounds: (a) The will was a forgery ; (b) the grant of probate was obtained by suppressing the fact that it was a forgery and by falsely representing to the Court that it was a genuine document ; (c) the grant has become useless and inoperative by reason of the decree made in suit No. 61 of 1884 as hereinafter mentioned ; (d) the proceedings to obtain probate were defective in substance.

If that paragraph was really intended to be a claim for the revocation of the grant of the probate of the will of Kissori Mohan Kundu Choudhury, then it seems quite obvious, that it was not a claim which could properly be made in a suit such as the present suit. It is a claim which could only be made in properly constituted testamentary proceedings. But the paragraph which has mainly given rise to the discussions that have taken place not only in the Court below but before this Court is para. 3. In that paragraph the plaintiff said this :

The plaintiff will contend that the proceedings and decree in suit No. 61 of 1884 (in the Court of the second Subordinate Judge at Hooghly, which was a suit for partition of the joint family properties between the co-sharers and in which among others the plaintiff's mother and the defendants or their predecessors-in-interest were parties) declared and/or created the right of Sm. Ramani Dasi alias Sm. Manorama Dasi, as widow of Kishori Mohan Kundu Choudhury as a co-sharer in the estate of Chaitanya Charan Kundu Choudhury and she will contend that by reason thereof the defendants are estopped from setting up the alleged dispositions in the alleged will or denying the title of the plaintiff as the heiress of Kishori Mohan Kundu Choudhury in the joint family properties. In particular she will rely on inter alia the following in support of her contention.

Then she sets out a number of documents which came into existence in connexion with the proceedings in the Court at Hooghly. The appellants say that that paragraph comes to no more than this : that the plaintiff was in effect alleging that the defendants ought not to have been allowed to set up the will of Kissori Mohan Kundu Choudhury as a defence to the plaintiff's case and that something

had occurred in the Court at Hooghly which operated either as an estoppel in the way of the defendants or in the nature of res judicata. The learned Judge devoted the greater part of his somewhat lengthy judgment to a discussion of the effect of that para. 3 of the written statement on behalf of the plaintiff. Mr. S. M. Bose, on behalf of the plaintiff-respondent, has argued before us that the effect of the proceedings before the Court of the second Subordinate Judge, Hooghly, was that there was a declaration not only contained in the admission on the part of the defendant but declaration in the decree which was made by the Court at Hooghly, and to all intents and purposes affirmed on appeal by this Court, that the plaintiff was numbered amongst the co-sharers in the estate of Chaitanya Charan Kundu Choudhury or rather her mother was so numbered together with the brothers of Kissori Mohan Kundu Choudhury in such a way as to bring it about that in effect the brothers of Kissori Mohan were renouncing or abandoning their position as beneficiaries under the will, and were restoring the family properties to the position they would have taken had there been no will at all. Mr. Bose referred first of all to a written statement which was filed in the Hooghly suit on behalf of Gurudas Kundu Choudhury one of the defendants. In that written statement he said:

The plaintiff has actually no cause of action for this suit against this defendant, nor has he disclosed in the plaint any sufficient cause thereof. The plaintiff and the defendant cannot be reckoned as members of an undivided Hindu family. The 6 anna co-sharers, namely the plaintiff and his brother Kedar Nath and his deceased (step) brother Annada Prasad's sons are members of a Hindu family separate from that to which the 10 anna co-sharers, namely these defendants and defendants 4, 5, 6, 8 and 9 belong. The co-sharers of the 10 annas and 6 annas estate have some joint moveable and immoveable properties and Karbar but the plaintiff has not mentioned anything in his plaint which goes to show that these defendants have done anything affecting the plaintiff's interest therein, nor is there any reason for their so doing; and the plaintiff has not in his plaint stated anything against these defendants except an unfounded allegation of their collusion with his brother Kedar Nath.

It should be explained at this point that the suit in the Hooghly Court was brought by a representative of one of the branches of the family which descended from Ram Kanta Kundu Choudhury. He was the descendant of a man named Gour

Mohun Kundu Choudhury who was a brother of Chaitanya Charan Kundu Choudhury. He claimed that his branch was entitled to a six anna-share in the joint family property while the representatives of Chaitanya Charan were entitled to a ten anna share. The importance of the written statement which I have just read is (according to Mr. Bose) that it includes in the group of ten anna sharers "defendant 5" in the Hooghly suit and she was the mother of the present plaintiff. Mr. Bose, therefore, says that there was an admission by that written statement that the plaintiff's mother was entitled as a co-sharer to claim with the brothers of her husband Kessori Mohan Kundu, to the extent of such interest as she would get as a Hindu widow. Mr. Bose then referred us to the decree which was ultimately made in the Hooghly suit. That decree is dated 12th February 1889 and contained this statement:

The defendants 2 to 9 who are co-sharers to the extent of 10 annas obtained possession of the said (property) and of Kheraj and Lakharaj properties mentioned in Sch. Ga, below which on division have been allotted to them by the Commissioners.

The Hooghly suit as already stated, ultimately came on appeal to this Court and the decree of this Court was dated 25th April 1892. It must be borne in mind, however, that the widow Ramani Dasi herself also put in a written statement in the Hooghly proceedings and in that written statement she said:

I, Srimati Ramani Dasi, state that at the time of his death my husband made a will whereby he appointed his brother Hira Mohun Kundu Choudhury defendant 3 as the executor and the said defendant having as such taken probate of the will has been managing and looking after all the properties left by my husband. Under such circumstances it is unjust to make me a defendant in this suit. Whatever written statement is necessary to be filed in this suit has been filed by the said defendant 3 and I admit that written statement to be true and the said written statement may be treated as if filed on my behalf.

It seems clear, therefore, that so far as Ramani Dasi was concerned, she, in the Hooghly suit, was repudiating the suggestion (so far as any such suggestion had been made) that she was entitled to any part of the estate of Chaitanya Charan Kundu, other than such interest as she acquired by reason of her husband's will which had been duly proved by one of her co-defendants in the suit. In my opinion the admission (if it can properly be called an admission) which appears in the writ-

ten statement, which I have read, of one of the defendants in the Hooghly suit, and the statement in the decree of the Hooghly Court regarding the ten anna co-sharers ought to be taken for our present purpose, as indicating nothing more than that on the one side of the family there was an aggregation of persons who constituted ten anna co-sharers and on the other side there was an aggregation of persons who constituted six anna co-sharers and defendant 5 the mother of the present plaintiff was numbered in the group which constituted the ten anna co-sharers. Therefore, in my opinion it is impossible successfully to contend that the effect of the decree in the Hooghly suit was to obliterate the will and the probate of the year 1880.

But there is another aspect of the case which puts the matter beyond all question in my judgment and it is this that in the proceedings in the Hooghly Court the executors under the will of Kishori Mohan Kundu Choudhury were not parties, and they were not brought into the suit at all. It is true that one individual who was in fact an executor under the will was there, but he was so far as the plaintiff in that suit was concerned, not there qua executor under the will but solely in his personal capacity as one of the group of ten anna co-sharers. The fact that when he put in his written statement he referred to himself as an executor, makes no difference whatever, in my opinion because he was not in fact sued as an executor. Therefore the question of the validity and the operative effect of the will of Kishori Mohan Kundu was never under discussion or at issue, in any sense whatever in the Hooghly Court. In the circumstances it is impossible for us to hold that the effect of the proceedings and the decree in suit No. 61 of 1884 in the Court of the 2nd Subordinate Judge at Hooghly was to confer upon the plaintiff any rights in respect of her father's property other than those she already possessed by virtue of her father's will. The learned Judge seems to have taken the view that because Ramani Dasi (otherwise called Manorama Dasi) the mother of the plaintiff, was a party to the Hooghly proceedings therefore what transpired as the outcome of those proceedings, has precluded the defendants from relying upon the will as a defence to the plaintiff's claim in the present suit. In my opinion it is by no

means certain that it can rightfully be argued that anything which Ramani Dasi did or did not do in those proceedings could be effective in favour of the present plaintiff as against the present defendants and I doubt very much whether this case can really be said to be a case where these proceedings in the law can be taken to be proceedings as between the same parties as those in the present proceedings. In that view of the matter it would be of course impossible to hold that any case of *res judicata* can arise. It is, however, sufficient for the purpose of disposing of this appeal to say, as I have already said, that the executors of the will were not represented in those proceedings, and therefore nothing was done which could interfere with the full legal effect of the provisions contained in the will of Kissori Mohan Kundu Choudhury.

Once we have arrived at the position that the proceedings in the Hooghly Court have no effect upon the validity and operative force of the will of Kissori Mohan Kundu Choudhury it automatically follows that the plaintiff cannot possibly succeed in this suit. If by the written statement on behalf of the plaintiff the plaintiff intended to set up a substantive case, that the will of her father made and proved some fifty or more years ago, was a forgery, or that the probate which was granted ought to be revoked, the short answer is that she can only do this in proceedings properly constituted and brought under the testamentary jurisdiction of this Court. The learned Judge seems to have fully recognised that that is the position in law and he set it out in his judgment. At the bottom of p. 42 of the paper book we find that the learned Judge said :

Various issues were raised, but only two points were argued, namely whether in this suit the plaintiff could challenge the will as a forgery, and what was the effect of the decision in suit No. 61 of 1884.

Then he says:

On the first point the decision in 43 I A 91 (1) at p. 97 in my opinion concludes the matter. It may be argued for the plaintiff that the rule in England depended on the existence of separate Courts with separate jurisdiction, but the Judicial Committee in the case cited laid down the rule for the Courts in India, and where probate has been granted, it is only a Court with probate jurisdiction sitting as such that

can recall that probate on the ground that the will was forged. However if necessary this suit could be adjourned until the decision of a Court of probate was obtained.

Then the learned Judge proceeded to deal with the effect of the suit of 1884. Holding, as I do, that the proceedings in suit No. 61 of 1884 were not so constituted that they can have any effect whatever on the will of 1880 it follows that this appeal must be allowed and the plaintiff's suit dismissed. We think that the unsuccessful plaintiff must pay the costs to the representatives of Hira Mohan and the representatives of Nagendra Mohan and the costs of the Thakur both of the trial Court and this Court. The Thakur is entitled to retain its costs out of the Debutter estate in any event. The cross-objections are dismissed without costs. The receiver will be discharged.

Panckridge, J.—I agree. In my opinion if we were constrained to dismiss this appeal the result would be a manifest injustice. The learned Judge properly held that it was not competent for the plaintiff in these proceedings to challenge the validity of the will or the grant of probate. It follows that the only arguments upon which the plaintiff was entitled to rely are those based on para. 3 of the additional written statement. Before the learned Judge it appears that the only aspect of the paragraph which was dealt with by the plaintiff was that which concerned with the question of *res judicata*. Before us, however, learned counsel for the plaintiff sought to base a contention upon the paragraph to the effect that the decree of the Hooghly Court had operated to transfer the estate of the testator from the executors to the ten anna co-sharers, or, in other words, to confer upon the testator's widow a Hindu widow's estate in the testator's undivided share.

It appears to me to be a sufficient answer to this submission to say that the testator's estate was not represented in the proceedings and therefore the decree could not affect it. The plaint in the Hooghly suit makes no mention of the testator or his will or of the fact that the defendant Hira Mohan Kundu was the executor named in the will and had obtained probate of it. The testator's widow, so far from claiming to be interested as on an intestacy, expressly disclaimed such interest, and relied upon the will. The only fact upon which the plaintiff relies as indicating that the tes-

1. Sheoparson Singh v. Ramnandan Singh, 1916 P O 78=33 I C 914=43 I A 91=43 Cal 694 (P O).

tator's estate was before the Court is that in the written statement of defendants 3, 5 and 7, defendant 3 Hira Mohan purports to file it "for self and as executor to the estate of Kishori Mohan Kundu Choudhury, deceased." In my opinion this fact makes no difference to the position. It cannot be suggested that the plaintiff by his plaint had made the representatives of Kishori Mohan's estate parties to the suit in their representative capacity. I consider that to make them parties at a subsequent stage, a formal application was required and such formal application was never made. In these circumstances it appears to me unnecessary to deal with the application of the plaintiff's counsel for leave to amend the additional written statement or the plaint in such a way as to put forward a claim to the testator's estate based upon the suggested transfer effected by the decree of the Hooghly Court.

In my opinion, it would be useless to allow such an amendment, because in any event the plaintiff's claim, if founded upon the suggestion of such a transfer, is bound to fail. The same considerations seem to me to be applicable to the question of *res judicata*. If the representatives of Kishori's estate were not, as such, parties to the proceedings in the Hooghly Court, no decree or decision of that Court can operate as *res judicata* against them. Accordingly, I am of opinion that the will of Kishori stands and that nothing took place in the Hooghly Court which had the effect of transferring his estate from the executors or from those claiming under the will to the 10 anna co-sharers as a body or to the testator's widow in her capacity of a Hindu widow. I therefore concur in the order that the appeal should be allowed and the suit dismissed. The defendants are entitled to their costs here and in the trial Court.

R.M./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 590**

R. C. MITTER, J.

(Dewan) Emdad Ali—Decree holder—Appellant.

v.

Haran Sheikh—Objector and others—Respondents.

Appeal No. 88 of 1935, Decided on 15th June 1936, from appellate order of Sub-Judge, Pabna, D/- 27th August 1934.

(a) Practice—Inconsistent pleas not to be raised in course of same litigation.

A litigant shall not be allowed to take inconsistent and diametrically opposite positions in the course of same litigation. [P 592 C 1]

(b) Transfer of Property Act (1882), S. 52—Doctrine of *lis pendens* includes sales *in invitum*.

Section 52 embodies the principle of *lis pendens* which is wide enough to include sales *in invitum*. [P 592 C 1]

(c) Practice — Remand — No appeal filed from order of remand—Party aggrieved cannot challenge it.

An order of remand, although an irregular one if not appealed against, is final and cannot be challenged later on by the aggrieved party: 1935 Cal 134, *Rel. on*. [P 592 C 1, 2]

(d) Execution sale—Mortgage of, or charge on, property to be sold—Mortgagee's objection under O. 21, R. 59, Civil P. C., in execution sale upheld—Fact of mortgage must be inserted in sale proclamation—Order under O. 21, R. 62, Civil P. C., not set aside by proper suit—Order remains final—In such case purchaser cannot challenge mortgage—Other ways of notifying mortgage or charge—Effect of notification in case of mortgage and charge.

A mortgage or charge can be brought to the notice of intending purchasers at Court sales in two ways: firstly if a claim preferred under O. 21, R. 59 by the mortgagee succeeds the fact of the mortgage must be inserted in the sale proclamation. In that case the order passed under O. 21, R. 62, if not set aside by a suit instituted under the provisions of O. 21, R. 63, would stand as a final order and would preclude the purchasers at the Court sale from challenging the mortgage. A mortgage or charge, however, can also be notified in the sale proclamation settled under the provisions of O. 21, R. 66 or otherwise at the time of the sale. Where a mortgage or charge is notified at the sale, but not as a result of an order made by the Court under O. 21, R. 62, the notification has no greater or less effect in law than that of notice. The purchaser at the Court sale in that case only takes with notice of the mortgage or charge. In the case of a mortgage such notification does not carry the matter further, for a mortgage is binding on the purchaser of the equity of redemption whether he has notice of it or not. But in the case of a charge its notification has a value: 28 All 418 and 1920 Cal 354, *Rel. on*.

[P 592 C 2; P 593 C 1]

(e) Mortgage—Decree on mortgage obtained collusively—Other person obtaining decree against mortgagor and attaching mortgaged property—Mortgage decree is nullity—Such other person is not affected by mortgage decree and cannot be regarded as representative of mortgagor.

Decree obtained by a person in collusion with defendant in a mortgage suit is not a decree of Court at all in the eye of the law, and a person who purchases a mortgaged property in execution of his decree against a mortgagor is not affected by the mortgage decree and cannot be held to be a representative of the mortgagor: 24 Cal 62 (FB) and *Bandon v. Beecher* (1835) 3 Cl & F 479, *Rel. on*. [P 592 C 2]

Sura Chandra Lahiri and Ganga Prasad—for Appellant.

Krishna Kamal Maitra—for Respondents

Judgment.—The facts of the case are as follows: One Najimuddin and two other persons owed a considerable amount of money to the respondent Haran Sheikh, who brought his suit to recover the same on 27th April 1931 and recovered a decree on 16th January 1932. In execution of his decree he purchased on 20th June 1932 half-share of the property which is the subject-matter of this appeal. Shortly after Najimuddin had incurred his liabilities to Haran Sheikh, he executed in favour of the appellant, Dewan Emdad Ali, a mortgage bond on 12th Assin 1336, corresponding to a date in September 1929. The mortgage is an unusual one because it not only included all his immoveable properties but also all his moveables including his cooking vessels and all his earthly possessions. This mortgage followed a hibabil-ewaz which he had executed in favour of his wife in lieu of alleged dower which included also all his immoveable properties and all his moveables. This hibabil-ewaz was undoubtedly a fictitious transaction and has been found to be so by the lower Court, but it has no direct bearing upon the question raised before me. Shortly after the aforesaid mortgage Dewan Emdad Ali brought a suit to enforce it.

He got a preliminary decree on 25th February 1932, and a final decree on 20th April 1932. Shortly after obtaining his decree Haran Sheikh applied for execution. In one execution (Money Execution 88 of 1932) he prayed for sale of moveables and in another execution (Money Execution 20 of 1932) he prayed for sale of immoveable properties. Dewan Emdad Ali made two applications to the Executing Court in the two execution cases, one relating to the moveables and another to the immoveables. I am only concerned with his application in respect of the immoveable properties against which Haran Sheikh wanted to proceed. It is not an application under O. 21, R. 59 of the Code. He simply asked his mortgage decree to be notified at the time when the immoveable properties attached by Haran Sheikh would be sold. On that application the Court passed the following order on 2nd May 1932:

One Dewan Emdad Ali puts in a petition that the property mentioned in lot No. 2 of the execution petition, which has been advertised for sale is mortgaged to him and the mortgage suit has been decreed in the local 2nd Munsif's Court. It is ordered that the mortgage to be noted upon (?) at the time of sale, as the sale proclamation has already been issued.

At the time of the sale Dewan Emdad Ali's mortgage was notified, and at the sale the decree-holder Haran Sheikh purchased the same, as I have stated above, on 20th June 1932. Dewan Emdad Ali put his mortgage decree in execution and purchased the mortgage properties (16 annas of the property now in dispute was one of them) on 25th February 1933. He applied for possession and was resisted by Haran Sheikh and the proceedings out of which this appeal arises were started by Dewan Emdad Ali, he applying to the executing Court to be put in possession of the entire property. Haran Sheikh resists his claim to a half-share therein, the share which he purchased in execution of his decree.

The learned Munsif by his order dated 19th June 1933 held that as Haran was not a party to the mortgage suit and was in possession, Dewan Emdad Ali could not go upon the property without calling upon Haran Sheikh to pay up the mortgage dues, and Haran Sheikh could not be turned out of the property without an opportunity being given to him to redeem. He accordingly dismissed the application of Dewan Emdad Ali to be put in possession. There was an appeal against this order by Dewan Emdad Ali. The learned Subordinate Judge heard the said appeal on 26th October 1933. Before him Dewan Emdad Ali contended that Haran's purchase was affected by the doctrine of *lis pendens*, as he purchased after the institution of the mortgage suit, in fact after the mortgage decree. He urged accordingly that the Munsif was wrong in holding that Haran Sheikh was not bound by his mortgage decree and had still in him the right of redemption. The learned Subordinate Judge held that the doctrine of *lis pendens* was applicable and remanded the case by his order dated 26th October 1933 for a finding as to whether the mortgage suit of Dewan Emdad Ali was a collusive suit or not. After remand the learned Munsif held that the said suit was not a collusive one, but the learned Subordinate Judge on further appeal has held otherwise.

It is surprising to hear now the learned advocate of Dewan Emdad Ali saying that the order of remand made by the learned Subordinate Judge on 20th October 1933 was a wrong one, as the learned Subordinate Judge ought to have held that S. 52, T. P. Act, was not applicable. At that stage the pleader of Dewan Emdad Ali had urged before the learned Subordinate Judge that the principle underlying S. 52 was applicable, convinced the Subordinate Judge that it was applicable and got a remand. I think that this is the case in which the salutary principle that a litigant shall not be allowed to take inconsistent and diametrically opposite positions in the course of the same litigation ought to be applied. It is on this principle that the appeal ought to be dismissed, the findings that the mortgage of Dewan Emdad Ali was a fictitious one and his suit to enforce it a collusive one being good findings based on evidence and binding on me in second appeal. Mr. Lahiri in support of his appeal formulated four points, namely : (i) S. 52, T. P. Act, does not apply to Court sales ; (ii) that the execution Court was precluded from entering into the question as to whether the mortgage decree was collusive or not ; (iii) Haran having expressly purchased subject to his client's mortgage cannot challenge the same or the mortgage-decree ; (iv) Haran being the representative of the judgment-debtor, Najimuddin, the Court was bound to deliver possession to his clients.

Regarding the first point, no doubt S. 52, T. P. Act, does not in terms apply, as Haran Sheikh purchased at a Court sale. But S. 52 embodies the principle of *lis pendens* which is wide enough to include sales in invitum. That is what the Subordinate Judge in substance held, and held at the instance of Dewan Emdad's pleader, when he said that S. 52, T. P. Act, was applicable. He used the expression that S. 52 T. P. Act, was applicable only as a convenient expression. I have already held that the learned advocate for the appellant cannot be allowed to raise now the questions involved in the first two points. I am further of opinion that the order of the learned Subordinate Judge, dated 26th October 1933, is not now open to challenge. It was an order of remand though an irregular one. The trend of authorities, with the exception of the deci-

sion of Page and Graham, JJ., is that such an order is an appealable one : 38 C W N 1202 (1) at p. 1203. S. 105 (2) of the Code accordingly now precludes the appellant from challenging the order of remand and from urging the first two points.

The fourth point urged before me falls to the ground with the first and second points. Haran Sheikh would be a representative of Najimuddin if he was affected by the mortgage decree obtained by Dewan Emdad Ali against the latter. This is the principle formulated by the Full Bench in 24 Cal 62 (2). But the mortgage decree affects him if the doctrine of *lis pendens* applies. I have already held that the mortgage decree does not affect him as it was obtained in a collusive suit. On the principle formulated by Lord Brougham in the well-known case in 3 Cl & F 479 (3) the decree obtained by Dewan Emdad Ali in the mortgage suit is not a decree of Court at all in the eye of the law. I accordingly overrule the fourth point also.

Regarding the third point : in my judgment a fundamental distinction must be kept in view. A mortgage or charge can be brought to the notice of intending purchasers at Court sales in two ways. Firstly if a claim preferred under O. 21, R. 59 by the mortgagee succeeds, the fact of the mortgage must be inserted in the sale proclamation. In that case the order passed under O. 21, R. 62, if not set aside by a suit instituted under the provisions of O. 21, R. 63, would stand as a final order and would preclude the purchaser at the Court sale from challenging the mortgage. A mortgage or charge however can also be notified in the sale proclamation settled under the provisions of O. 21, R. 66, or otherwise, as in this case at the time of the sale. In my judgment where a mortgage or charge is notified at the sale but not as a result of an order made by the Court under O. 21, R. 62, the notification has no greater or less effect in law than that of notice. The purchaser at the Court sale in that case only takes with notice of the mortgage or charge. In the case of a mortgage such notification does not carry the matter

1. Mahommed Ali v. Karam Ali, 1935 Cal 134=155 I O 506=38 C W N 1202.
2. Ishan Chandra v. Benimadhab, (1897) 24 Cal 62=1 C W N 36 (F B).
3. Bandon v. Beecher, (1835) 3 Cl & F 479=9 Blight (N S) 532=6 E R 1517.

further, for a mortgage is binding on the purchaser of the equity of redemption whether he has notice of it or not.

But in the case of a charge its notification has a value. In the case before me there were no claim proceedings at the instance of Dewan Emdad Ali. After the proclamation had been published he made an application to the Court and the Court said that notice of his mortgage was to be given at the time of the sale. Haran purchased at the sale and is only affected by the consequences of notice. He has not been put to any further disadvantage and he is not precluded from challenging the mortgage or the mortgage decree, if he is not otherwise precluded on other grounds. The view I am taking is supported by the decisions in 28 All 418 (4) and 47 Cal 446 (5). I accordingly overrule all the points urged before me and dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

4. Shib Kunwar v. Sheo Prosad, (1906) 28 All 418=1906 A W N 63=3 A L J 200.

5. Kalidas v. Prasanna, 1920 Cal 354=55 I C 189=47 Cal 446.

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MUKERJI AND S. K. GHOSE, JJ.

Debendra Narain Roy — Plaintiff — Appellant.

v.

Jogendra Narain Deb and others — Respondents.

Appeals Nos. 171 and 205 of 1933, Decided on 17th March 1936, from original decrees of Sub-Judge, First Court, 24-Parganas, D/- 24th April 1933.

(a) Assam Bijni Succession Act (2 of 1931), S. 4, sub-ss. (1) and (2) — Declarations contained in sub-ss. (1) and (2) are 'law'.

The declarations contained in sub-ss. (1) and (2) of S. 4 are 'law'. They are such declarations as a local legislature of a province, otherwise competent, is empowered to enact. The Bijni Succession Act is intra vires the Assam Legislature. [P 601 C 2; P 609 C 2]

(b) Government of India Act (1919) S. 65 (1) (e)—Laws may relate to particular individuals.

Section 65 (1) (e) cannot be construed to mean that the laws are to be general law for all purposes for all Courts and for all places and things. The laws may relate to particular individuals and need not be general legislation of provincial concern. [P 602 C 1]

(c) Government of India Act (1919), S. 80-A (1)—'Law' contemplated by S. 80-A (1) are laws of all kinds, general or particular.

'Laws' contemplated by S. 80-A (1) are laws of all kinds, not only laws in general or in the

abstract, but rules of law in concrete cases as well : *Ashbury v. Ellis*, (1893) A C 239, *Ref.*

[P 602 C 1]

(d) Government of India Act (1919), S. 80 (3) — Interpretation of—Local legislature considering law relating to central subject, may do so with previous sanction of Governor-General.

Sub-s. (3) of S. 80-A should be interpreted as meaning that the local legislature of a province, if it makes or takes into consideration any law regulating a central subject, it may do so with the previous sanction of the Governor-General. The expression 'subject to the provisions of this Act' should be understood in this sense. [P 606 C 2]

(e) Government of India Act (1919), S. 80-A (1) (3) Cl. (e) — Word 'regulate' in Cl. (e) does not mean 'adjust' but means 'enact'.

The word 'regulate' in Cl. (e) of S. 80-A (1) (3) does not mean 'adjust' but means, to control by legislation, to subject to guidance by creating a law : 1916 Cal 136, *Disting.* [P 607 C 1,2]

(f) Interpretation of Statutes — History — Language should be examined to find out its natural meaning, uninfluenced by previous state of law—History of enactment should not be inquired into unless enactment is ambiguous.

In interpreting a statute the proper course in the first instance is to examine the language of the statute and to ask what is its natural meaning uninfluenced by the considerations derived from the previous state of the law and not to start by inquiring how the law previously stood, and then, assuming that it was probably intended to have it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. It is useless to enter into an enquiry with regard to the history of an enactment and any supposed defect in the former legislation on the subject which it was intended to cure, in cases where the words of the enactment are clear. It is only material to enter into such an enquiry where the words of an enactment are ambiguous and capable of two meanings in order to determine which of the two meanings was intended. It is not necessary to go into the history of the words unless the words are doubtful and require historical investigation to explain them. If the words are really and fairly doubtful then according to well known legal principles and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates : *Bank of England v. Valiagno*, (1891) A C 144 ; *Reg. v. Bishop of London*, (1889) 24 Q B D 213 and *Reg. v. Most*, (1881) 7 Q B D 244, *Foll.*

[P 608 C 1,2]

(g) Government of India Act (1919), S. 80-A — Sub-sections of S. 80-A are not to be read as mutually exclusive.

The several sub-sections of S. 80-A are not to be read as mutually exclusive, but the first is controlled by the other three, and, the second controls the first, and, is in its turn controlled by the third ; the third controls both the first and the second, and the fourth controls all the others.

[P 609 C 1]

(h) Government of India Act (1919), S. 80-A (3)—Schedule of classification, part 2, item 51 — Central subject may be legislated upon under S. 80-A (3) — Item 51 is not the only way in which provincial legislature can deal with central subject.

A declaration contemplated in Item 51 of Part 2 of the schedule of classification is not the only way in which a provincial legislature is enabled to deal with a central subject. A central subject may be legislated upon under S. 80-A (3), Government of India Act. These two again are not the only ways in which a central subject may be handled by a provincial legislature. [P 609 C 2]

(i) Assam Bijni Succession Act (2 of 1931), S. 1 — Act is public Act — It determines right of individuals not merely inter se but as governing their relations with others.

The Bijni Succession Act, even though it may be regarded as local and personal in some of its aspects is nonetheless a public Act. [P 611 C 1]

Merely because an Act is a local or personal Act, as being confined to certain local limits and as affecting the status of a particular description of persons only, it does not cease to be a public Act if it is the product of the legislature in its legislative capacity and is not the result of a procedure in which the legislature is called to enact a law embodying a conclusion arrived at by it judicially or upon the basis of a contract as between rival parties for whose benefit the law is intended. If from the general tenor of the Act it appears that it purports to determine the status of individuals not merely inter se but as governing their relations with others, the Act can hardly be regarded as private Act. The importance of the question whether the Act is a public Act or private Act consists only in this: that if it is the latter then, though there be no saving clause, the rights of third parties will not be regarded as affected by necessary implication: *Dawson v. Paver*, (1844) 67 E R 974, R. v. *London County Council*, (1893) 2 Q B 454, Ref.

[P 611 C 1; P 612 C 1, 2]

(j) Assam Bijni Succession Act (2 of 1931), S. 4 (1)—Words "with title dating back" etc. in S. 4 (1) cannot be treated as mere recital and not as part of enactment.

The words "with title dating back", etc., cannot be taken apart from the rest of the passage and treated as a mere recital and not as a part of the enactment. [P 615 C 2]

(k) Interpretation of Statutes—Declaratory statute—Declaratory statute is generally retrospective in effect—Language of Act plain as to which portion is retrospective and which prospective — It is not necessary to rely on any presumption.

Declaratory statutes are generally retrospective in their effect. Where, however, the language of the Act itself in that respect is plain and non-ambiguous, as to which of its provisions are retrospective and which prospective, it is not necessary to rely on any presumption as to the intent relating to its operation, to be inferred from the character of the Act being declaratory or otherwise: *English case law referred*. [P 615 C 2; P 616 C 2]

(l) Interpretation of Statutes — Retrospective effect — Retrospectivity is never pre-

sumed — It should be expressly or by necessary implication declared to be so.

Retrospectivity is never presumed in interpreting a statute, and a law is regarded as retrospective only when it is so by express enactment or it is a necessary implication by the language employed by the legislature, the presumption always being against the taking away of vested rights: *English case law referred*.

[P 616 C 2]

(m) Precedent—Authority of—Applicability of decision to different statute — Authority is of little value.

The authority of a decision, whether it is to apply or not to apply to a different statute, is of little value: *In re New Callas*, (1882) 22 Ch D 484, Ref.

[P 617 C 2]

(n) Interpretation of Statutes — Retrospective effect—Law altered during pendency of action — Rights of parties are to be governed by law as it existed when action was begun unless new statute expressly varies such rights — Absence of provision as to costs or compensation is not material—Court has wide discretion in the matter.

Where the law is altered during the pendency of an action, the rights of parties are to be decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights. The rule which is one of construction will only yield to a sufficiently expressed intention of the legislature that the enactment should have a retrospective operation.

[P 618 C 1]

If the provision of an enactment purporting to have retrospective action is in itself clear, unambiguous and compelling in its meaning, the absence of a power of a provision as to costs or compensation is not quite material. The Civil Procedure Code makes a provision which leaves the Court a wide discretion in the matter of costs: *Case law referred*. [P 618 C 2]

(o) Interpretation of Statutes—Objects and Reasons—Proceedings of Legislatures including Statements of Objects and Reasons should be excluded from consideration.

In interpreting a statute, proceedings of the legislature in passing an Act, including statements of objects and reasons, and the debates of the legislature, must be excluded from consideration. Nor are the Courts at liberty to construe an Act by any reference to the Bill in its original form: 22 Cal 788 (P C); 1920 P C 56; *Herron v. Rathmines and Raghgar Improvement Commissioners*, (1892) A C 498 and *Q. v. Capel*, 12 Ad. & E. 381, Rel. on.

[P 619 C 1, 2]

(p) Interpretation of Statutes—Section—Interpretation of—Court should take whole Act into consideration — Construction not fitting with rest of Act should be rejected—Court cannot, however, alter the meaning of what is clear.

Court interpreting a particular section of an Act must take the whole of the Act into consideration, and if any construction of the section does not fit in with the rest of the Act, it must reject it and look for some other construction which would apply to all parts of the Act equally well. But in doing so the Court is not free to alter the meaning of what is of itself

clear and explicit : *Bentley v. Rotherham and Kimbarworth Local Board of Health*, (1876), 4 Ch D 588; *Palmer's Case*, (1784) 1 Leach C. C. (Ed. 4) 355 and *Warburton v. Loveland*, (1831) 2 D & Cl 480, Rel. on. [P 619 C 2]

(q) Interpretation of Statutes—Intention—Words of Act precise and unambiguous—Nothing more is necessary than to expound them in their natural and ordinary sense—Doubt arising from terms employed—Recourse can be had to cause of statute and to preamble in gathering intention and comparison of one part with other—Preamble can be referred to ascertain general scope of Act—Full title of Act can be used for ascertaining scope of Act—Short title should be disregarded.

An Act should be construed according to the intent of the legislature which passed it. If the words of the statute are in themselves precise and unambiguous, then nothing more is necessary than to expound the words in their natural and ordinary sense. The words themselves alone, in such cases, declare the intention of the legislature. But if any doubt arises from the terms employed by the legislature, it is a safe means of collecting intention, to call in aid the ground and cause of making the statute and to have recourse to the preamble and to compare one part of the Act with another. It is not safe to make out the intention of the statute from some other sources of information and then to construe the words of the statute in order to meet the assumed intention. [P 620 C 1, 2]

The preamble may always be referred to for the purpose of ascertaining generally the scope of the Act where the enacting words are ambiguous. The enacting words are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so they cannot be cut down by reference to it. The preamble however does not extend the provisions of the Act beyond what the enacting part of the Act contains. While it is legitimate to use the full title of the Act to throw light upon its progress and scope, it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience, its object being identification and not description. The full title must not be neglected and it may be some guide to the meaning. [P 621 C 2 ; P 622 C 1, 2]

(r) Assam Bijni Succession Act (2 of 1931), S. 4 (1) and (2)—Act is confined to succession to the Raj—Any title otherwise than on basis of succession is outside scope of the Act—Claim solely based on alleged right of succession to Raj is barred but not claim based on alleged title acquired by adverse possession.

The Bijni Succession Act, 1931, is confined to the succession to the Raj and any title otherwise than on the basis of succession, which anybody may have to the properties of the Raj or any portion thereof, is clearly outside the scope and purview of the enactment. The only title that sub-ss. (1) and (2) of S. 4 purport to declare, and the only title which S. 8 speaks of, is title as holder of the Raj on the basis of succession either by nomination or by appointment and no title based on any other ground. [P 623 C 2]

A claim solely based on an alleged right of succession to the Raj is therefore hit by sub-ss. (1) and (2) of S. 4 and is barred, but a claim based upon an alleged title acquired by adverse possession, even though that claim is in respect of the properties which constitute the Bijni Raj, as defined in the Act, but does not concern any question of status as the holder of the Raj or any question of succession, is not barred by the Act. [P 623 C 2]

The title declared by the Act is the title to succession based upon the nomination as made on 28th September 1895, and has nothing to do with any title based on adverse possession and the declaration contained in S. 4 does not affect such title. [P 624 C 1]

(s) Assam Bijni Succession Act (2 of 1931), S. 9—S. 9 is prospective.

The enactment contained in S. 9 is expressly prospective in its language. [P 624 C 1]

(t) Assam Bijni Succession Act (2 of 1931), S. 4 (1) and (2)—Act operates even outside limits of province of Assam.

The Bijni Succession Act applies to the status of the holder of the Raj wherever the properties appertaining to the Raj may be situate. It was intended by the Assam Legislature that the Act should operate even outside the limits of the province of Assam and was within its authority in legislating on that footing. The scheme of an Act may be such as to affect the properties outside the territorial limits of jurisdiction of a particular legislature. This generally happens when the legislation is intended to act through a person who is within its jurisdiction. [P 624 C 2 ; P 625 C 1]

(u) Appeal—Parties—Person impleaded as defendant to suit and party to decree dismissing suit—He has right to show even as respondent in appeal, that decree was wrongly passed.

A person who is impleaded as a defendant to a suit and is a party to a decree dismissing the suit that has been passed in the suit, has the right to show even as a respondent in the appeal from the decree, that the decree was wrongly passed even though the effect of setting aside the decree would be to re-open the suit as against him. The Court has wide powers to add a party to a suit or an appeal. [P 626 C 1]

(v) Assam Bijni Succession Act (2 of 1931)—Scope—Act merely declares rule of succession and contains no provision forfeiting or confiscating property of any person.

The legislature in passing the Bijni Succession Act has passed no provision forfeiting or confiscating the property of any person. It has merely declared a rule of succession which according to it is the customary law and has only supplemented that law where in its view, it needed supplementing. [P 626 C 2]

P. R. Das, S. K. Gupta, Bijan Kumar Mukherjee, Rabindra Narayan Roy (in No. 171); *Gunada Charan Sen, Jitendra Mohan Banerjee and Prandhan De* (in No. 205)—for Appellant.

A. K. Roy, S. C. Bose, S. C. Basak, Prakash Chandra Pakrashi, Phani Bhushan Chakravarti, Rabindra Nath Chowdhury, Holiram Deka, Shyamapada

Majumdar, Tarapada Mukherjee, J. N. Sen, Indu Prakash Chatterjee, Jitendra Mohan Banerjee, Biswanath Naskar, Rabinindra Narayan Roy and Prandhan De—for Respondents.

Judgment.—These two appeals have arisen out of two suits which were instituted by the respective plaintiffs for recovery of possession of properties which, even apart from the entity which they collectively form under a recent enactment, have for a long series of years been popularly known as constituting the Bijni Raj. The properties, with the exception of a few solitary items which are comparatively recent acquisitions, lie in the Province of Assam and are extensive and valuable, covering an area of 1200 sq. miles and yielding a gross annual income of over 5 lacs of rupees. The Rajas of Bijni belong to a very ancient house which may be traced as far back as the fifteenth or sixteenth century. The Maharaja of Cooch Bihar in Bengal still represents the main line of this dynasty, and the Rajas of Darrang, Sidli and Bijni also belong to the same stock. History traces the House to an aboriginal tribe of Kochos or Rajbansis who rose to power and who on the dismemberment of the ancient Hindu kingdom of Kamrup with its capital at Gauhati by repeated Mahomedan invasions, founded a kingdom which was at one time co-extensive with it. (See Hunter's Imperial Gazetteer of India, Vol. 1, p. 240.) With successive changes of status, the Bijni Raj, which possibly was a paramount power at its inception, became a feudatory State, at first under the Mahomedans, then under the Ahoms, again under the Mahomedans and later on under the Rajas of Bhutan; and after the Bhutan war of 1864 it came to be regarded as a hereditary zemindari. The members of the Raj family call themselves Shivabansis and although it has been a matter of controversy between the parties in the present cases as to whether or not they are governed by the Hindu Law, it is not disputed that in the matter of succession they are governed, as well, by a customary law and certain Kulachar or family customs and usages.

The history of the Raj, with which we are concerned for the purposes of these appeals, opens with the death of the last male holder of the Raj, Raja Kumud Narain. The Raja died intestate on 9th

March 1883 without any male issue and leaving him surviving two widows, Rani Siddheswari and Rani Abhoyeswari, and a daughter, Sikhaheswari who died soon after. The two widows obtained possession of the estate, but disputes arose between them leading to a suit, No. 10 of 1887, commenced by Rani Abhoyeswari against Rani Siddheswari for possession of the Raj on declaration of her title. On 17th May 1891, while this suit was pending on appeal, Rani Siddheswari died. Rani Abhoyeswari thereafter continued in possession of the estate till her death on 17th October 1918. On her death the Deputy Commissioner of Goalpara stepped in and took possession of the Raj on the view that one Jogendra Narain, son of Raja Kumud Narain's brother Kirti Narayan, was entitled to the Raj, while one Heramba Prasad Barua, son of Rani Abhoyeswari's brother Bhabani Prasad Barua, was entitled to the personal estate of the said Rani. The said Jogendra Narain being a lunatic, the Court of Wards, Assam, assumed charge of the Raj on 5th December 1918 and has since then retained possession.

Before referring to the two suits which have given rise to the appeals, it is necessary to refer to two other suits which were previously instituted. In 1919 one Bhairabendra Narain and one Udai Narain, since deceased, who trace their descent from Maharaja Shib Narain, a common ancestor of theirs and of Raja Kumud Narain, instituted a suit at Alipur, District 24-Parganas, being Suit No. 225 of 1919, against Raja Jogendra Narain and others for recovery of possession of the Raj on declaration of their title thereto. In 1920 one Samarendra Narain instituted another suit against the Raja for similar relief at Dhubri, District Goalpara, and that suit was subsequently transferred to Alipore, District 24-Parganas, and numbered as T. Suit No. 51 of 1922. Samarendra Narain having died, his sister's son Sourendra Narain was substituted in his place as plaintiff. On 25th October 1930 Suit No. 51 of 1922 was dismissed. On the same day petitions of compromise were filed in Suit No. 51 of 1922 and Suit No. 225 of 1919 as between Raja Jogendra Narain and the plaintiffs in the two suits, namely Bhairabendra Narain and Sourendra Narain. Eventually, on 22nd December 1930, the two suits were dis-

posed of in accordance with the compromise. To the terms of the compromise reference will be made hereafter. The two suits out of which the appeals have arisen are: T. Suit No. 84 of 1930 which has given rise to Appeal No. 171 of 1933 and T. Suit No. 164 of 1930 from which Appeal No. 205 of 1933 has emerged.

Suit No. 84 was instituted on 9th May 1930. The plaintiff in this suit is one Debendra Narain Roy who commenced it describing himself as the sole surviving executor to the estate of Rani Abhoyeswari. He alleged that since the death of Rani Siddheswari in 1891 Rani Abhoyeswari was in possession of the entire Raj and the properties appertaining thereto in assertion of her own title adversely to and to the exclusion of all members of the Bijni Raj family or of any rightful claimants under custom or Kulachar and was in such possession to the knowledge of them all since then and till her death on 17th October 1918, and that Rani Abhoyeswari had thus acquired an absolute and indefeasible title. He alleged that the Rani had executed a Will on 30th August 1918 whereby she had appointed him as one of the executors, and that on her death he and one of the other executors, namely one Bhawani Prasad Barua, had obtained probate of the will from the High Court on the Original Side on 14th March 1919. Filing the probate along with the plaint, he prayed for a declaration that he, as executor under the will, is entitled to the entirety of the Bijni Raj mentioned in Sch. B to the plaint and for possession of the said properties and also for other incidental and consequential reliefs. Sch. B to the plaint, in which as stated in the prayer aforesaid the Bijni Raj was described, consisted of nineteen items of immovable properties (of which 17 were situated in the Province of Assam, one in the Province of Bengal and one in the United Provinces), one item as to mesne profits and seven items of moveables. The aggregate value of the properties was stated to be Rs. 5 lacs 47 thousand odd. Raja Jogendra Narain (designated as Kumar) represented by the Court of Wards was impleaded as defendant 1; Bhairabendra Narain, one of the two plaintiffs in suit No. 225 of 1919, and Surendra Narain, son of Uday Narain, deceased, who was the other plaintiff in that suit as defendants 2 and 3 respectively;

and Sourendra Narain the plaintiff in suit No. 51 of 1922 as defendant 4.

Suit No. 164 was instituted on 25th October 1930, on which date, as already stated, judgment was pronounced in suit No. 51 of 1922 dismissing it, and petitions of compromise were filed in the two suits, namely No. 255 of 1919 and No. 51 of 1922, as between Raja Jogendra Narain, Bhairabendra Narain and Sourendra Narain. The plaintiffs in this suit were No. 1, Punyendra Narain and No. 2, Surendra Narain, the former being grandson by a predeceased son and the latter, as already stated, son of Uday Narain, deceased, who was co-plaintiff with Bhairabendra in suit No. 255 of 1919. In the plaint the history of the litigation between Rani Siddheswari and Rani Abhoyeswari was given; it was asserted that on Raja Kumud Narain's death one Lalit Narain, grandfather of plaintiff 2, and great-grand-father of plaintiff 1, as the nearest male agnate, was entitled to succeed and did succeed to the Raj; it was alleged that Lalit Narain instituted a suit against Rani Abhoyeswari for recovery of possession of the Raj but the suit was withdrawn on a compromise under which the Rani was to remain in possession till her death; and that on the Rani's death Lalit Narain's son, Uday Narain, became entitled to succeed and did succeed to the Raj. And then in para. 14 the foundation of the claims of the two plaintiffs was set out in the following words:

That the said Kumar Uday Narain Deb died on 1st January 1924 leaving him surviving his second son, Kumar Surendra Narain Deb, plaintiff 2, and plaintiff 1 who is the only son of his predeceased eldest son, Kumar Tikendra Narain Deb. The plaintiffs state that in the selection of the eldest and nearest agnate preference has sometimes been given to the eldest branch of the family and sometimes to the eldest member and that it is difficult to ascertain the exact rule of succession in this respect; but plaintiff 1 believed that it is lineal primogeniture and the plaintiff 2 believes that it is ordinary primogeniture; and plaintiffs agree and state that if it is the former plaintiff 1 is entitled to succeed, and if it is the latter plaintiff 2 is entitled to succeed to the Bijni Raj estate, which on the death of the said Kumar Uday Narain Deb has vested either in plaintiff 1 or in plaintiff 2.

Jogendra Narain, his title as Raja being disputed and designated as Kumar and represented by the Court of Wards, was impleaded as defendant 1, Bhairabendra Narain and Surendra Narain as defendants 2 and 3; Debendra Narain Roy as

defendant 4; and as defendant 5 the Trustee in Bankruptcy, in London, to the estate of one Maharaj Kumar Prince Victor Nityendra Narain of Cooch Bihar was made a party on the allegation that in 1922 Uday Narain had under undue influence and coercion and at a time when he was seriously ill and hard pressed for money executed a conveyance in favour of the Prince of his right, title and interest in the Bijni Raj estate and that the Prince had since then been adjudged a bankrupt in England and his estate had vested in the Trustee. To the plaint was appended a schedule of properties, the items being the same as those described in the schedule in suit No. 84 of 1930 with only this difference, that an item of 1 lac of rupees, said to be in the Bijni Treasury which is to be found in the schedule in the latter suit is not reproduced, and the values given as regards all the other items being less so that the aggregate claim was put down at Rs. 3 lacs 10 thousand odd. Suit No. 84 of 1930 and suit No. 164, instituted as aforesaid, remained pending in the First Court of the Subordinate Judge of the 24 Parganas at Alipore. In March 1931 Mr. Laine, Member, Board of Revenue, Assam, introduced a Bill in the Assam Legislative Council, called the Bijni Succession Bill. The Bill was passed as Assam Act 2 of 1931. It received the assent of the Governor on 27th March 1931 and of the Governor-General on 9th May 1931, and was published under S. 81 (3), Government of India Act, in the Assam Gazette of 20th May 1931.

On the Act coming into force, it was pleaded in defence in the two suits as a bar to the plaintiff's claims. Additional written statements were filed on behalf of the plaintiffs and certain issues were framed or added to those originally framed with the result that there came to be for trial 20 issues in suit No. 84, and 24 issues in suit No. 164. Of the 20 issues in suit No. 84 issues Nos. 14, 15 and 19 (b) related to the question of effectiveness of the probate of the will of Rani Abhoyeswari in respect of the properties situate in the Province of Assam; and issues Nos. 16, 17, 18, 19 (a) and 20 related to the question whether the Act operated as a bar. And in suit No. 164 the issue which raised the last-mentioned question was issue No. 24. Under an order of the Subordinate Judge, dated 30th January 1932, which was slightly varied by

this Court on 12th July 1932, the issues in the two suits just referred to have been first tried out. The result has been that suit No. 164 has been wholly dismissed and suit No. 84 has been dismissed in part, that is to say, in respect of the properties which are situated in the Province of Assam, and has remained pending in respect of the two items of immoveable properties, one situated in Bengal and the other in the United Provinces. The plaintiffs in the two suits have preferred these appeals. At the hearing of the appeals several sets of arguments have been addressed to us: Mr. P. R. Das has addressed us on behalf of Debendra Narain Roy (Appellant in Appeal No. 171); the Advocate-General and Dr. Basak, on behalf of the Court of Wards representing Raja Jogendra Narain (respondent in both the appeals); Mr. S. C. Bose, on behalf of Bhairabendra Narain (respondent in both the appeals); Mr. Gunada Charan Sen, on behalf of Punyandra Narain and Surendra Narain (appellants in Appeal No. 205); and Mr. J. N. Sen, for Maharaj Kumar Prince Victor Nityendra Narain (respondent in Appeal No. 205). The controversy in the appeals broadly speaking centres round two main questions; first: whether the Act, and particularly S. 4 of it, was ultra vires the Assam Legislature; and 2nd what is the effect of the Act upon the two suits. To deal with these questions the provisions of the Act will have to be considered; and for the first question a general view will be sufficient, but for the 2nd question a more detailed examination will be necessary. The 1st question will be taken up first. The long title of the Act is: "An Act to regulate the succession in the Bijni Raj." The preamble states:

Whereas it is expedient to declare and supplement the customary law of succession in the group of estates known as the Bijni Raj in Assam with a view to the prevention of disputes and the preservation of the Raj:

Section 1 gives the short title of the Act as "The Bijni Succession Act, 1931" S. 2 contains definitions of the following words and expressions: 'The Bijni Raj' or 'the Raj'; 'Family'; 'The Holder of the Raj' or "The holder" and 'prescribed.' S. 3 declares the Bijni Raj an impartible estate descendible to a single male holder according to the provisions of the Act. S. 4, which is the all-important section of the Act for the purpose of these cases, consists of three sub-sections. Sub-s. (1)

declares Raja Jogendra Narain as the holder from his nomination on 28th September 1895 by Rani Abboyeswari and for his lifetime; sub-s. (2) declares Bhairabendra Narain as the next holder on Raja Jogendra Narain's death, and also provides for succession in case of Bhairabendra Narain predeceasing the Raja; and sub-s. (3) declares that subsequent successions were to be determined by nomination or appointment. S. 5 gives a list of persons in their order who would be entitled to nominate, together with the qualifications and conditions to be fulfilled to be so competent. S. 6 provides for confirmation of nominations and the effect of the confirmation. S. 7 provides for appointment to succession in case of failure of nomination. S. 8 lays down that publication in the gazette of a nomination confirmed or appointment made would be conclusive proof of title to the Raj from the appropriate date provided the person is alive on such date. S. 9 provides for temporary administration of the Raj when there is no holder. S. 10 lays down certain restrictions to transfer and on attachment or sale. Ss. 11, 12 and 13 lay down certain savings, succession fee and power to make rules. In the schedule appended to the Act the estates of the Raj are described.

Leaving out of account for the moment the other provisions of the Act and confining his attention solely to the first two sub-sections to S. 4, for that is the only part of the Act by which his client is hit, Mr. Das has argued in limine that the declaration contained therein is not 'law' in the sense in which a legislative body is competent to enact it. This contention has been raised in this Court for the first time by Mr. Das and does not appear to have been raised in the Court below. "Law in its most general and comprehensive sense," says Blackstone (*Commentaries*, Vol. 1, p. 38)

signified a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation of optics, of mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

Municipal Law, called so in compliance with common speech as denoting the rule by which particular districts, communities or nations are governed,

says Blackstone (*Ibid*, p. 43),

is properly defined to be a rule of civil con-

duct prescribed by the superior power in State, commanding what is right and prohibiting what is wrong.

And, says he,

First it is a rule, not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal. Therefore a particular act of the legislature to confiscate the goods of Titius or to attain him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed to be high treason; this has permanency, uniformity and universality and therefore is properly a rule. It is also a rule to distinguish it from advice or counsel which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised; whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only a matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also. It is also a rule to distinguish it from a compact or agreement, for the compact is a promise proceeding from us, law is a command directed to us * * * Municipal law is also a rule of civil conduct. This distinguishes Municipal law from the natural or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct but also the rule of faith. * * * It is likewise a rule prescribed. Because a bare resolution, confirmed in the breach of the legislator without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which the notification is made is a matter of very great indifference.

Pertinent to this matter it is profitable to quote what Markby in his *Elements of Law*, when stating the conclusions of Austin drawn from Hobbes and Jeremy Bentham in his lectures on the Province of Jurisprudence has said. He has observed:

Law is a term which is used in a variety of different meanings; but widely as they differ, there runs throughout them all the common idea of a regular succession of events, governed by a rule, which originates in some power, condition or agency, upon which the succession depends. The conception of the law which we are about to consider, the law of the lawyer, is contained within and forms part of the conception of a political society. * * * In a political society one member or a certain definite body of members, possesses the absolute power of issuing commands to the rest, to which commands the rest are generally obedient. * * * It is the body of commands issued by the rulers of a political society to its members which lawyers call by the name 'law.' There are only two small and very insignificant classes of the commands so issued by the rules of a political society which are nevertheless not enforced; as for instance, rules of rank and procedure in

society, orders to wear mourning when a great person dies, and so forth. These are no part of law in our sense of the term. So also the rulers of a political society sometimes, but very rarely, address a command to a particular individual or individuals by name. Such occasional and specific commands are not properly comprised under the term law which, as we have said, involves the idea of a general rule, applicable to all cases which come under a common class. Austin considers that there are two other objects included within the province of jurisprudence and called laws which are, nevertheless not commands; namely declaratory laws and laws which repeal laws. But, as it seems to me, every such law, if it is addressed by the sovereign one or number to its subjects generally, if it is a signification of desire and is imperative, falls under Austin's conception of law; though it may only be a complete law, that is, a complete command, when taken in conjunction with some other signification of desire.

The learned Advocate General has argued that it is not permissible to separate sub-sections (1) and (2) of S. 4 from the rest of the Act and to judge whether those sub-sections contain declarations which would satisfy the requirements of 'law' understood as above. That argument is undoubtedly reasonable. Mr. Das has argued that the declarations represent rules which are in the nature of *senatus decreta* or *previlegia* as contradistinguished from *senatus consulta* or *legis* in Roman Law—terms to which reference will be made hereafter in that they are not general rules which regarded the whole community. The argument is correct in the sense that the declarations relate to the status of two specified persons only and not of persons generally belonging to a given class or community; but to 'law' they are all the same. For even if the two sub-sections are taken entirely divested of the context, they do lay down a rule in the sense in which Blackstone has used that term, not a transient sudden order concerning either Raja Jogendra or Bhairabendra, the operation of which is spent on them or either of them only but something which would bind the members of the Bijni Raj family as also the community in general in their relations with those persons something which, in that way presents a feature of permanency, uniformity and universality. To apply the test which Markby has referred to, the declarations are not such as are not meant to be enforced nor are they addressed to any individuals in particular, but involve the idea of a general rule applicable to all relations which the said two persons

would have with the world outside in their capacity as holders of the Bijni Raj. Mr. Das's contention therefore must be overruled.

Mr. Das has next contended that the declarations contained in the aforesaid sub-sections are in the nature of decrees in respect of the rights of particular individual or individuals and that though legislative enactments embodying such declarations are within the competency of the British Parliament which is a Sovereign body and which exercises not only legislative functions but certain judicial functions as well, they are entirely *ultra vires* the Indian legislatures, central as well as provincial. We shall have to discuss the nature of the Act taken as a whole hereafter and in that connexion will have to consider whether it can be regarded as a private Act, as Mr. Das has contended that it is. But, for the present we confine ourselves to the two sub-sections aforesaid which contain, what Mr. Das says, declaratory decrees in favour of the particular individuals referred to therein. "The principle of Parliamentary sovereignty" as Dicey in his *Law on the Constitution* has said, means neither more nor less than this, namely that Parliament thus defined has under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

In the classical passage on the subject of unlimited legislative authority of Parliament, Blackstone in his commentaries, Vol. 1. p. 161 has said:

It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority on earth can undo.

Coke in his *Institutes* (4th Institute, p. 36) says:

The power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds,

and gives some instances of interference with private rights which strikingly illustrate the absolute nature of the power that the Parliament can exercise. Dicey has said:

Parliament however habitually interferes, for the public advantage, with private rights. Indeed such interference has now become (greatly to the benefit of the community) so much a matter of course as hardly to excite remark, and a few persons reflect what a sign this inter-

ference is for the supremacy of Parliament. The statute book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons. (Law of the Constitution, pp. 46 and 47.)

In Maitlands' Constitutional History of England under caption "The Work of Parliament," at pp. 380-383 it has been pointed out that though the most important work of the Parliament is that of making statutes this is not all that it does, and that leaving out of account the judicial power of the House of Lords as a Court for the trial of peers and as a Court to which appeals can be brought from the lower Courts, and the procedure by way of impeachment, the House of Parliament do a good deal of important work without passing statutes and hearing causes; and that such statutes as the Parliament makes are by no means confined within what a jurist or a political philosopher could consider the domain of legislation. There it has been observed:

A vast number of statutes he (i. e., jurist or the political philosopher) would class rather as privilegia than a legis; the statute lays down no general rule but deals only with a particular case. This is particularly noticeable in the last century One is inclined to call the last century the century of privilegia.

The legislative powers of the Indian legislatures, central and provincial, which are all non-sovereign law-making bodies, arise from definite Parliamentary enactments. The powers are wide and plenary, but the authority they exercise are as completely subordinate to, and as much dependent upon Acts of Parliament as is the power of any other body, which is a creature of a statute to make by-laws. When any particular case comes before the Courts, whether civil or criminal, in which the rights and liabilities of any party are affected by any legislation of an Indian legislature, the Courts may have to determine with a view to the particular case whether such legislation was or was not within the legal powers of the Council. This of course is the same thing as adjudication as regards the particular case in hand upon the validity or constitutionality of the legislation in question. The Courts however cannot declare invalid, annul or make void a law so passed, but if it is found ultra vires or unconstitutional they will refuse to give effect to it and treat it as void or invalid or having no legal existence. The leading case on the subject:

(1878) 3 A C 889 (1) in which the constitutionality of an Act (24 of 1869) of the Indian legislature was in question. Lord Selborne in delivering the judgment of the Judicial Committee, expressed himself thus:

The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, as was intended to have, plenary powers of legislation as large and as of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument, by which affirmatively the legislative powers were created, and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no condition or restriction by which that power is limited (in which category would of course be included any act of the Imperial Parliament at variance with it) it is not for any Court of justice to enquire further, or to enlarge constructively those conditions and restrictions.

It may be observed here that the same principles have since been held to apply to enactments of Colonial legislatures: see (1885) 10 A C 282 (2); (1885) 10 A C 279 (3); (1891) A C 272 (4) at p. 274. The powers of the Indian legislature (which, by S. 63, Government of India Act, shall consist of the Governor-General and two Chambers namely the Council of State and the Legislative Assembly) are given by S. 65 of Act. The portion of the section relevant runs thus:

The Indian legislature shall have power to make laws (a) for all persons, for all Courts, and for all places and things, within British India.

If the Act now under consideration or the declaration contained in its S. 4, subsections (1) and (2) which we are at present dealing with are 'law' as we have held they are, the same would obviously be entirely within the competence of the Indian legislature. But it has been suggested that the declarations concern only particular individuals and therefore do

1. Queen v. Burah, (1878) 3 A C 889.
2. Powell v. Apollo Company, (1885) 10 A C 282 = 54 L J P C 7 = 53 L T 638.
3. Harris v. Davies, (1885) 10 A C 279 = 54 L J P C 15 = 53 L T 601.
4. Musgrave v. Chun Teeong Toy, (1891) A C 272 = 60 L J P C 28 = 64 L T 378.

not fall within the category of 'laws for all persons.' In our opinion, S. 65 (1) (e) cannot be construed to mean that the laws are to be general laws for all persons for all Courts and for all places and things. So far as the Local legislature of a Province is concerned the powers are given by S. 80-A (1), Government of India Act which runs in these words :

The local legislature of any province has power, subject to the provisions of this Act, to make laws, for the peace and good government of the territories for the time being constituting that province.

We shall hereafter refer to the several contentions that have been urged in connexion with some of the expressions used in this sub-section; but at the present moment the point we are considering is whether the words of the sub-section would admit of a law in the shape of such declarations as are contained in the first two sub-sections of S. 4 of the Act under consideration. In our view of the 'laws' contemplated by S. 80-A (1) are laws of all kinds, not only laws in general or in the abstract, but rules of law in concrete cases as well. Reference in this connexion may be made to the decision of the Judicial Committee in (1893) A C 339 (5) at p. 344 where Lord Hobhouse said thus:

If the New Zealand legislature had enacted that in a concrete case such as the present one, the New Zealand Courts should have power to give the plaintiff a decree notwithstanding that the defendant held himself aloof, we should hardly have heard the suggestion that such a law was not one for the peace, order or good government of New Zealand. Of course they have framed their law in more abstract and flexible terms. But making those terms their Lordships are clear that it is for the peace, order and good Government of New Zealand, etc., etc.

We are of opinion therefore that the declarations contained in the first two sub-sections of S. 4 of the Act are such declarations as a Local legislature of a province, otherwise competent, is empowered to enact. In pressing his contention aforesaid, namely that it is beyond the competency of Local legislature of a province to make declaration of this nature Mr. Das has asked us to scrutinize carefully the words,

laws for the peace and good government of the territories for the time being constituting that province.

He has not disputed that the Assam legislature has plenary powers to make

such laws as may in its opinion be conducive to peace and good government, but he has contended that such laws must partake of the character of general legislation of provincial concern. For the purposes of this argument he was prepared to concede that a declaration, or "a declaratory decree," as he would call it, may be a law enacted for peace and good government. He does not dispute the correctness of the pronouncement of Rankin, C. J., in 54 Cal 727 (6) at p. 738, which is in these words :

In my judgment it is reasonably clear that these words (meaning the words peace and good government) appearing in S. 80-A (1) and some of the other sections of the Act are used because they are words of the widest significance and it is not open to a Court of law to consider with regard to any particular piece of legislation whether it is meritorious in the sense that it will conduce to peace and good government. It is sufficient that they are words which are intended to give, subject to the restrictions of the Act, a legislative power to the body which it invests with that authority.

Mr. Das also desires to stand clear of the decision of the Judicial Committee in 58 I A 169 (7) which has made it perfectly plain that the Court is no judge to determine whether a particular measure is or is not for peace and good government. And he does not dispute the decision of Lord Halsbury, L. C., in (1885) 10 A C 675 (8), that the words authorise the utmost discretion of enactment for the attainment of the objects pointed to and that :

They are words under which the widest departure from criminal procedure as is known and practised in this country (meaning England) have been authorised in Her Majesty's Indian Empire.

And further observed that there was not the least colour for a contention that:

If a Court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure "peace, order and good government" they would be entitled to regard any "statute directed to those objects, but which a Court should think likely" to fail of that effect as ultra vires and beyond the competency of the Dominion Parliament to enact.

So in Keith on Responsible Government, Edn. 2, Vol. 1, p. 302, it has been said :

6. Girindra Nath Banerji v. Birendra Nath Pal, 1927 Cal 496=102 I C 647=54 Cal 727=31 O W N 593.

7. Bhagat Singh v. Emperor, 1931 P C 111=1931 Cr O 521=131 I C 415=32 Cr L J 727=58 I A 169=12 Lah 280.

8. Riel v. The Queen, (1885) 10 A C 675=55 L J P C 28=54 L T 339=16 Cox C O 48.

5. Ashbury v. Ellis, (1893) A C 339=62 L J P C 107=1 R 388=69 L T 159.

By modern usage the power of the Legislature is to legislate for the 'peace, order and good government' of the territory, and there can be no doubt that the phraseology agrees in effect with the older peace, welfare, and 'good government' or the Victorian power to make laws in all cases. The means to these ends are entirely for the judgment of the legislature which enacts; the test is subjective, not objective, and no Court can substitute its views of what should be enacted for those of the Legislature. This was laid down in 10 A C 675 (8).

Mr. Das however maintained that unless it is a general legislation of provincial concern it cannot be regarded as law which the local legislature of the particular province is competent to enact. He has relied in this connexion upon three cases to which we shall now refer. The first case is (1882) 7 A C 829 (9). The case was on appeal from the Supreme Court of the Province of New Brunswick and the Act of which the validity was the question for decision was the Canada Temperance Act, 1878. Under the British North America Act, 1867, commonly called the Federation Act, the legislative authority of the Parliament of Canada was conferred by S. 91, and the exclusive powers are given to the Provincial Legislatures of the Provinces in respect of certain subjects enumerated in S. 92. Under S. 91 the Canadian Parliament has authority to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the Provinces. The section then proceeds to lay down 29 specified items with respect to which the exclusive legislative authority of the Parliament of Canada is reserved and then, at the end, it is said :

And any matter coming within any of the classes of "subjects enumerated in the section shall not be deemed to come within the "class of matters of a local or private nature comprised in the enumeration "of the subjects by this Act assigned exclusively to the legislature of the" provinces.

In S. 92 the subjects of exclusive provincial legislation are enumerated, the last item 16, being :

Generally all matters of a merely local or private nature in the provinces.

One important feature of this sort of classification is obvious and that has been pointed out by Lefroy in his Constitu-

9. Russel v. Queen, (1882) 7 A C 829=51 L J P C 77=46 L T 889.

tional Law of Canada at p. 75 in these words :

The great importance of that feature of the Federation Act (S. 91) whereby a general undefined and unrestricted power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces by S. 92 is given to the Dominion Parliament is obvious. Yet it may mislead to speak, as is often done, of the residue of Parliament, because the provincial legislatures under S. 92 also have a residuary power to make laws in relation to generally all matters of a "merely local or private nature in the province." The exercise of legislative power by the Dominion Parliament in regard to all matters not enumerated in S. 91 ought, therefore, to be strictly confined to such matters as are unquestionably of Canadian interest and importance. It derives "no jurisdiction from S. 91 when legislating on any subject not" included within the classes of subjects enumerated in that section "to deal with any matter which is in substance of local or provincial concern and does not truly affect the interest of the Dominion" as a whole. When so legislating it has no authority to trench or "encroach upon any class of subjects which is exclusively assigned" to provincial legislatures by S. 92. It cannot legislate "into matters which in each province are substantially of local or" private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion.

The feature noticed as above is very important for, as will be seen when the classification of subjects in the schedule to the Devolution Rules framed under the Government of India Act is examined this feature is there absent and in that classification any conflict that may arise under the classification under the Federation Act has been sought to be avoided by safeguards which seem reasonably adequate. Under the classification under the Indian Constitution all subjects remain central subjects, unless expressly scheduled in Part 2 of the Schedule or declared by the Governor-General in Council to fall within the said Part as being merely of a local or private nature within a particular province. For the purpose of understanding the true import of the decision cited as aforesaid this feature has to be remembered; for the question which arose in the case was whether the subject falling exclusively within the scope of the provincial legislature as a subject of local or provincial interest, the Canadian Parliament could legislate on it as affecting the Dominion as a whole. Their Lordships referred to

(1881) 7 A C 96 (10) in which the principles with the aid of which the distribution of legislative powers as provided for in Ss. 91 and 92, and their general scope and effect were to be construed, and held that the matter regulated by the Act in question was not a matter exclusively assigned to the provincial legislatures but was a matter which could be legislated upon by the Dominion Parliament by virtue of its general authority to make laws for the peace, order and good government of Canada. The next case relied on is (1896) A C 348 (11) and the Act concerned was the Canadian Temperance Act, 1886. It was held that the general power of legislation conferred upon the Dominion Parliament by S. 91, North British America Act, 1867, in supplement of its therein enumerated powers must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in S. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion. Lord Watson observed:

Their Lordships do not doubt that some matters, in their original local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and therefore within the jurisdiction of the Provincial legislation and that which has ceased to be merely local or provincial and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

The third case relied upon is (1930) A C 97 (12) in which Lord Tomlin referred to several earlier decisions and stated the propositions which had been laid down therein on questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction. These propositions were re-stated in a later decision, (1932) A C 54 (13), at p. 71, to which the learned

Advocate-General has drawn our attention. Mr. Das seeks the cases in his favour because jurisdiction was said to be in the Dominion Parliament under the words "peace, order and good government of Canada" in S. 91 of the Federal Act, only when the subjects were held to be unquestionably of national interest and importance. Such a criterion was necessary to be resorted to in order to settle the conflict between the two jurisdictions, but it cannot enter into the meaning of the words themselves. That the above is a correct appreciation of the decisions will be apparent from what has been said of the case in 7 A C 829 (9) in Qick and Garran's Annotated Constitution of the Australian Commonwealth, pp. 512-513. There a Canadian case is quoted in which Strong, C. J. said:

It is established by 7 A C 829 (9) that the Dominion being invested with authority by S. 91 to make laws for the peace, order and good government of Canada, may pass what are denominated local option laws. But as I understand that decision, such Dominion laws must be general laws not limited to a particular Province.

And it has been further noted there that in (1896) A C 348 (11) Lord Watson observed that they need not be general laws, not limited to a particular Province, but they must be for the benefit of the whole of the Provinces, and Lord Herschell remarked that it would be too narrow to say that such laws must extend to every Province, but on the other hand they must not be local legislation in a particular Province. In our opinion, this contention of Mr. Das as will presently be seen that

any matter which, though falling within a central subject is declared by the Governor-General in Council to be of a merely local or private nature within the Province

is a provincial subject (Sch. 1, Devolution Rules, Part 2, Item No. 51) and so a subject on which the provincial legislature may legislate. There is nothing in the description of this item to suggest that the words 'local' and 'private' as used in this item should have a meaning only co-extensive with the entirety of the province of a meaning which involves such idea as of national interest and importance extending over the whole of the province and not merely over a part of it. The local legislature is fully competent to legislate on the subject for the peace and good government of the territories "for the time being constituting that pro-

10. Citizens Insurance Co. v. Passons, (1881) 7 A C 96=51 L J P C 11=45 L T 721.

11. Attorney-General for Ontario v. Attorney-General for the Dominions, (1896) A C 348=65 L J P C 26=74 L T 583.

12. Attorney-General for Canada v. Attorney-General for British Columbia, (1930) A C 97.

13. In re the Regulation and Control of Aeronautics in Canada, (1932) A C 54=146 L T 76=101 L J P C 1=75 S J 796=48 T L R 18.

vince": vide S. 80-A (1) of the Act. The case in (1893) A C 339 (5), which is an authority for the proposition that under the words "peace, order and good government of New Zealand" legislation decreeing a concrete case could legitimately be passed, has already been cited.

The next contention presented by Mr. Das is a more weighty one and deserves very careful consideration. For the purposes of this contention it makes no difference whether the first two sub-sections of S. 4 of the Act, are taken aloof from the rest of the Act or the whole of the Act is taken together. The contention, broadly stated, is that the Act is a piece of legislation on a subject which the Assam legislature had no power to deal with. With regard to legislation dealing with private matters we have been referred to several enactments. One of these is the Murshidabad Act (15 of 1891), but Mr. Das has contended that it is an Act of the legislature and that the Indian legislature is competent to make any law and so a law such as the Act deals with. Another is the Punjab Kalra Estate Act, 1932, which was passed by the Punjab Legislature with the sanction of the Governor-General under S. 80-A (3), Government of India Act; and Mr. Das's contention is that it is equally ultra vires, if it was passed in circumstances similar to those under which the Bijni Succession Act was passed. The several steps in the process of reasoning on which this contention is based have to be stated with precision. First: S. 80-A (1), Government of India Act, says: "The local legislature of any province has powers, subject to the provisions of this Act, to make laws" etc., and the expression "subject to the provision of this Act" means subject to the classification of subjects into 'Central' and 'Provincial' as enumerated in Sch. 1 of the Devolution Rules framed under S. 45-A of the Act.

Second: the subject with which this legislation is concerned rightly falls under item 16 or item 47 of Central Subjects and can become a provincial subject only if a declaration is made by the Governor-General in Council to the effect that it is of a merely local or private nature within the province so as to come under Item No. 51 of the Provincial Subjects, but in present case admittedly there was no such declaration; as the subject remained

a Central subject the Provincial legislature had no authority to legislate on it. Third: The legislation purports to have been made with the previous sanction of the Governor-General in accordance with sub-s. (3) of S. 80-A, but that sub-section does not confer a power on the provincial legislature to legislate on a Central Subject but only imposes on it a disability. Fourth: Cl.(e) of the said sub-section speaks of "regulating a Central Subject" which only means this: that if there is a legislation on a Central Subject by the Indian legislature, and if a provincial legislature acting within its own field of legislation on a Provincial Subject, finds it necessary to impinge upon that legislation of the Indian legislature, it may do so but not without the previous sanction of the Governor-General under that sub-section; and in any event it does not mean that a provincial legislature can make an original law in respect of a Central Subject with the previous sanction of the Governor-General. If the reasoning be correct it is obvious that the Assam Legislature in enacting, only with the previous sanction of the Governor-General under S. 80-A (3), this piece of original legislation relating to a subject which is admittedly a Central Subject acted ultra vires its powers.

As regards the first of these points, it cannot be contended that the expression "subject to the provisions of this Act" means only subject to Sch. 1 of the Devolution Rules in which the Central and Provincial Subjects are classified in two parts: it must mean subject to all the provisions contained in the Act itself and the rules framed under the authority of the Act as well as the schedules which form a part of the rules. That being so, sub-s. (1) of S. 80-A would mean that the power which is conferred thereby on the provincial legislature and the power so conferred is otherwise unrestricted and unconditional, is subject to the rest of the Act including sub-ss. (2), (3) and (4) of S. 80-A itself and to the rules, including amongst others the Devolution Rules framed under S. 45-A and S. 129-A of the Act, and to Sch. 1 which is a part of R. 3 of the said Devolution Rules. These Devolution Rules appear to have been framed by the Governor-General in Council with the sanction of the Secretary of State in Council and to have received the approval of both Houses of Parliament before they were then notified. The power

as already stated, is expressed in very wide terms, not restricted or conditioned except as "subject to the provisions of this Act." Under S. 45-A rules being framed classifying the subjects they fall under two heads "Central subjects" and "Provincial subjects" for the purpose of distinguishing the functions of the Government of India and the Indian Legislature from Local Governments and local legislatures. If the other sub-sections of S. 80-A were not there then sub-s. (1) being subject to S. 45-A and the classification which the rules framed thereunder have made would perhaps have enabled the provincial legislature to legislate on provincial subjects only, though it must be admitted that there is anything expressly stated in the Act which would show that such would be the position. But the power given by sub-s. (1) of S. 80-A is also subject to sub-ss. (2), (3) and (4). Now, firstly, in respect of any legislation within its exclusive field if such legislation affects any Act of Parliament the provincial legislature has no power to make it: sub-s. (4). Here then is a further curtailment of the power left to it after being subject to classification made by the rules framed under S. 45-A, when it is a matter of repealing or altering as to the particular province any law made by any authority in British India other than the legislature of that province, that provincial legislature may repeal or alter such law subject to the previous sanction of the Governor-General: sub-s. (2). Here the law to be repealed or altered may be either on a central subject or on a provincial subject and may be an enactment of the Indian legislature or of any other provincial legislature.

Sub-s. (2) speaks of any law, "any authority," and is not controlled either by sub-s. (1) or by S. 45-A or the rules and classification thereunder. On the other hand sub-s. (1) being subject to sub-s. (2) the result is that notwithstanding the curtailment of the power given by sub-s. (1), by reason of the classification, the provincial legislature is entitled to travel beyond its exclusive field. If the fact be that sub-s. (2) is not controlled by sub-s. (1) a fact which cannot possibly be controverted we do not see any reason why it should be presumed that the intention of the legislature was any different in respect of sub-

s. (3) and that that sub-section should be regarded as controlled by sub-s. (1). On the other hand it seems to us clear that just as it is the case with sub-s. (2), sub-s. (3) also reserves to sub-s. (1) a further instalment of powers notwithstanding the curtailment the latter has undergone by reason of the classification aforesaid.

The result, in our opinion, is that sub-s. (3) should be interpreted as meaning that the local legislature of a province if it makes or takes into consideration any law "(e) regulating a Central subject," it may not do so without the previous sanction of the Governor-General. In other words that it may do so with such previous sanction. In our judgment the expression "subject to the provisions of the Act" should be understood in the sense indicated above and not as Mr. Das has contended for. We are confirmed in the view that we take of the interpretation of sub-s. (3), S. 80-A on a reference to the rules framed under that sub-section which, as already stated, are always framed by the Governor-General in Council with the sanction of the Secretary of State in Council and the approval of both Houses of Parliament, as some of these rules enable the provincial legislatures to deal with subjects, some of which are central subjects.

So far as point 2 is concerned it may be premised that the subject matter of the legislation falls either under item 16 or item 47. Item 16 is "civil law, including laws regarding status, property, civil rights and liabilities and civil procedure." The subject, concerning, as it does, the succession to the Bijni Raj, comes well under 'status,' 'property' or 'civil rights'. But whether it does so or not it does not matter, for there is item 47, the residuary item: "all other matters not included among provincial subjects under Part 2 of this schedule." Admittedly, there has been no declaration bringing it under item 51, part 2. The scheme of the classification is that all subjects remain central subjects unless specifically scheduled in Part 2 or taken into that part by declaration. This, it may be noted is a cardinal point of distinction between the classification of subjects under the Government of India Act and such as it is under the Federation Act to which reference has already been made. The subject, therefore, is a central subject; and this legislation has been

made on that footing, sanction under S. 80-A (3) having been obtained presumably, as the case was taken to fall within Cl. (e) of that section which speaks of "regulating any central subject." One branch of Mr. Das's argument was that no central subject can at all be dealt with by a provincial legislature having regard to the classification of the subjects in the schedule. This argument we have already dealt with. Another branch of his argument was that if there was a declaration such as is referred to in item 51 of Part 2 of the schedule, and if after such declaration legislation is undertaken by a provincial legislature, that would be a case where the provincial legislature would be legislating on a central subject; and that the sanction under S. 80-A (3) may have been obtained on an erroneous supposition that there was such a declaration when, in fact, there was none. To this branch of his argument there are two answers. One is that if clause (e) be held to apply to such cases, then the Governor-General in Council will first have to declare the matter "to be of a merely local or private nature within the province", and again before the law is to be made or taken into consideration, the Governor-General will have to grant sanction, a procedure which savours of unnecessary duplication. This answer, however, is not conclusive, for justification of such a double procedure is not altogether inconceivable. But the other answer is that afforded by R. 3, sub-r. (2) of the Devolution Rules which says:

Any matter which is included in the list of provincial subjects set out in Part 2 of Sch. 1, shall to the extent of such inclusion be excluded from any central subject of which, but for such inclusion, it would form part.

By this rule, therefore, the matter to which the declaration would relate would at once move out of part 1 and get into part 2 and become a provincial subject, never to step out again and resume its character as a central subject. After the declaration, therefore, there would be no room for the subject to come in under Cl. (e), sub-s. (3) of S. 80-A under the words "regulating any central subject."

To take up the fourth point before the third, Mr. Das's contention is based upon the meaning he seeks to attach to the word "regulating in Cl. (e) of S. 80-A (3). He has argued that the word 'regulate' does not mean 'enact' but means 'adjust'.

The Court below has illustrated this contention as being of this nature. If there is a legislation by the Indian Legislature on a central subject, a provincial legislature in regulating that central subject may only frame rules for adjusting that legislation to suit the particular province. Such an extreme position has been repudiated by Mr. Das, and rightly enough, for the words of the sub-section are "make any law regulating a central subject." He contends nevertheless that regulating, means 'adjusting,' so that if there is a legislation by the Indian legislature on a central subject that legislation may be varied by the provincial legislature in order to adjust it to the conditions and exigencies of the particular province, or, in other words, according to local conditions and needs of that province. It should be noticed that such a limited meaning would be inapplicable to the word, as used at other places in the Act, e. g. in S. 67. Sub-s. (2) (i) read with the context in that provision, reads:

It shall not be lawful . . . to introduce at any meeting of "either chamber of the Indian Legislature . . . any measure . . . regulating any provincial subject or any part of a provincial" subject which has not been declared by rules under this Act to be subject to legislation by the Indian Legislature.

It is clear that when the Indian Legislature makes an enactment, such enactment can hardly, if ever, be an enactment adjusting a pre-existing provincial legislation to the whole of British India according to the local conditions and needs thereof. Mr. Das has relied for this meaning upon the decision of this Court in 20 C W N 370 (14). We are unable to see anything in that decision which supports such a meaning. On the other hand in that case the Oxford Dictionary meaning of 'regulate' was referred to:

To control govern, direct by rules regulations; to subject to guidance or restrictions; to adapt to circumstances and surroundings.

To control by legislation, to subject to guidance by creating a law, are meanings which would be covered by this definition; and we see no reason why such a meaning should not be given. A subject on which there is no law is a subject which is at large and if a law is enacted in order to control or guide it, that law regulates

14. Mathuramohan Saha v. Ram Kumar Saha, 1916 Cal 136=35 I C 305=43 Cal 790=23 C L J 26=20 C W N 370.

the subject. There are Regulations, which have from time to time been enacted in respect of virgin subjects, and they regulate those subjects notwithstanding that there was no pre-existing legislation in respect of them. Mr. Das has asked us to look into the two cases which were referred to by Mukherjee, J. in that case: (1896) A C 188 (15) and (1896) A C 348 (11). The former case is an authority for the proposition that a power to regulate need not necessarily include a power to prevent or prohibit; and the latter that a power to regulate assumes the conservation of the thing which is made the subject of the regulation. The cases, in our opinion, do not help Mr. Das in any way. Point 3 taken is that sub-s. (3) of S. 80-A, in the form in which it is expressed, only creates a disability and does not mean to confer a power. It is certainly correct to say that taking the subsection out of the context, that is to say without reading it along with sub-s. (1) which is controlled by it, it is difficult to find in it words which would indicate that any power was being conferred by it. But, as we have pointed out, it has to be read with sub-s. (1). Sub-s. (1), as already observed, if its words "subject to the provisions of the Act" are omitted, confers the widest possible power; and if being subject to S. 45-A that power has been curtailed, that curtailment is vitally affected by sub-s. (3). There is certainly a marked difference in the phraseology adopted in sub-s. (3) as compared with that in sub-s. (2). In the former the words are:

The local legislature of any province may not without the sanction of the Governor-General make or take into consideration, any law, etc., in the latter the words are:

The local legislature of any province may, subject to the provisions of the sub-section next following repeal or alter as to that province any law, etc.

Why then is this difference? Dr. Basak has treated us to a very interesting discourse on this matter and we acknowledge the great assistance that we have derived from his laborious research into the history of the legislation concerning the sub-sections. As regards an investigation into the history of an enactment there are certain cardinal rules to be observed when such investigation is undertaken for construing a statute. Three cases will be

sufficient for the purpose. In interpreting a statute the proper course in the first instance is to examine the language of the statute and to ask what is its natural meaning uninfluenced by the considerations derived from the previous state of the law and not to start by inquiring how the law previously stood and then, assuming that it was probably intended to have it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view: per Lord Herschell in (1891) A C 107 (16) at p. 144. It is useless to enter into an enquiry with regard to the history of an enactment and any supposed defect in the former legislation on the subject which it was intended to cure, in cases where the words of the enactment are clear. It is only material to enter into such an enquiry where the words of an enactment are ambiguous and capable of two meanings in order to determine which of the two meanings was intended: Per Lord Esher M. R. in (1889) 24 Q B D 213 (17) at pp. 214-215. We have not to do with the history of the words unless the words are doubtful and require historical investigation to explain them. If the words are really and fairly doubtful then according to well-known legal principles and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates: per Coleridge, C. J. in (1881) 7 Q B D 244 (18), at p. 251.

The doubt, which the difference in phraseology to which reference has been made, creates, necessitates an historical investigation, and so long as we do not attack the problem of interpretation at the wrong end we think we are justified in enquiring how the sub-sections found their way into this Act. S. 80-A in its present language was inserted by the Government of India Act 1919, 9 & 10 Geo. V, c. 101. The phraseology of sub-ss. (2) and (3) appearing in S. 80-A is the same as in S. 79, Government of India Act, 1915, 5 & 6 Geo. V, c. 61. If the history of the sub-sections is traced down from the Regulating Act, 1773 (Geo III, c. 63, Ss. 36

16. *Bank of England v. Vallagno*, (1891) A C 107 = 60 L J Q B 145 = 64 L T 353 = 39 W R 657 = 55 J P 676.

17. *Reg. v. Bishop of London*, (1889) 24 Q B D 213 = 58 L J Q B 385.

18. *Reg. v. Most*, (1891) 7 Q B D 244 = 14 Cox C C 583 = 50 L J M C 113 = 44 L T 823 = 29 W R 758 = 45 J P 696.

15. *Municipal Corporation of Toronto v. Vergo*, (1896) A C 188.

and 37), through the Indian Councils Act 1861 (24 & 25 Vic., c. 67, Ss. 42, 43, 44 and 48) and the Indian Councils Act, 1892 (55 & 56 Vic., c. 14, S. 5) it becomes perfectly clear that while the provisions corresponding to sub-s. (3) of S. 80-A always imposed a restriction to the unrestricted power of legislation conferred on the local legislature by the provision corresponding to sub-s. (1), the provision corresponding to sub-s. (2) was originally introduced to confer a power on the provincial legislatures which the provision corresponding to sub-s. (1) which was there was not sufficient to confer. The difference in the phraseology is thus accounted for: when a power was being conferred, the word 'may' was used; when a power already possessed was being curtailed the words 'may not' were used.

The result, in our opinion, is that the several sub-sections of S. 80-A are not to be read as mutually exclusive, but the first is controlled by the other three, the second controls the first and is in its turn controlled by the third, the third controls both the first and the second, and the fourth with which we are not very much concerned here, controls all the others. To adopt Mr. Das's construction of sub-s. (3) as conferring a disability only would be to ignore the expression "without the sanction, etc," an expression which plainly indicates that there is some power reserved somewhere and, in our opinion, that power is contained in sub-s. (1).

The foundation of Mr. Das's arguments in connexion with the question of the competency of the Assam legislature rests on the assumption that the matter of the legislation falling within a subject which admittedly is Central can come within the purview of the jurisdiction of that legislature, only by being declared by the Governor-General-in-Council as being "of a merely local or private nature within the province" and so being brought under item 51, Part 2 of the Schedule of classification. His argument has been adopted by Mr. Gunada Charan Sen and Mr. J. N. Sen with some variations here and there the structure and substance remaining more or less the same. Mr. Gunada Charan Sen has submitted an alternative contention that as the language of item 51, Part 2 of the Schedule, attracts the matter of this legislation, that should be treated as a provincial subject and not a central

subject; and that even if it be conceded that S. 80-A, sub-s. (3), Cl. (e), enables a provincial legislature to legislate on a Central Subject, that power would be of no avail because here the subject was Provincial and not Central. This argument is obviously untenable because unlike, as in the Federation Act, a matter, though it may be of merely local or private nature within the province, does not under the Government of India Act become a Provincial Subject unless there is a declaration by the Governor-General in Council to that effect.

In our judgment a declaration contemplated in item 51, Part 2 of the Schedule of classification is not the only way in which a provincial legislature is enabled to deal with a Central Subject, and we are of opinion that a Central Subject may be legislated upon by such legislature under S. 80-A (3), Government of India Act, as was done in this case. We are also inclined, as at present advised, to agree with Mr. Bose that these two are not the only ways in which a Central Subject may be handled by a provincial legislature; but of such other procedure as may be available, it is not necessary for us to go into details. In agreement with the Court below therefore we hold that the Act was intra vires the Assam legislature. We next come to the second question, namely as to the effect of the Act upon the two suits now before us on appeal. In dealing with the second question in the Court below a very large number of authorities were cited on behalf of the parties and have been noticed by the learned Judge in his judgment. Many of them are on principles governing the construction of statutes and their effects. About these principles there is no doubt whatsoever at the present day and accordingly they have not been disputed before us. This relieves us of the necessity of discussing some of these authorities. The points however which have been stressed upon before us on behalf of the parties as favouring their respective contentions and such authorities as may have some bearing on those points will only have to be considered. One important contention that has been urged by Mr. Das is that the Act is a private Act as distinguished from a public Act. On this head his argument, broadly speaking, is that the Act being so regarded, its construction and effect must be judged on the lines on

which they are judged in English Courts. Blackstone, J., while saying that:

Law in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational.

and defining Municipal Law as

a rule of civil conduct prescribed by the supreme power in a state,

has classified statutes according to their several kinds in the manner following:

Statutes are either general or special, public or private. A general or public Act is a universal rule that regards the whole community; and of this the Courts of law are bound to take notice judicially and ex officio, without the statute being particularly pleaded or formally set forth by the party who claims an advantage under it. Special or private Acts are rather exceptions than rules being those which only operate upon particular persons and private concerns, such as the Romans entitled *senatus decreta* in contradistinction to the *senatus consulta* which regarded the whole community; and of these which are not promulgated with the same notoriety as the former, the Judges are not bound to take notice, unless they be formally shown and pleaded.

It should however be mentioned here that for the purposes of judicial notice all Acts passed after 1850 are decreed public Acts unless the contrary is declared therein. (Interpretation Act, 1889, 52 & 53, Vic., c. 63, S. 9.) The *senatus consulta*, in form, had nothing of the imperative of a *lex* about it; the presiding consuls or the Emperor submitted their proposals and the senate approved of them. These however were the principal statutory factors of the *jus novum* law that differed widely from the principles of the old *jus civile*: see Muirhead's *Law of Rome*, 3rd Edn., p. 278. About the end of the first century they had superseded *legis*, but just after the close of the second century they were in their turn superseded by the Imperial Constitution: see Hunter's *Roman Law*, 2nd Edn., p. 75. The private statutes lay down no general rule, but deal with a particular case, and would, as observed by Maitland in his *Constitutional History of England* in a passage already quoted, be classed by jurists and political philosophers rather as *privilegia* than as *legis*:

All legislative proposals which are submitted to Parliament are divided into two classes and are described either as public or private Bills. Parliament deals with each of these classes in a different manner. A public Bill may be introduced by any Member in either House, but a private Bill may only be laid before Parliament upon a petition presented by the parties interested; and the procedure which is adopted to pass a public Bill into law is not the same

in all respects as that which is adopted with regard to a private Bill. The boundary line which divides the subjects which should be submitted to Parliament by means of a public Bill and those which should be submitted to it by means of a private Bill 'is extremely difficult to draw, but as a general rule . . . any measure which affects only private interests or refers to a particular locality should be introduced as a private Bill. . . . ' There are however many Bills which, although introduced into Parliament as public bills are found to affect private interests. Bills of this kind are subject partly to the rules of procedure which govern private Bills and partly to those which govern public Bills and are known as hybrid Bills: Halsbury's *Laws of England*, Vol. 21, pp. 702-703, paragraphs 1285-1288.

Private Bills, although they deal with almost every class of subjects, are divided into two groups, namely: (1) Local Bills, which are commonly referred to as private Bills, are Bills promoted by particular corporations, companies and other parties who require parliamentary powers for the object or undertaking which they have in view, and therefore include Bills in relation to specified railways, harbours, piers, roads or tramways, supply of gas, water or electricity improvements, sanitary or police matters in local districts. A general Bill dealing with any of these subjects could be a public Bill; but where it is desired to apply or extend the general law in the case of a locality or to give exemption from it, this is done by a private Bill. (2) Personal Bills which affect only the interests or property of the individuals to which they relate. Ibid pp. 727-728, para. 1353.

The procedure that is adopted with regard to private Bills is described in great detail in Halsbury's *Laws of England*, Vol. 21, p. 729, et seq, para. 1356, onwards. In May's *Parliament Practice*, pp. 686 to 689, it is clearly brought out how in passing public Bills Parliament acts strictly in its legislative capacity; while in passing private Bills it still exercises its legislative functions but its proceedings partake of a judicial character. The following extract may conveniently be quoted to illustrate the position:

The persons whose private interests are to be promoted appear as suitors for the Bill, while those who apprehend injury are admitted as adverse parties in the suit. Many of the formalities of justice are maintained; various conditions are required to be observed, and their observance to be strictly proved; and if the parties do not sustain the Bill in its progress by following every regulation and form prescribed, it is not forwarded by the House before which it is pending. If they abandon it, and no other parties undertake its support the Bill is lost, however sensible the House may be of its value. The analogy which all these circumstances bear to the proceedings of a Court of Justice is further supported by fees which is required of every party promoting or opposing private Bill, or petitioning or opposing any particular provision. . . . The union of the judicial and legislative functions is not confined to the

forms of procedure but is an important principle in the inquiries and decision of Parliament, upon the merits of private Bills. 'As a Court it inquires into and adjudicates upon the interests of private parties, as a legislature it is watchful over the interests of the public.'

The analogy to proceedings in Court is so complete that even parties are sometimes restrained by prohibitory injunctions from promoting or opposing a private Bill or compelled by mandatory injunction to apply for a private Bill and in good faith to promote it.

As regards the classification of Parliamentary statutes at different periods the history from the earliest times to the present day is given in Crais on Statute Law, pp. 56-57: see also, per Parks, B., in (1846) 15 M & W 244 (19) and per Coleridge, J. in (1856) 25 L J Ex 254 (20). The words "of a merely local or private nature within the province" appearing in item 51 of Part 2 of the classification schedule under the Government of India Act have unquestionably some relations to the 'Local' and 'personal' Bills which are the two classes of private Bills referred to above. But merely because an Act is a local and personal Act, as being confined to certain local limits and as affecting the status of a particular description of persons only, it would not cease to be a public act, if the Act is the product of the legislature in its legislative capacity and is not the result of a procedure in which the legislature is called upon to enact a law embodying a conclusion arrived at by it judicially or upon the basis of a contract as between the rival parties for whose benefit the law is intended. The substance of the enactment may be of a local and personal nature regarded from some points of view and in that way the enactment may partake of some of the characteristics of a private Act under Parliamentary legislation; but if the procedure which is resorted to in the matter of enactment of private Acts by Parliament be, as it is, unknown to the Indian and Provincial Legislatures, it is not at all apparent why the present Act, even though it may be regarded as local and personal in some of its aspects, is any the less a public Act than any other piece of legislation in this country. Several decisions bearing on

the rules of interpretation to be adopted as regards private Acts have been cited before us. One is (1844) 5 Hare 415=67 E R 974 (21). In that case Wigram V. C. said:

Where an act of Parliament in express terms or by necessary implication empowers an individual or individuals to take or interfere with the property or rights of another, and upon a sound construction of the Act it appears to the Court that such was the intention of the legislature in such cases it may well be the duty of the Court, whose province is to declare and not to make the law to give effect to the decree of the legislature so expressed. But where an Act of Parliament merely enables an individual or individuals to deal with property of his or their own, for their own benefit, and does not in terms or by necessary implication, empower him or them to take or interfere with the property or rights of others, questions of a very different character arise. Here the distinction between public and private Acts of Parliament becomes materials. By a private Act of Parliament I do not mean merely a private estate's Act. But local and personal as distinguished from general public Acts. Public Acts, it is said in the books, bind all the Queen's subjects. But of private Acts of Parliament, it is said, that they do not bind strangers, unless by express words or necessary implication the intention to affect the rights of strangers is apparent in the Act; and whether the Act is public or private does not depend on any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act) but upon the nature and substance of the case. For these general propositions it is not necessary I should do more than refer to 8 Co Rep 136 (b)=77 E R 681 (22) and (1671) 1 Ventris 175=85 E R 119 (23). That the defendants' Act in this case is a local and personal and in that sense a private Act of Parliament does not admit of dispute. It is local as being confined to a particular place; and personal as being expressed to be for the benefit of the individuals named in it, and not for the benefit of all Her Majesty's subjects: however all may incidentally be benefited by that which improves this particular district. (His Honour read the title and preamble of the Act.) Here we have that which in many of the reported cases is stated to be the distinguishing feature of a private Act of Parliament. It states that the persons intended to be benefited by the Act are the persons having personal interest in the property which is the purpose of the Act to improve; and the Act then appoints Commissioners, empowers them to enclose and contains the drainage clause upon which the defendants more especially found the right which they have insisted upon in this suit. The plaintiff is a stranger to the Act upon which the defendants are proceeding.

19. Richards v. Easto, (1846) 15 M & W 244=3 D & L 515=15 L J Ex 163=10 Jur 695.

20. Shepherd v. Sharp, (1856) 25 L J Ex 254=1 H & N 115=2 Jur N S 617=4 W R 570.

21. Dawson v. Paver, (1844) 5 Hare 415=4 Rail cases 81=16 L J Ch 274=11 Jur 766=67 E R 974.

22. Sir Francis Barrington's Case, (1616) 8 Co Rep 136 (b)=77 E R 681.

23. Lucy v. Levington, (1671) 1 Ventris 175=85 E R 119.

It may be observed in this connexion that in (1893) 69 L T 440 (24) on appeal (1893) 2 Q B 454 (25) also it has been held that the list of what are local and personal Acts is the substance and character of the Acts themselves and not the mere form or description. It is apparent that the matter is a matter of substance and not of form or technicality, and if from the general tenor of the Act it appears that it purports to determine the status of individuals not merely inter se but also as governing their relations with others (an element which is obviously present in the Bijni Succession Act) the Act can hardly be regarded as a private Act in the sense in which the term is understood in Parliamentary legislation. This is a point of difference arising upon the substance of the enactment. It will be seen that Wigram, V. C., in the case aforesaid observed :

The plaintiff is a stranger to the Act upon which the defendants are proceeding.

To understand the exact significance of this observation it is necessary to look into the facts, because in that case no question of procedure as regards the passing of a private Act was referred to and the word "stranger" therefore, was not used for the purpose of signifying that the plaintiff was not a contesting party in the legislation before the Parliament. The word was there used as meaning a person whose rights were not intended to be affected by the provisions of the Act. It is true to say that everybody is in some sense bound by a statute even though it be a private Act. As was explained by Hale, C. J. in (1671) 1 Ventris 175 (23):

Every man is so far party to a private Act of Parliament as not to gainsay it, but not so as to give up his interest; it is the great question in 8 Co Rep 136 (b) (22). The matter of the Act there decides it to be between the foresters and the proprietors of the soil; and there it shall not extend to the commoners to take away their common. Suppose an Act says, whereas in a controversy concerning land between A and B it is enacted that A shall enjoy it, this does not bind others, though there be no saving clause because it was only intended to end the difference between the two.

In 5 Hare 415 (21) the plaintiff was said to be stranger because the Act empowered certain persons to deal with

their own property in a certain place and defined by a certain description and there were no words which either expressly or by necessary implication imported that the legislature intended to affect the rights of other persons in other property, and the plaintiff fell within the last mentioned category. As Wigram, V. C. pointed out in the case aforesaid :

In private Acts in general the legislature does nothing more than enable persons to enter into a contract who could not otherwise enter into it; and the persons who are parties to the Act are expressly named in it [quoting from the judgment of Lord Chief Baron McDonald in 4 Gwill 1387 (26)]. (Then referring to certain other cases) But these cases leave untouched the proposition that an Act of Parliament, not being a public Act, will not bind the right of strangers unless by express words or necessary implication the intention to do so can be collected. It is a question of construction.

The importance of the question whether the Act is a public Act or a private Act consists only in this that if it is the latter then, though there be no saving clause, the rights of third parties will not be regarded as affected by necessary implication: See Craies on Statute Law, p. 467, note (O), referring to Co. Litt, p. 25, note 16. To illustrate this rule of construction several other cases have been cited, (1859) 6 C B N S 1=141 E R 350 (27), in which Cockburn, C. J. said :

We have been reminded that a private Act could never bind persons who were not parties to the Act. Provisions, however general in their terms, could not be held to affect the rights of parties who were not before the Parliament and whose rights are not intended to be affected.

In (1885) 15 Q B D 597 (28), Lord Esher said :

In the case of a private Act which is obtained by persons for their own benefit you construe more strictly provisions which they allege to be for their benefit, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain is plainly stated in it.

In (1789) 2 T R 701 (29) at p. 705, Lord Kenyon observed that :

Private Acts are not to be construed in precisely the same way as public Acts, but rather like a conveyance or contract according to the intention of the parties.

24. R. v. London County Council, (1893) 69 L T 440.

25. Reg. v. London County Council, (1893) 2 Q B 454=63 L J Q B 4=4 R 529=42 W R 1=69 L T 580.

26. Riddle v. White, 4 Gwill 1387.

27. Shrewsbury v. Scott, (1859) 6 C B N S 1=29 L J C P 34=6 Jur N S 452=141 E R 350.

28. Altrincham Union v. Chasire Lines Committee, (1885) 15 Q B D 597=50 J P 85.

29. Townley v. Gibson, (1789) 2 T R 701.

and Lord Wensleydale said in (1860) 8 H L C 348 (30), "as an agreement." So also Lord Halsbury, L. C. said in (1892) A C 498 (31) that the particular provisions may be regarded as words of contract to which the legislature has given its sanction rather than the words of the legislature itself. In (1909) A C 1 (32), Lord Loreburn, L. C. said :

The Courts will take every means of defeating an attempt by a private Act to take away the right either of the Crown or of persons who have not been brought in. And I desire to say for myself that I am not satisfied with regard to these private Acts of Parliament that there are sufficient means either of securing accurate drafting or of safeguarding the rights of persons other than those who are concerned in the private legislation.

The ratio of these decisions, on which Mr. Das has relied, is based upon the distinction in procedure that obtains for getting a private Act passed and inasmuch as the procedure is entirely foreign to the Indian legislatures, central as well as provincial, the principles of construction enunciated in them can hardly apply to the Bijni Succession Act, even though that Act in some of its features may be taken to resemble a private Act. On the other hand, the learned Advocate-General has relied upon several cases which have laid down that even as regards Acts of this nature the enactments contained in them must be given the fullest effect when the necessary implication of the enactment justifies the same, e. g. (1907) 1 Ch 50 (33). Mr. Das has drawn our attention to the compromise in the two suits, Nos. 255 of 1919 and 51 of 1922, in order to establish that the Bijni Succession Act, or at least S. 4 thereof, enacts what the parties, or at least two of them, namely, Raja Jogendra and Bhairabendra, agreed amongst themselves. And he has contended, that call it a private Act or a public Act, if the position be that an enactment merely declares what is a matter of agreement as between them the

declaration can bind nobody but themselves. This principle has been affirmed in several cases on private Acts to which we have already referred. Now the Subordinate Judge has summarised the net result of the compromise in these words:

By the compromise Raja Jogendra Narain was acknowledged to be proprietor and holder of the Bijni Raj estate and he was to continue to own and hold the estate for the term of his natural life, and after his death the plaintiff in Suit No. 225 of 1919, Bhairabendra, was to become the proprietor of the Raj estate his interest being vested estate in remainder in it from the time of the compromise. Bhairabendra got besides Rs. 1,50,000 from Raja Jogendra Narain. The plaintiff in Suit No. 51 of 1922, Sourendra, gave up and abandoned all claims to the Raj, on getting five lacs of rupees from the Raja. Sourendra's sister was married to Bhairabendra.

This summary is substantially correct; except that to be more accurate it may be said that while the Raja Jogendra Narain was to be the proprietor of the Bijni Raj for life, Bhairabendra was to be absolute owner, the interest of Bhairabendra being a vested interest in the remainder in the sense that his sons, grandsons, and so on, in the eldest male line (lineal primogeniture) and failing them his nearest and eldest agnatic relations (ordinary primogeniture) would succeed to the Raj as an impartible Raj. The whole of the Act, with the exception of Ss. 3 and 4, is clearly outside the terms of the compromise. S. 3 declared the impartibility of the Raj, as the compromise also intended. Sub-s. (1), S. 4 not only declares Raja Jogendra as the holder of the Raj as was provided for by the compromise but also stated, "with title dating from his nomination to the succession made by Rani Abhoyeswari Debi on 28th September 1895," a statement the effect of which is not to be found anywhere in the compromise. In sub-s. (2), S. 4, Bhairabendra's title as the holder of the Raj after the death of Raja Jogendra is affirmed; this is what the compromise intended. But in that sub-section it is also provided that, in case Bhairabendra dies, his successor, according to lineal or ordinary primogeniture, as is also intended by the compromise, is to be the person who would, in the opinion of the Governor of Assam, be such heir, a condition which is not in the compromise but which perhaps does not after all signify a substantial deviation. But S. (3) deviates from the compromise altogether; for after there is one succession on Raja Jogendra's

80. Rowbotham v. Wilson, (1860) 8 H L C 348= 30 L J Q B 49=6 Jur N S 695=2 L T N S 642.

81. Herron v. The Rathmines and Rathgar Improvement Commissioners, (1892) A C 498= 67 L T 658.

82. Great Northern Piccadily and Brompton Ry. Co. v. Attorney-General, (1909) A C 1= 78 L J K B 185=98 L T 731=52 S J 411= 24 T L R 506.

83. In re Wilton's Settled Estate, (1907) 1 Ch 50=76 L J Ch 37=96 L T 193=23 T L R 64=51 S J 67.

death the right of Bhairabendra's heirs according to lineal or ordinary primogeniture, such as is reserved by the compromise, is entirely taken away by the Act and such succession is thenceforward to be governed by nomination or appointment.

The points of similarity between the compromise and the provision contained in S. 4 of the Act are so few while the divergence between them is so marked and wide, that it is not possible to presume that the section is merely an embodiment of an agreement, such as forms the essence of a private legislation. It should be remembered that at the date when the Bill was introduced there was in existence not merely the compromise, but also a judgment in a contested suit, namely No. 51 of 1922, in which, as it is said, various questions relating to succession to the Bijni Raj were discussed and adjudicated upon. It is possible and indeed very probable that the compromise was known to the legislature. But the supposition that it was on the footing of the compromise that the Legislature proceeded to make the declarations contained in sub-ss. (1) and (2) of S. 4, which are in their form declarations in rem is not founded on any tangible materials, either in the shape of express words or of recitals of circumstances or anything else, such as are to be found in private Acts. Indeed, it is quite possible and not at all unreasonable to imagine that upon such materials as were before it the legislature was satisfied that according to the customary law of succession to the Bijni Raj which it was laying down in the other provisions of the Act, Raja Jogendra, having had the nomination from Rani Abhoyeswari, was entitled to continue as the holder of the Raj in preference to all others and that Raja Jogendra, having consented to Bhairabendra coming in after his lifetime, had also nominated him as his successor, so that Bhairabendra under the said law was entitled to the declaration that was being made in his favour.

The only part of the Act by which Mr. Das's client, the plaintiff in suit No. 84, is hit is S. 4, because he has set up a title anterior to the date on which the Act came into being, a date on which the suit was pending. And as the declaration made in sub-s. (2), S. 4 will take practical effect only on the death of Raja

Jogendra it will not be incorrect to say that the said plaintiff is more immediately hit by sub-s. (1) of that section which says :

Raja Jogendra Narain Bhup of Bijni is hereby declared and shall during his lifetime be the holder of the Raj with title dating from his nomination to the succession made by Rani Abhoyeswari on 28th October 1895.

To get over the effect of this declaration Mr. Das has advanced several arguments. It has been argued in the first place that the word prevention in the expression "with a view to the prevention of dispute" appearing in the preamble implies futurity, and that therefore the enactment should be read as intended to apply to such disputes as may in future arise, the disputes which were existing at the time when the Act came into being not being intended to be governed by it. For the meaning of the word 'prevent' reference has been made to the case in (1882) 8 Q B D 600 (34) where in a charter party the words were "accidents preventing the loading" and Pollock, J. made certain observations indicating that the strict grammatical and original meaning of the word "prevent" is averting something which is to come in future; but in the same judgment there are observations to the effect that the word in popular language means stopping something either before it has commenced or while it is going on. Disputes which had already commenced or were going on would therefore equally come within the purview of the word. Besides there are also the words, "for the preservation of the Raj," an expression which indicates a continuity in respect of a state of things existing from before and therefore the legislation may well be taken to have been intended to apply to disputes which had already commenced and which threatened the existence of the Raj, as being a legislation which would put an end to such disputes. Secondly, it has been pointed out that even though the portion of sub-s. (i), S. 4 which runs in these words :

Raja Jogendra Narain Bhup of Bijni is hereby declared and shall during his lifetime be the holder of the Raj

stands as a declaration of his status for the entire period commencing from the point of time when the declaration is made and ending with the termination of his life, the plaintiff in suit No. 84 is not

affected because his title is a title which was previously acquired. And that therefore the words which really affect him are the words

with title dating from the nomination to the succession made by Rani Abhoyeswari Debi on 28th September 1895,

words which speak of a continuity of title from the date aforesaid up to the present day that there is no room left for the title of anybody else. To get over the effect of these words it is said that they are no part of the enactment, but are mere recitals in the nature of a preamble, the correctness of which it is open to a party to challenge against whom they are sought to be used. It is pointed out that in many statutes there are subsidiary preambles other than the preamble to the statute as a whole; the subsidiary preambles being in the nature of recitals of facts prefacing some particular section or sections, and that the offending words referred to above are of that character. Several cases have been referred to in this connexion (1901) 1 Ch 842 (35) the case of a private Act in which Cozens Hardy, J. said that the recital though admissible against persons claiming under the Act is not conclusive and the Court is at liberty to consider the fact or the law to be different from the statement in the recital. 1 El and Bl 501=22 L J M C 89 (36) in which Lord Campbell made similar observations and also remarked that the recital in a private Act is merely evidence and not conclusive as an estoppel: (1844) 12 Cl & F 295 (37), in which it was held that the recital in a private Act was very strong evidence, for it is the well-known practice of the Parliament not to allow such recitals to be inserted unless their truth was judicially established. It has also been argued that though a recital in an Act of Parliament may be used as evidence it is not conclusive evidence and it is liable to be rebutted: see Craies on Statute Law, p. 492. As instances in which such recitals were distinguished from enactments, the cases in (1874) 1 I A 178 (38) and 2 Bom 19 (39) have been

35. *Mettens v. Hill*, (1901) 1 Ch 842.

36. *R. v. Haughton*, (1858) 1 El & Bl 501 = 22 L J M C 89=17 Jur 455=1 W R 165.

37. *Wharton Peerage Claim*, (1844) 12 Cl & F 295.

38. *Brindaban v. Brindaban*, (1874) 1 I A 178 = 13 Beng L R 408=21 W R 824 (P O).

39. *Baban Mayacha v. Nagu Shranucha*, (1877) 2 Bom 19.

cited. On the other hand the learned Advocate-General and Mr. Bose have referred to a number of cases for the purpose of showing the conclusive character of recitals in Acts of Parliament. One of them is (1891) A C 531 (40), in which at p. 549, Lord Halsbury, L. C., said:

That, in fact, the language of an Act of Parliament may be founded on some mistake and that words may be clumsily used I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament, which would be attended with the most serious consequences.

Another case is (1893) A C 104 (41), in which, at p. 123, Lord Hannon said:

This is an absolute statement by the legislature that there was a seigneurie of Mingan. Even if it could be proved that the legislature was deceived, it would not be competent for a Court of law to disregard its enactments. If a mistake has been made the legislature can correct it. The Act of Parliament has declared that there is a seigneurie of Mingan, and that thenceforward its tenure shall be changed into that of frank aleuturier. The Courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination.

A third case is (1876) 4 Ch D 588 (42) which is an authority for the position that with regard to subsidiary recitals the canon of construction is the same, namely that if the enactment part is clear and unambiguous they may not be referred to for the purposes of construction. We do not consider it necessary to deal with these cases in further detail because we are clearly of opinion that there is no foundation for the contention that the words "with title dating back," etc., can be taken apart from the rest of the passage and treated as a mere recital and not as a part of the enactment. Thirdly, Mr. Das has addressed to us some arguments in order to emphasise the distinction between declaratory and remedial Acts. Declaratory statutes are generally

40. *Commissioner for special purpose of Income-tax v. Pamsel*, (1891) A C 531 = 61 L J Q B 265=65 L T 21=55 J P 805.

41. *Labrador Co. v. Queen*, (1893) A C 104 = 67 L T 730.

42. *Bentley v. Rotherham and Kimberworth Local Board of Health*, (1876) 4 Ch D 588 = 46 L J Ch 284.

retrospective in their operation. Blackstone, J. in (1779) 2 Wm 1277=96 E R 751 (43), said:

Declaratory statutes do not prove the law was otherwise before, but rather the reverse.

"A declaratory Act," said Coleridge, C.J. in (1890) 63 L T 705 (44):

means to declare the law, or to declare that which has always been the law, and there having been doubts which have arisen Parliament declares what the law is and enacts that it shall continue what it then is.

But declaratory statutes may be of various kinds. For instance a statute may correct an error in a former statute, and if the two are of the same session of Parliament, the second has relation back to the time when the first one was passed: (1816) 2 Price 381=146 E R 130 (45). It may be explanatory of a former statute; and so there may be cases in which, unless retrospective operation is given, it would fail of its object: see Parke, B., in (1832) 3 B and Ad 465=110 E R 168 (46). There is also abundant authority for holding that if an Act is in its nature a declaratory Act the argument that it must not be construed so as to take away previous rights is not applicable: see (1890) 24 Q B D 557 (47); (1849) 18 L J Ex 332=154 E R 1014 (48). But it has been held that the use of the words "it is declared" in a statute does not necessarily import that the statute is merely declaratory of existing law and, therefore, retrospective; and that the use of the expression "it is declared to introduce new rules of law" is not incorrect and is far from uncommon: (1898) A C 769 (49). In (1898) A C 469 (50), Lord Waston delivering the judgment of the Judicial Committee pointed out that the cases do not lay down an invariable rule and observed as follows:

It does not seem to me probable that the legislature should intend to extinguish by means of retrospective enactment, rights and

interests which might have already vested in a very limited class of persons, consisting so far as appears of one individual, namely the respondent. In such cases their Lordships are of opinion that the rule laid down by Erle, C. J. in 10 C B N S 179 (51) at p. 191 ought to apply. They think that in a case like the present the learned C. J. was right in saying that a retrospective operation ought not to be given to the statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

It will serve no useful purpose to refer to the other cases cited before us in this connexion because here we are able, as we shall presently proceed to show, to distinguish upon the words of the Act itself, the language of the Act in that respect being plain and unambiguous, which of its provisions are retrospective and which prospective, and we have not to rely upon any presumption as to intent relating to its operation to be inferred from the character of the Act being declaratory or otherwise.

Fourthly Mr. Das has cited before us a variety of decisions either laying down general principles of interpretation relating to retrospective operation of statutes or dealing with specific enactments in which such principles have been applied. The rule is so firmly settled that we consider it unnecessary to refer to the cases in detail. Retrospectivity is never presumed and in law is regarded as retrospective only where it is so by express enactment or it is a necessary implication from the language employed by the legislature, the presumption always being against the taking away of vested rights. In Craies on Statute Law it is expressed thus (p. 326):

Before giving such a construction, (meaning a retrospective construction to an Act of Parliament) one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct interpretation. And perhaps no rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only: Referring to (1901) A C 297 (52) at p. 305;

43. Nicol v. Verelet, (1779) 2 Wm 1277=96 E R 751.

44. Jones B. Bennett, (1890) 63 L T 705=6 Asp M C 596.

45. Attorney-General v. Pongett, (1816) 2 Price 381=146 E R 130.

46. R. v. Dursley, (1832) 3 B & Ad 465 = 110 E R 168.

47. Attorney-General v. Theobald, (1890) 24 Q B D 557=62 L T 768=38 W R 527.

48. Attorney General v. Hertford, (1849) 18 L J Ex 332=154 E R 1014=3 Ex 670.

49. Harding v. Queensland Stamp Commissioners, (1898) A C 769 = 67 L J P O 144 = 79 L T 42=14 T L R 488.

50. Young v. Adams, (1898) A C 469=67 L J P O 75=78 L T 506=14 T L R 373.

51. Midland Ry. Co. v. Pye, (1861) 10 C B N S 179 =30 L J O P 314=4 L T 510=9 W R 658.

52. Smith v. Callander (1901) A C 297 = 70 L J P C 53=84 L T 801.

(1890) 15 A C 384 (53) at p. 387 (1679) 2 Mod 310 (54); (1848) 2 Ex 22 (55); (1883) 23 Ch D 690 (56); (1853) 8 Ex 352 (57); (1855) 5 H L C 481 (58); (1866) 1 H L 9 (59); (1884) 12 Q B D 224 (60); (1869) 4 Q B 271 (61); (1875) 1 Ch D 48 (62); (1898) 2 Q B 547 (63).

Some of these cases have been referred to by Mr. Das in his arguments on this part of the case. Other cases cited by him in this connexion are the following: (1886) 31 Ch D 402 (64) at p. 408 in which Bowen, L. J., said:

It seems to me that even in construing an Act which is to a certain extent retrospective and in construing a section, which to a certain extent retrospective, we ought, nevertheless, to bear in mind that maxim (i. e., *omnis nova constitutio futuris formam imponere debet non praeteritis*) as applicable where we reach the line at which the words of the section cease to be plain.

(1878) 3 A C 582 (65), in which Lord O'Hagan said:

Unless there is a clear intention of the legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective;

and Lord Blackburn observed:

Where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument of no effect at all and from which the party was at liberty to depart so long as he pleased binding, I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that it is not the case. (1878) 10 Ch D 518 (66), in which Fry, J., said that the retrospective construction was not to be favoured, unless the legislature clearly and distinctly authorised the doing of something which is physically inconsistent with the existence of an existing right.

53. *Main v. Stark*, (1890) 15 A C 384=59 L J P C 68=63 L T 10.

54. *Gilmore v. Shuter*, (1679) 2 Mod 310.

55. *Moon v. Durden*, (1848) 2 Ex 22 = 12 Jur 138=76 R R 479.

56. *Hickson v. Darlow*, (1883) 23 Ch D 690 = 48 L T 449=31 W R 417.

57. *Waugh v. Middleton*, (1853) 8 Ex 352 = 22 L J Ex 109.

58. *Larpent v. Bibby*, (1855) 5 H L C 481 = 24 L J Q B 301.

59. *William v. Harding*, (1866) 1 H L 9 = 35 L J B K 25=12 Jur N S 657=14 L T 139=14 W R 503.

60. *Hough v. Windus*, (1864) 12 Q B D 224 = 53 L J Q B 165=50 L T 312=32 W R 452.

61. *Ellis v. McCormick*, (1869) 4 Q B 271.

62. *Re Joseph Suche Co Ltd.*, (1875) 1 Ch D 48.

63. *Re Athlumnay*, (1898) 2 Q B 547=67 L J Q B 935=79 L T 303=47 W R 144=5 Manson 322.

64. *Reid v. Reid*, (1886) 31 Ch D 402=55 L J Ch 294=54 L T 100=34 W R 333.

65. *Gardner v. Lucas*, (1878) 3 A C 582.

66. *Mayor etc of Yarmouth v. Simmons*, (1878) 10 Ch D 518.

Mr. Das has also referred to two Indian cases decided by the Judicial Committee both of which dealt with the question of succession of taluqdars under the Oudh Estates Act 1 of 1869. Under S. 10 of that Act the entry of the name of a person in certain lists to be prepared under the Act is conclusive evidence of the fact that he was a taluqdar. In one of these cases, 16 I A 71 (67), their Lordships held that an entry had been improperly made and so declined to give effect to it; a list to be prepared under an enactment is evidently of different probative value from the enactment itself. In the other case, 31 I A 30 (68), all that was decided was that the Act could have no retrospective operation, so as to deprive the successors of a person, who had died before the Act came into existence, of rights which they had already acquired on his death. The learned Advocate-General and Mr. Bose have also referred to some of these cases and also a number of other cases bearing on this question, but it will serve no useful purpose to refer to them as they also lay down the very same principle; the only difference being that in them it was possible to infer by necessary implication an intention to confer retrospective operation. Each of these cases, it may be stated turned on the language and intentment of the particular statute with which it was concerned; and it is obvious that the cases, beyond laying down the general rule, to which we have already referred, do not afford us any assistance in construing the Bijni Succession Act which neither bears any similarity to any of them in its provisions, nor are in any respect *pari materia* with any of them. As the learned Advocate-General has submitted, the authority of a decision whether it is to apply or not to apply to a different statute is of little value. Jessel, M. R., in (1882) 22 Ch D 484 (69), said:

Now as regards *Little's* case (70) of course it is binding on this Court whenever you get the identical circumstances, but it is not binding if you consider it a case of construction; because nothing is better settled than that the construction put upon an instrument by a Court of law or equity is not binding on another Court

67. *Shankar Baksh v. Hardeo Baksh*, (1891) 16 Cal 397=16 I A 71=5 Sar 299 (P C).

68. *Mahammad Abdus Samad v. Kurban Husain*, (1904) 26 All 119=31 I A 30=8 Sar 593 (P C).

69. *In re New Callao*, (1882) 22 Ch D 484=52 L J Ch 283=48 L T 251=31 W R 185.

70. (1878) 8 Ch D 806.

of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language.

Fifthly, Mr. Das has drawn our attention to certain decisions in which the effect of subsequent legislation upon pending suits have been considered. The general law of course is that the law as it existed at the date when an action was commenced must decide the rights of the parties in the suit, unless the legislature expresses a clear intention to vary the relation of litigant parties to each other: the words used must appear to the Court to compel them to give the law an *ex post facto* operation, (1837) 6 A & E 943 (71). Cases illustrative of this general rule (that when the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights) are noted in Maxwell's Interpretation of Statutes 7th Edn., p. 192; 31 L J Ex 230 (72), 31 L J Q B 4 (73), 44 L J Q B 22 (74) and 4 H & N 76 (75). One of the cases relied upon by Mr. Das is 2 Ex 22 (55), which was a case in which the question was whether a new enactment could defeat a pending action for a wager already commenced, that is to say an action for enforcement of a vested right. Parke B, while observing that the general rule is *nova constitutio futuris formam, etc.*, laid down there that that rule which is one of construction only will yield to a sufficiently expressed intention of the legislature that the enactment should have a retrospective operation. He said:

In some cases the legislature has thought it just to make enactments retrospective even at some sacrifice of general principles. But then it does so on express terms; and generally, I believe invariably, couples the retrospective enactment with the best indemnity in favour of vested rights which the nature of the case admits.

In (1875) 1 Ch D 48 (62), Jessel, M. R., in considering the effect of S. 10, Judicature Act, 1875, upon a winding up which had already commenced, observes:

I so decide because it is a general rule that when the legislature alters the rights of parties by taking away or conferring on them only right of action, its enactments unless in express terms they apply to pending actions, do not affect them.

A large number of important decisions bearing on the question of retrospective operation of statutes of pending actions were reviewed by McCardie, J. in (1823) 128 L T 342 (76). Some of these decisions also have been laid before us, the rule being everywhere stated in the same cogent fashion. It was argued that it would be attributing the grossest form of injustice to the legislature to proceed on the assumption that when an action has already commenced the legislature has passed an enactment turning a good claim into a bad claim, a good suit into a bad suit, without making any provision for cost and compensation in the shape of indemnity. If however that provision of the enactment itself is clear, unambiguous and compelling in its meaning, the absence of a provision as to costs or compensation is not quite material. And it may be stated also that the Code makes a provision, which leaves the discretion of the Court so wide in the matter of costs that it may be safely assumed that in cases in which a pending action is affected by a new enactment a proper order, even though it be an order entitling an unsuccessful party for costs against the successful one, may not be beyond the competency of the Court, provided of course the claim of the unsuccessful party is found *prima facie* to be a good claim under the law as it previously stood. Certain Indian decisions have also been referred to in this connexion, none laying down any principle other than this that in order to affect a pending suit, there must be something in the Act itself clearly indicating such an intention on the part of the legislature. The cases are 57 Cal 796 (77); 35 C W N 1047 (78); 39 C W N 1006 (79); 39 C W N 1213 (80). The cases turned on the special language and feature of the particular enactments to

71. *Hitchcock v. Way*, (1837) 6 A & E 943=2 N & P 72=6 L J K B 215.

72. *Thistleton v. Frewer*, (1862) 31 L J Ex 230.

73. *Wright v. Greenroyd*, (1862) 31 L J Q B 4=1 B & S 758=8 Jur N S 98=5 L T 347.

74. *Comp. Leman v. Housley*, (1875) 44 L J Q B 22.

75. *Young v. Hughes*, (1859) 4 H & N 76=28 L J Ex 161.

76. *Bowling v. Camp*, (1823) 128 L T 342.

77. *Jnanendra Narayan v. Saroda Sundari*, 1931 Cal 25=129 I C 355=57 Cal 796.

78. *Debendra v. Pashupati*, 1932 Cal 198=136 I C 889=35 C W N 1047.

79. *Jagamohan Ghose v. Behari Barui*, (1935) 39 C W N 1006.

80. *Brojendra Kumar v. Sushil Chandra*, 1936 Cal 334=163 I C 270=63 Cal 368=39 C W N 1213.

which they related and which bear no similarity to the Bijni Succession Act. The case in 48 C L J 150 (81) has also been referred to in which the decision in (1905) A C 369 (82) was relied on for holding that a right of appeal is not a mere matter of procedure but a vested right accruing as on the date of commencement of the suit. On behalf of the respondents reliance was placed on the decision in the case in (1882) 9 Q B D 672 (83) in which there are certain remarks which the respondents desire to use in their favour. The special features of that case are explained in the decision of this Court in 39 C W N 1213 (80). They have also referred to the recent decision of the Judicial Committee in 40 C W N 263 (84). It would be sufficient to say that the considerations that arose in that case were widely different. Several other cases were also placed before us on their behalf of which one deserves mention: 31 C L J 463 (85), which suggests no departure from the general rule that

The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons is deeply founded on good sense and strict justice and in the absence of clear words to that effect, a statute will not be construed so as to take away a vested right of action acquired before it was passed.

For the purpose of deciding the second question, we shall have to construe the Act for ourselves, bearing in mind the cardinal rules of construction. But before we proceed to do so it would be convenient to deal with two matters which arise at the outset. Firstly we have been asked on behalf of the appellant to look into the statement of objects and reasons for the enactment. To this the respondents object; but at the same time the respondent, by way of retaliation as it were, have referred us to the debates in the Legislative Council relating to the passing of the enactment. We think we are precluded from looking into either of these things. Proceedings of the legisla-

ture in passing an Act including statements of objects and reasons, and debates of the legislature must be excluded from consideration: 22 I A 107 (86). Nor are we at liberty to construe the Act by any reference to the Bill in its original form: (1892) A C 498 (31) at p. 501. The Judicial Committee has said in 47 I A 33 (87) at p. 42:

No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

Also, as was observed by Denman, C. J. in 12 Ad & E 381 (88):

We are pressed with a history of the introduction of this proviso into the Act in its passage through Parliament. Of such facts, if capable of being ascertained, we are not permitted judicially to take notice. The law must ever be interpreted by the general rules of construction and we cannot travel out of its language in search of any supposed intention.

Another matter that arises is whether in construing S. 4 of the Act or rather the first two sub-sections of that section we should confine our attention to that section or the said two sub-sections alone or whether we should look at the rest of the Act as well. On behalf of the respondents we have been asked to adopt the former course, because certain difficulties were felt in construing the rest of the Act in the light of certain submissions that were made on their behalf. It was said that we need not trouble to consider whether a particular interpretation of S. 4 would fit in with the rest of the Act, because no question as regards the rest of the Act has yet arisen and any such question will be dealt with when, if ever, it does arise. We are of opinion that we must take the whole of the Act into consideration, and if any construction of S. 4 does not fit in with the rest of the Act we must reject it and look for some other construction which would apply to all parts of the Act equally well. But in doing so we shall not be permitted to alter the meaning of what is of itself clear and explicit. In (1876) 4 Ch D 585 (42) Jessel, M. R. expressed the rule in this way:

There is no doubt a rule applicable to Acts of Parliament as well as to other legal instru-

81. Shaikh Sardarali v. Sheikh Daliluddi Ostagar, 1928 Cal 640=113 I C 49=32 C W N 1130=48 C L J 150 (F B).

82. Colonial Sugar Refining Co. v. Irving, (1905) A C 369=74 L J P C 77=92 L T 738.

83. Quilton v. Mapleson, (1882) 9 Q B D 672.

84. K. O. Mukerji v. Mt. Ram Ratan Kuer, 1936 P C 49=160 I C 105=15 Pat 268=40 C W N 263 (P C).

85. Promotho Nath Pal v. Sourav Dasi, 1920 Cal 435=58 I C 327=24 C W N 1011=47 Cal 1108=31 C L J 463.

86. Administrator-General v. Premlal, (1895) 22 Cal 788=22 I A 107=6 Sar 603 (P C).

87. Krishna Ayyanger v. Nallaperumal Pillai, 1920 P C 56=56 I C 163=47 I A 33=43 Mad 550 (P C).

88. Q. v. Capel, (1841) 12 Ad & E 381=4 P & D 87=9 L J M C 65=4 Jur 886.

ments, that you may control the plainest words by reference to the context. But then, as has been said very often, you must have a context even more plain, or at least as plain as the word to be controlled.

The Rule is also expressed thus :

It is only when any part of the Act of Parliament is penned obscurely and when other passages can elucidate that obscurity, that recourse ought to be had to such context for that purpose. No rule of construction can require that when the words of one part of a statute convey a clear meaning it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part. [Craies on Statute Law, p. 93, referring to (1784) 1 Leach C. C. (Edn. 4) 355 (89) and (1831) 2 D & Cl 480 (90) at 489].

Of the rule of construction to be adopted not many need be cited. One of the leading rules may be quoted, as the first rule from the language of Tindal, C. J. when delivering the opinion of the Judges in 11 Cl & F 85 (91) at p. 143 :

The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed it. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such cases best declare the intention of the law-giver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute and to have recourse to the preamble, which according to Dyer, C. J. in 1 Plow 353 (92) at p. 369, is 'a key to open the mind of the makers of the Act and the mischief they are intended to redress.'

A second rule, which may be availed of where a doubt arises, whether general words have been used in general or particular sense has been expressed thus by Turner, L. J. in (1854) 6 D G M & G 1 (93), quoting from 1 Plow 201 (94) at p. 204 :

Expositions have always been founded upon the intent of the Legislature, which they (the sages of law) have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances.

A third rule is to be found in 2 H & C 178=159 E R 178 (95) in which Pollock, C. B. pointed out the dangers of travelling out of the Act itself and observed :

In construing the statute it is our duty to ascertain the true legal meaning of the words used by the legislature and to collect the intention from the statute itself, either the preamble or the enactments, and not to make out the intention from some other sources of information and then construe the words of the statute in order to meet the assumed intention.

And there is a fourth rule, which is very important as it lays down the order in which one should proceed. Sir W. Page Wood, V. C., in 4 K & J 367 at 369=70 E R 154 (96) has said :

In construing any Act of the legislature the verbal construction of the particular section in question, if it be plain and simple, must govern the Court in arriving at its conclusion. If there be any doubt or difficulty in the wording of the particular section in question, the Court is entitled to look first at the circumstances attending the passing of the Act, next at the preamble, as far as it affords any indication which may serve as a key to the interpretation of the Act, and then, I may add, to the whole purport and scope of the Act to be collected from the various clauses other than the particular clause the meaning of which is in dispute.

Bearing in mind the procedure laid down in the decision last mentioned let us first of all examine S. 4, sub-s. (1). The sub-section contains a clear and unequivocal declaration :

Raja Jogendra Narain Bhup is hereby declared and shall during his lifetime be the holder of the Raja with title dating from his nomination to the succession made by Rani Abhoyeswari Debi on 28th September 1895.

Sub-s. (2) also contains a declaration about Bairabendra succeeding as the holder of the Raj upon the death of Raja Jogendra. The declaration in sub-s. (1) therefore though made 'hereby,' that is to say as at the time when the Act comes into operation, does, by its own words, go back to the nomination at the one end and the death of the other of Raja Jogendra giving him a continuous status as holder of the Raj during the entire period. There is no question, upon the words used, of the declaration having anything to do with any period antecedent to the nomination. And commencing from the nomination and ending with his natural life the same status is assured to him. There is no question of any further retrospective or prospective

89. Palmer's Case, (1784) 1 Leach 355.

90. Warburton v. Loveland, (1831) 2 D & Cl 480 =6 Bligh (N S) 1.

91. Sussex Peerage Case, (1844) 11 Cl & F 85=8 Jur 793=65 R R 11.

92. Stowel v. Lord Zouch, 1 Plow 353.

93. Hawkins v. Gathercol, (1854) 6 D G M & G 1=24 L J Ch 332=1 Jur (N S) 481=3 W R 194.

94. Stradling v. Morgan, 1 Plow 201.

95. Attorney-General v. Sillem, (1863) 2 H & C 178=159 E R 178.

96. Cope v. Doherty, (1858) 4 K & J 367=70 E R 154=2 De Gex & J 614.

operation of the declaration. It does not matter for the purposes of the cases before us, whether the declaration contained in S. 3 is retrospective in its operation. As regards S. 5 the word 'shall' being used in the proviso contained in that section, the section, as an enactment, is prospective. So also are the sections that follow. So far then, no doubt or difficulty arises.

Then, what is the status that has been declared in sub-s. (1)? The answer must be,—The status of Holder of the Raj with title to that status as obtained by the nomination. 'The Raj' or 'The Bijni Raj' is defined as a group of estates, etc.: S. 2 (1), and the estates are listed in the Schedule. 'The Holder of the Raj' or 'The Holder' means the owner of the Raj: S. 2 (3). It thus appears that instead of declaring the title of Raja Jogendra to the estates, etc., which comprise the Raj, his title as 'Holder of the Raj' is declared, the expression 'Holder of the Raj' meaning that he is the owner of group of estates, etc., which constitute the Raj. The form in which the declaration is expressed suggests that the group of estates, etc., constitutes one entire entity to which Raja Jogendra having succeeded as owner by virtue of his nomination acquired the status of the 'Holder' and that the status he so acquired would continue throughout his life. The question at once arises whether he would remain 'the Holder' only so long as he remains owner of the estates, or whether he will cease to be 'the Holder' if he loses the estates in whole or in part, or whether on the other hand it was the intention of the Legislature that he would in no case lose his title as owner either to all the estates or any of them. It is clear to our minds that there are no words in the two sub-sections or, for the matter of that, in the whole of the section, either expressly or by implication answering the questions. And yet the question has to be answered in order to make out whether the claim of title, if any, of persons other than Raja Jogendra or Bhairabendra to the properties or any of them would be barred by the declarations. We have therefore to travel outside S. 4 and try to collect the intention.

First, as to the circumstances attending the passing of the Act. Of these all that we have are the litigations, some of which had already come to an end and others which were pending. They by themselves do not throw much light, for

nowhere in the Act are any of them referred to; and regarded as circumstances attending the passing of an Act they are at best equivocal for they leave us where we were, not enabling us to ascertain what exactly was the kind of mischief that was sought to be prevented or remedied by the Act.

The next thing to look into is the preamble. The decisions are quite clear that the preamble may always be referred to for the purpose of ascertaining generally the scope of the Act, where the enacting words are ambiguous: (1828) 7 B & C 643 (97); (1830) 1 B & Ad 538 (98); (1844) 11 Cl & F 85 (91); (1880) 16 Ch D 368 (99); (1891) A C 531 (100); (1903) A C 443 (101); that the enacting words of the Act are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so they cannot be cut down by reference to it: (1848) 2 Ex 256 (102); (1852) 18 Q B 789 (103); (1876) 4 Ch D 395 (104); (1883) 8 A C 386 (105); (1897) 2 Q B 242 (106); (1907) 1 K B 205 (107), and that on the other hand, the preamble does not extend the provisions of the Act beyond what the enacting part of the Act contains: (1744) 3 Atk 203 at 204=26 E R 918 (108); (1898) 2 Q B 578 (109); (1894) 1 K B 811 (110). The mischief intended to be remedied by the scope and purview of the Act, as stated in the preamble, is:

Whereas it is expedient to declare and supplement the customary succession in the group of estates known as the Bijni Raj in Assam with a view to the prevention of disputes and the preservation of the Raj.

97. *D. Bywater v. Brandling*, (1828) 7 B & C 643.
98. *Halton v. Cove*, (1830) 1 B & A D 538=9 L J K B 74.
99. *Crowder v. Stewart*, (1880) 16 Ch D 368=50 L J Ch 136=29 W R 831.
100. *Commissioners of Income-Tax v. Pemsel*, (1891) A C 531.
101. *Fenton v. Thorley & Co. Ltd.*, (1903) A C 443=72 L J K B 787=89 L T 314=52 W R 81=19 T L R 684.
102. *Salkeld v. Johnson*, (1848) 2 Ex 256.
103. *Pocock v. Pickering*, (1852) 18 Q B 789.
104. *Taylor v. Corporation of Oldham*, (1876) 4 Ch D 395.
105. *Overseas of West Ham v. Ides*, (1883) 8 A C 386.
106. *Powell v. Kempton Racecourse Co.*, (1897) 2 Q B 242=66 L J Q B 601=77 L T 2=46 W R 8=61 J P 548.
107. *Fetcher v. Birkenhead Corporation*, (1907) 1 K B 205.
108. *Basset v. Basset*, (1744) 3 Atk 203=26 E R 918.
109. *Kinnaird v. Cory & Son*, (1898) 2 Q B 578.
110. *Walter v. Lane*, (1894) 1 K B 811.

The legislature therefore aims at prevention of disputes and preservation of the Raj and with that object in view proceeds to declare and supplement that customary law of succession. Does it intend by the Act to prevent all kinds of disputes possible and to preserve the Raj from all attacks? The answer cannot be in the affirmative; for it undertakes a legislation which covers only one particular branch of the law, namely the customary law of succession. As it is only the customary law of succession which the Legislature proceeds to declare and supplement, it is only such disputes and such attacks as may injure the Raj in the absence of such law that were meant to be settled or repelled. It follows therefore that the avowed object of the legislature in passing the enactment was to remedy a mischief due to the absence of a proper piece of legislation dealing with the succession to the Raj. Therefore the meaning of S. 4, which we have been trying to ascertain, of the declaration contained in its sub-ss. (1) and (2) is, according to the preamble, that the said sub-sections purport to declare the title to the status of 'the holder of the Raj' as owner by right of succession of the entire entity of the group of estates, etc., as constituting the Raj, as distinguished from the title to the properties themselves. The words of the enactment, which are of doubtful import, are neither cut down nor extended if this meaning is attributed to them. Next we proceed to see what is the scope and purview of the Act and for that purpose we have to examine the other parts of the Act, other than the particular clause that we have to construe. Lord Moulton in (1913) A C 546 (111) has observed:

While it is admissible to use the full title of an Act to throw light upon its progress and scope it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience, its object being identification and not description.

And in the same case there is an observation of Lord Parker, which is important and should be borne in mind when examining the other parts of the enactment. He said:

It does not appear to me to be consonant with sound principles of construction to cut down the plain meaning and effect of one section of an Act because if this meaning and effect be

given to the section certain provisions of another section might be otiose.

The short title is, "The Bijni Succession Act, 1931;" the full title is, "An Act to Regulate the Succession in the Bijni Raj."

The full title must not be neglected or disregarded and it may be some guide to the meaning: Per Williams, J. in (1836) 2 Hr & W 9 (112); per Lord Denman, C. J. in (1842) 2 Q B 646 (113); per Coleridge, J. in (1852) 18 Q B 93 (114); per Willes, J. in (1890) 25 Q B D 99 (115); per Chitty, J. in (1888) 39 Ch D 524 (116); per Kekewich, J. in (1900) 1 Ch 749 (117); per Lord Macnaughten in (1903) A C 443 (118). The full title and preamble have been often used to determine the scope and the purview of the Act and the object of the Legislature: see e.g. Per Jessel M. R. in (1879) 12 Ch D 655 (119); (1898) A C 210 (120). They as well as the rest of the enacting part of the statute are to be all taken together: (1826) 3 Add 210=162 E R 456 (121). Both the preamble and the full title plainly indicate that it is the succession to the Raj with which the Act is concerned. This is not a case in which there is any conflict, either real or apparent, as between the preamble and the enacting part that is before us for construction. Now let us examine the other parts of the enactment. S. 5 speaks of the persons entitled to nominate; S. 6 of confirmation of nomination and the effect of the confirmation; S. 7 provides for appointment in case of failure of nomination; S. 8 states that publication in the Gazette of a nomination confirmed or an appointment made is

112. *Smith v. Preston*, (1836) 2 Hr & W 9.

113. *Hinton v. Dibbin*, (1842) 2 Q B 646=2 G & D 36=6 Jur 601.

114. *Blake v. Midland Railway Company*, (1852) 18 Q B 93=21 L J Q B 233=16 Jur 562.

115. *Kenrick & Co. v. Lawrence & Co.*, (1890) 25 Q B D 99=38 W R 779.

116. *East and West India Dock Co. v. Shaw Savill & Albion Co.*, (1888) 39 Ch D 524=57 L J Ch 1038=60 L T 142.

117. *Attorney General v. Marget Pier & Harbour Co.*, (1900) 1 Ch 749=69 L J Ch 331=82 L T 448.

118. *Fenton v. Thorley & Co. Ltd.*, (1903) A C 443=72 L J K B 787=89 L T 314=52 W R 81=19 T L R 684.

119. *Griffiths Carr v. Griffith*, (1879) 12 Ch D 655.

120. *Dartford Rural Council v. Bexley Heath & Co. Ltd.*, (1898) A C 210=67 L J Q B 231=77 L T 601=46 W R 235=14 T L R 91=62 J P 227.

121. *Brett v. Brett*, (1826) 3 Add 210=162 E R 456.

111. *National Telephone Co. Ltd. v. Post Master General*, (1913) A C 546=82 L J K B 1197=109 L T 562=57 S J 661=29 T L R 637.

conclusive of such nomination or appointment. All these sections deal with succession to the Raj.

Section 9 is very important. It makes provision for administration of the Raj when there is no holder; for it says, "pending the confirmation of the nomination or pending the appointment, as the case may be, of the next holder;" that is to say, it speaks of a period during which there is no holder. It also speaks of an "Incoming Holder." Can it be suggested that when there is no holder there is nobody who has title as owner to the estates, etc., comprising the Raj? The answer clearly is, No. The meaning is that so long as there has been no confirmation of a nomination made, or no appointment made of anybody giving him the status of a holder, the estates etc., are not without an owner and the title to them rests with somebody, that is to say, with the true owner, whoever he may be, and it is only their administration that is provided for by the section. This, in our opinion, removes the doubt that we felt as to the meaning of S. 4, sub-ss. (1) and (2), and makes it plain that the expression "Holder of the Raj" or "Holder" was not intended to exclude the title of anybody on any ground other than succession to the Raj, the rules as to which are laid down in the Act. Proceeding to consider the different clauses of S. 10 we find that they unmistakably show that it is possible that at some time or other the properties, the whole of them or in part, may have passed to outsiders by transfer made in contravention of the provisions of sub-s. (1) of that section, a transfer which is declared void by sub-s. (2) of that section, and yet the holder remains the holder notwithstanding such transfer. Sub-s. (3) of S. 10 provides that in the case of a transfer made in contravention of sub-s. (1) any holder would be competent to institute a suit for recovery of the property transferred within 12 years from the date of death of the transferor, or if on such death he is subject to any disability then within three years from the cessation of such disability, whichever of the two is the longer period.

The extent to which Limitation Act is intended to be affected by this Act is thus expressly specified in S. 10, sub-s. (3). It is important to notice that according to the provision contained in S. 10, the holder of the Raj is given a

special period of time within which he may sue for recovery of properties transferred by the previous holder in contravention of the law, and if no such suit is commenced within that period the transferee who was holding under such void transfer cannot be defeated thereafter. In the circumstances last mentioned, the holder remains the holder but the title to the transferred properties comes to be in the transferee. The status and the title are then in two different persons. The savings contained in S. 11 need not be detailed, but they are of importance as specifying the extent to which the general law is intended to be affected. S. 12 deals with succession-fee, and S. 13 with the power to frame rules relating to nominations, confirmation of nomination, temporary administration when there has been no nomination or confirmation of nomination or no appointment, and succession fees, and generally to carry out the purposes of the Act.

The whole Act appears to us to be entirely consistent with the preamble and the short title and none of the provisions contained in the sections carry the object of the Act beyond that which is declared by the preamble and denoted by the short title. In our judgment it must be held that the Act is confined to the succession to the Raj, and any title otherwise than on the basis of succession which anybody may have to the properties of the Raj or any portion thereof appears to us clearly to be outside the scope and purview of the enactment. And we are of opinion that the only title that sub-ss. (1) and (2) of S. 4 purport to declare, and the only title which S. 8 speaks of, is title as holder of the Raj on the basis of succession, either by nomination or by appointment and no title based on any other ground. Any other view would, in our opinion, be inconsistent with the words of S. 4 of the Act, read along with the context, the scheme and the intent of the Act. It follows that suit No. 84 of 1930 in which the plaintiffs claim is based upon, an alleged title acquired by adverse possession even though that claim is in respect of the properties which constitute the Bijni Raj as defined in the Act, but does not concern any question of status as the holder of the Raj or any question of succession is not barred by the Act. It also follows, that suit No. 164 of 1930 in which the plaintiffs' claim is

solely based on their alleged right of succession to the Bijni Raj is hit by S. 4, sub-ss. (1) and (2) and cannot succeed. In dismissing suit No. 84 the Subordinate Judge has said :

It is apparent that in view of S. 4 (1), Bijni Act, there could be no question of acquisition of title by Abhoyeswari by adverse possession ; for, in the first place, she had not completed 12 years' possession before 28th September 1895 from which the title of defendant 1 was declared by the section to commence, and secondly Abhoyeswari must be deemed to have abandoned her alleged adverse possession by the very fact of her nominating defendant 1 to the succession of Bijni Raj on that day.

In our judgment the title which was declared by S. 4 of the Act is the title to succession based upon the nomination as made on 28th September 1895, and had nothing to do with any title based on adverse possession that might have accrued to any other person and, therefore, the declaration contained in S. 4 of the Act did not affect such title. The question whether Rani Abhoyeswari, by the nomination that she made, abandoned her adverse possession or should be deemed to have done so, or whether she completed the requisite period of adverse possession at all or in any manner is a question of fact which will have to be tried on evidence adduced by the parties and is not a pure question of construction of the provisions of the Act. So far as S. 9 of the Act has any bearing on the question, we are clearly of opinion that the enactment contained in it is expressly prospective in its language. The Subordinate Judge has held that suit No. 84, in so far as it concerns properties situated outside the province of Assam, may proceed because the plaintiff's claim in that suit is based on adverse possession and he has also observed that this was conceded by the Advocate General. As in our judgment the Bijni Succession Act does not affect a claim based on adverse possession, the Judge's reason applies to the whole of the claim in suit and the whole suit will now proceed in spite of the Act. In connexion with both the suits the learned Judge has also observed :

As S. 4 (1) is an enacting and operative part of the Act the defendants (meaning plaintiffs), for reasons already stated, cannot be allowed to question the fact or the date of nomination of defendant 1 for succession to the Raj. They cannot also be allowed to prove, as against S. 4 (1) of the Act, the alleged custom or Kulachar of succession as put forward in their plaint. The conclusion is, therefore, that by expressly

declaring the title of the defendant 1 with effect from 28th September 1895 the Act by necessary intendment and implication and nonetheless effectively imposed insurmountable bar to the present suits.

These observations in so far as they lay down that the plaintiffs in the two suits are debarred from questioning the correctness of the declaration contained in S. 4 of the Act are undoubtedly correct. But while the plaintiffs in Suit No. 164 by being so debarred are precluded from establishing the only ground on which their alleged title rests, the plaintiff in Suit No. 84 whose alleged title rests on adverse possession on the part of Rani Abhoyeswari does not necessarily stand in need of proving or disproving any of the matters which are covered by the declaration, but if he does require to go into any of those matters he also is barred to that extent.

It has been argued on behalf of the contesting respondents in these appeals that if the interpretation that we have indicated above is to be accepted, then the intention of the legislature would be frustrated because the legislature aimed at the preservation of the Raj, and it would then be open to any person to attack it from outside and injure it. The answer to this argument is that the legislature for reasons of its own has not provided for all possible or conceivable contingencies and, at any rate, for no contingencies other than such as arose or would arise on the ground of succession to the Raj.

There remain now to consider a few special arguments which have been advanced to us by Mr. Gunada Churn Sen and Mr. J. N. Sen in connection with Appeal No. 205 of 1933. Mr. Gunada Churn Sen, appearing on behalf of the appellants in that appeal, while adopting all the arguments of Mr. Das has submitted a special contention with regard to the two items of property which lie outside the territorial limits of the Province of Assam. He has argued that his client's title (i. e. of the plaintiffs in Suit No. 164) to those properties at any rate are unaffected by the Bijni Succession Act inasmuch as the Act being an Act of the Assam Legislature has no force outside the Province of Assam. Now, it is a general presumption that the legislation of a country is territorial and that the Legislature does not intend to exceed its jurisdiction. But the scheme of the Act may be such as to

affect properties outside the territorial limits of jurisdiction of a particular legislature and this generally happens when the legislation is intended to act through a person who is within such jurisdiction. In Maxwell on Interpretation of Statutes, Edn. 7, p. 123, the law is thus expressed:

The state has a right to impose its legislation on its subjects, natural and naturalised, in every part of the world; and on such matters as personal status or capacity it is understood always to do so; but with that exception, in the absence of an intention clearly expressed or to be inferred either from its language or from the object, subject matter, or history of the enactment, the presumption is that Parliament does not design its statute to operate on its subjects beyond the territorial limits of the United Kingdom. They are, therefore, to be read usually, as if words to that effect had been inserted in them.

In the Bijni Succession Act there is no definition of its Local Extent. On the other hand the scheme of the Act is such as would plainly indicate that the Bijni Raj consists of a group of estates in Assam (See preamble and schedule) with other properties moveable and immovable, wherever situate, as additions and accretions to the said group of estates: See S. 2, Cl. (1); and that the entire Bijni Raj is intended to be dealt with by the Act in so far as the status of its 'Holder' is concerned. The nature of the enactment which purports to lay down the customary law by which the succession to the Raj is to be governed indicates that the intention of the Legislature is to treat the subject matter as lying within the territorial limits of the Province, moveable and immovable properties appertaining to the subject matter but lying outside the province being regarded as 'additions and accretions'. The assumption of this position is probably also historically correct; in any event, there is nothing to suggest the contrary. In such circumstances we think we should hold that the Act applies to the status of the Holder of the Raj wherever the properties appertaining to the Raj may be situate, and that the Assam Legislature did intend the Act to operate even outside the territorial limits of the Province of Assam and was within its authority in legislating on that footing.

Mr. Sen has next argued that the items of properties situated outside the province of Assam are not 'additions' or 'accretions' within the definition of 'Bijni Raj' or 'Raj' as contained in S. 2, Cl. (1)

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of the Act; but that those words are to be understood as implying such interests other than proprietary rights as the interest of a tenant or a sub-tenant in alluvial accretions, encroachments, etc. We do not find any justification for putting such a narrow meaning upon the words. He has also contended that there is nothing to show that the items of properties lying outside the province of Assam were not acquired by one or other of the previous Rajas of Bijni, and that if they were so acquired they would not be covered by the definition referred to above. It may be pointed out here that no question was raised by the plaintiffs in their additional statement in the Court below that such properties were not 'additions' or 'accretions' within the meaning of the Act or that the Act did not apply to them. But in any case there does not seem to us to be any substance in this objection, because any previous Raja would come within the expression 'Holder of the Raj' or 'Holder' as defined in the Act. If that be so then acquisitions that may have been made by Raja Kumud Narain or Raja Amrita Narain must have been made by them in their capacity as 'the Holder' as defined. In the definition of 'the Bijni Raj' or 'the Raj' the expression used is 'may have been or may hereafter be made from time to time' an expression which embraces the past, the present and the future. Besides, there are in the said definition the words, "by or on behalf of the Holder." It may be repeated that the claim of these plaintiffs is based entirely on an alleged right of succession and a title by adverse possession or on any other footing finds no place (vide para. 19 of the plaint in Suit No. 164).

Mr. J. N. Sen, as already stated, appeared in Appeal No. 205 of 1933 on behalf of the respondent, Maharaj Kumar Prince Victor Nityendra Narayan, who was the defendant 5 in the suit. The prince, as a defendant in the suit and a respondent in the appeal has been impleaded as represented by a Trustee in bankruptcy in London. He was impleaded as a party defendant as he had purported to purchase the Raj by a conveyance from Uday Narain dated 14th February 1922. The plaintiffs challenged this conveyance alleging,

that at the time of the sale-deed the said Kumar Uday Narain Deb was seriously ill and

hard pressed for money. The said Maharaj Kumar Prince Victor Nityendra Narain had the said deed executed in his own favour by exercising undue influence and coercion.

The trustee in Bankruptcy did not appear or contest the suit and has not entered appearance in the appeal. In the bankruptcy proceedings the Prince has been finally discharged. When the appeal came on for hearing he applied to be added as a party respondent for himself, so that he may support the appellants, the plaintiffs, in their contentions in so far as they are directed against the decree dismissing the suit. To this application two objections were taken on behalf of the other respondents. One is that the decree dismissing the suit is a decree in favour of the Prince, and in as much as he is not adversely affected but rather benefited by the decree he cannot claim to be added in order to help the plaintiffs in carrying on the suit further as against himself; and the other is that the order of discharge in the bankruptcy proceedings had not the effect of restoring to him the title to the estate which had vested in the Trustee on the adjudication order; in other words, that he has no right, title or interest in the properties, such as would entitle him to come in the appeal as a party in his own right and as apart from a party represented by the Trustee. So far as the first of these objections is concerned we do not see much force in it, for the Prince having been made a party to the suit and being a party to the decree has the right to show, even as a respondent in the appeal and even though the effect of setting aside the decree be to re open the suit as against him, that the decree was wrongly passed. And as regards the second objection it would, we think, be sufficient to say that the application of the Prince was not for striking off the Trustee in bankruptcy from the record but only for getting himself added as a respondent in order to enable him to support the appellant. Very wide powers are given to the Court to add a party to a suit or an appeal and the addition, if permitted, will not be taken to decide any question of title to the properties as between him and the trustee or the creditors. In such circumstances, we have allowed the Prince to be added as a party respondent without prejudice to the right of any body in the properties involved in the suit. Mr. J. N. Sen, on behalf of the

Prince while purporting to support the appellants by adopting the arguments of Mr. Das, has put forward only one additional contention. It is this that the legislature had no authority to make any enactment which had the effect of forfeiting or confiscating one man's properties for the benefit of another and that in any event it can exercise no such power unless adequate provision is made by it for compensation to the party injured. He has sought to support this contention by reference to certain decisions, amongst which reference may be made to (1893) 1 Ch 16 (122) and (1920) A C 508 (123). We have noticed the contention but only for the purpose of rejecting it; the legislature in the present enactment has passed no provision forfeiting or confiscating the property of any person; it has merely declared a rule of succession which according to it, is the customary law, and has only supplemented that law where, in its view, it needed supplementing.

Mr. Bose appearing on behalf of Bhairabendra in Appeal No. 171 of 1933 has pressed the cross-objection which his client has preferred in that appeal. The cross-objection relates to the items of properties with regard to which the claim of the plaintiff in the suit out of which that appeal has emerged has been held not hit by the Act. The cross-objection has not been filed in the shape of a cross-objection which the Code contemplates. But as the grounds are contained in a petition of Bhairabendra filed in Court within the time allowed by law for filing cross-objections, we have allowed the petition to be treated as a petition of cross-objection. In the view that we have taken of the effect of the Act on the whole suit, the cross-objection must be dismissed.

The result of our judgment is: (1) that Appeal No. 171 of 1933 will be allowed and the decree of the Court below in the suit to which it relates being set aside the suit will be remanded to that Court for trial on the issues not yet dealt with, and will after such trial be disposed of; the costs of the Court below will abide the

122. London and North Western Railway Company v. Evans, (1893) 1 Ch 16=62 L J Ch 1=2 R 120=67 L T 630=41 W R 149.

123. Attorney General v. De Keyser's Royal Hotel Ltd., (1920) A C 508=89 L J Ch 417=122 L T 691=36 T L R 600=64 S J 513.

final decision of the suit in that Court, but the costs of this appeal shall be payable by respondent 1 to the appellant; and (2) that Appeal No. 205 of 1933 will be dismissed with costs, respondent 1 being entitled to his costs from the appellants. No further orders for costs are made. The applications are rejected.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 627

M. C. GHOSE, J.

Mt. Khairan Nissa—Plaintiff—Appellant.

v.

Mahamad Hussain Bara — Defendant—Respondent.

Appeal No. 1816 of 1933, Decided on 4th June 1936, from appellate decree of Special Sub-Judge, Jorhat, D/- 20th December 1932.

Mahomedan Law — Dower — Divorce — Woman living with husband divorced after many years — Husband providing in Talaknama to pay deferred dower by monthly instalments—Woman should be granted instalment decree.

When a disagreement occurs between a husband and a wife it is very difficult to apportion the blame. Where a woman has lived with her husband as his wife for a period of 15 years, that is to say, during the period of the bloom of her youth and when her early youth is gone she has been divorced and the husband himself felt it right to state in the deed of divorce "Talaknama" that he would pay her deferred dower by monthly instalments, it is fair and equitable that the woman should be allowed an instalment decree. [P 628 C 1, 2]

Woopendra Nath Neogi — for Appellant.

Syed Saadulla and Shyama Prosanna Deb—for Respondent.

Judgment. — This is an appeal by a wife against her husband claiming deferred dower money of Rs. 1,000. The defendant husband is a clerk at Shillong on a salary of Rs. 110 per month. He had married the plaintiff, and apparently they lived together for a period of 14 to 15 years, at the end of which there was disagreement between the parties and she thereafter left his house and went to live with her parents at Sibsagar. Her case was that she was driven out of the house at Shillong. The defendant's case was that she became extremely insubordinate and of her own accord she left his protection after he had duly pronounced a divorce on 2nd May 1927. After the

separation she instituted a maintenance case under S. 488, Criminal P. C., and apparently obtained an ex parte order, but when she proceeded to execute the order the defendant in 1930 produced the Talaknama and thereupon the Court dismissed the plaintiff's maintenance suit. The plaintiff's case was that she came to know of the Talaknama in January 1930. Thereafter, on 15th July 1930, the present suit was instituted. The plaintiff being a poor destitute woman was allowed to sue as a pauper.

The trial Court dismissed the suit on the ground of limitation. The Court found that the Talaknama was pronounced on 2nd May 1927. As a period of three years had elapsed from the date of the divorce the claim for dower money was extinguished by limitation. In appeal by the plaintiff the Court of appeal below affirmed the finding of the trial Court and held that the claim for dower money was barred by limitation. For the first time in the Court of appeal the plaintiff urged that if the claim for Rs. 1,000 be barred by limitation the plaintiff may be granted a decree on the basis of the deed of divorce produced by the defendant, for in that Talaknama executed by the defendant on 2nd May 1927 he stated that he would pay the dower money of Rs. 1,000 by monthly instalment, of Rs. 20. The Court of appeal below held that the claim for a monthly instalment was not made in the plaint nor in the first Court, and as she never accepted the offer made by the defendant in the Talaknama she was not entitled to a decree.

The first point in appeal is whether the plaintiff's claim is governed by Art. 116, Lim. Act, on the ground that the deed of dower was registered according to the Mahomedan Marriage Registration Act of 1876. The argument appears to be without substance, for there is apparently no Kabinnama registered even under the Mahomedan Marriage Registration Act. All that there is is the certified copy of the marriage from the register of the Mahomedan Marriage Registrar. In that copy there is a column stating that the prompt dower was Rs. 500 and the deferred was Rs. 1,000. Apart from this there is no other document registered or unregistered. It cannot be said merely because the amount of the deferred dower was stated in the marriage which was registered under the Marriage Registration

Act that the matter of the dower was in a registered document.

The next point is whether the plaintiff's claim for Rs. 20 a month according to the Talaknama executed by the defendant can be granted to her. On behalf of the plaintiff it is urged that though the plaintiff claims the whole of Rs. 1,000 in the suit, in the third prayer made by her in the plaint she stated that if for any reason the whole of the dower money could not be granted, anything which the plaintiff was found entitled to might be decreed to her, and that this prayer is sufficiently wide to allow her to take advantage of the offer which the defendant made in the Talaknama. On the other side it is urged that though she was duly informed of the Talaknama in May 1927 she refused to accept the Talaknama. She made a case in the criminal Court claiming maintenance from her husband and he was dragged to the criminal Court and he had to defend himself there. Then she brought three suits, one suit for her ornaments which she said had been kept by the husband, and obtained a decree for Rs. 800, and a second case claiming that the Talaknama was inoperative until 2nd January 1930 when she first came to know of it. That suit was dismissed, it being found that she knew of the Talaknama in May 1927. The present is a third suit instituted by her. It is urged that the husband is a poor clerk and that it was her refusal to live with the husband's mother which led to disagreement and the defendant was forced to divorce her on the ground of her unreasonable conduct and that in spite of the Talaknama of May 1927 she spurned his offer of Rs. 20 a month and even in the plaint she made no claim on that basis and it was not till the appeal Court that she for the first time claimed Rs. 20 a month on the basis of the Talaknama.

The matter is not free from difficulty. When a disagreement occurs between a husband and a wife it is very difficult to apportion the blame. It may be stated that the defendant may reasonably complain of the conduct of the plaintiff in the three years following the divorce in May 1927. But when all things are considered it is to be noted that this poor woman lived with him as his wife for a period of 15 years, that is to say, during the period of the bloom of her youth and

now when her early youth is gone she has been divorced. Apparently the defendant himself felt it right to state in the deed of divorce that he would pay her deferred dower of Rs. 1,000 in instalment of Rs. 20 a month.

Having regard to all the circumstances it appears fair and equitable that the plaintiff should be allowed an instalment decree of Rs. 20 a month. It is, however, to be noted that the claim at Rs. 20 a month arose on 2nd May 1927 when the divorce was pronounced. The claim for each month would be barred at the end of three years. In that view when the suit was instituted on 15th July 1930 the claim for three months, namely, Rs. 60, was barred by limitation. She is, therefore, now entitled to get only the balance of the deferred dower, namely Rs. 940 at the rate of Rs. 20 a month. Let a decree be made accordingly that she is entitled to a decree for Rs. 940 in all, but that it will be paid to her by the defendant at the rate of Rs. 20 a month until the sum is liquidated. The appeal is accordingly allowed and the plaintiff's suit decreed in part. Having regard to all the circumstances the parties will bear their own costs throughout. Leave to appeal is refused.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 628

REMFRY, J.

In the matter of *Jambad Coal Syndicate, Ltd.*

O. O. C. J. Decided on 16th August 1934.

(a) **Landlord and Tenant—Rent—Withholding of — Apprehension that third party might claim paramount title against landlord — Tenant cannot withhold payment of rent.**

An alleged apprehension that their possession may be disturbed or ended by a party said to have a title paramount to that of their landlords is no excuse for tenants to withhold their rent. [P 629 O 1]

(b) **Company — Winding up of — Debt demanded should be presently due — Title of creditor should be complete.**

For a winding up order the debt must be presently payable and the title of petitioner demanding it should be complete. The law requires that a demand must be made for a debt that is due, and it is not permissible to support a petition by alleging that something else is due. [P 629 O 1]

(c) **Lease—Lease not registered — Landlord cannot claim rent either under S. 53-A, T. P. Act, or under S. 47, Registration Act.**

Neither under S. 53-A, T. P. Act, nor the amended S. 47, Registration Act, can a landlord claim rent under an unregistered lease.

[P 629 C 2]

Order.—This is a petition for winding up a public company with limited liability. The ground in the petition is that after the statutory notice the company has failed to pay a debt of some Rs. 72,000 due for royalties and rent. For the company it is stated in the affidavit that a claim by a third party who is alleged to have a title paramount to that of the petitioning company is apprehended, and that as the lease has not been registered the petitioners are not entitled to claim rent or royalties. As far as the first ground is concerned an alleged apprehension, that their possession may be disturbed, or ended by a party said to have a title paramount to that of their landlords, is no excuse for tenants to withhold their rent. The other point is more difficult. It appears that by a consent decree in 1927 the Syndicate, as the company is called, agreed to take a new lease and surrender their old one. This lease has been executed by all the parties and as the affidavit states :

The lease was registered by the company and the Syndicate and various parties. Registration has not been completed by four persons who executed the document, and summonses have been issued to compel registration.

These four persons appear to be interested in the Syndicate. It may be that under S. 35, Registration Act, the company could have completed the registration as regards the parties admitting execution, but that has not been done. The delay in preparing the lease has been caused by difficulties in the company's title. For a winding up order the debt must be presently payable and the title of the petitioner complete. Clearly it is insufficient to show that some other debt is due or even that there is something over Rs. 500 due in respect of the claim made, if that was not the sum claimed. The law requires that a demand must be made for a debt that is due, and it is not permissible to support a petition by alleging that something else is due. The company therefore cannot rely on any admission that Rs. 13,000 and not Rupees 72,000 is due under the former lease if it is in force, nor is it sufficient to allege that Rs. 60,000 is due under the old lease. The demand was not made for rent or royalties under the old lease.

In my opinion it is clear that neither under S. 53-A, T. P. Act, nor the amended S. 47, Registration Act, can a landlord claim rent under an unregistered lease. If the lease required registration I cannot accept the argument that under S. 47, Registration Act, a claim for rent is permissible when the lease is not registered, for that would be to repeal part of the Act. It may be that the Syndicate would have no defence in a suit for specific performance of the agreement, and in fact it is not suggested that the Syndicate has ever refused to execute that lease, but the petitioning company is in the unfortunate position, that without completing the registration of the lease it can only sue for specific performance as a preliminary to a decree for the rent, though doubtless both claims can be made in one suit. It was argued that the rent was due under the consent decree and that a consent decree does not require registration. That is so, but only in so far as it relates to the subject matter of the suit. But the consent decree was not put in nor the pleadings.

It may be that the term as to a fresh lease was the subject-matter of the suit, but it is rather difficult to imagine how it could be. Further it does not appear that any demand was made for payment under the consent decree, and to adopt the classical illustration the petitioner cannot demand payment for beans and then in a petition for winding up the company prove a debt for the same amount due for peas. In my opinion the petitioning company were not in a legal position to make a demand for the rent. The petition is therefore dismissed with costs.

B.D./R.K.

Petition dismissed.

A. I. R. 1936 Calcutta 629

D. N. MITTER AND RAU, JJ.

Secy. of State—Defendant—Appellant.

v.

Brajendra Kishore Rai Choudhury and others—Respondents.

Appeals Nos. 56 and 68 of 1929, Decided on 26th August 1935, from original decrees of Addl. Sub-Judge, 3rd Court, Sylhet, D/- 24th September 1928.

(a) Assam Land and Revenue Regulation (1 of 1886), S. 154—Land revenue settlement—Government is sole judge of propriety of classification and suitability of rent.

The invariable rule of law is that at every new settlement there must be a new classification and a new rate of assessment to be determined

by the settlement officer under the direction of the Government and with its approval. Government is the sole judge of the propriety of the classification and suitability of the rate and the amount of revenue settled by the Government officer is final. [P 632 C 1]

(b) Assam Land and Revenue Regulation (1 of 1886)—Fisheries can be offered separately for settlement and assessed separately from land.

Fisheries included in a lease can be assessed and offered for settlement separately from the other lands of the patta. There is nothing in the Assam Land and Revenue Regulation to prevent such splitting up. [P 632 C 1]

(c) Assam Land and Revenue Regulation (1 of 1886)—Beels can be settled separately or assessed on profits.

Government has power to settle the Beels separately or to assess them on their own profits. [P 632 C 2]

(d) Assam Land and Revenue Regulation (1 of 1886), S. 6 (b)—Right founded on adverse possession is legally derived.

A right founded on adverse possession for more than the statutory period is one legally derived right within the meaning of S. 6 (b) of the Regulation : 1922 P C 48 and 1917 Cal 213, Ref. [P 635 C 1]

(e) Assam Land and Revenue Regulation (1 of 1886), Ch. (6), S. 154—Offer of re-settlement and temporary settlement should be of whole estate.

Regulation does not contemplate the partition of an estate except in the manner provided for in the provisions regarding partition as embodied in Ch. (6) of the Regulation ; and a temporary settlement of a part of the estate, viz, the Beels is in contravention of the provisions of the Regulation making the action of the settlement officer ultra vires of the statutes. Similarly offer of re-settlement should be of the whole estate : *Colonial Bank of Australasia v. William*, (1874) 5 P C 417, Ref.

[P 635 C 2; P 636 C 1]

(f) Res judicata—Court trying previous suit not competent to try subsequent suit—Finding creates duty on party against whom finding given to displace it—It does not operate as res judicata.

Where the finding is by a Court not competent to try the subsequent suit it cannot operate as res judicata, but the finding creates a paramount duty on the party against whom it is given to displace it : 1922 P C 241, Ref.

[P 637 C 1]

(g) Mesne Profits — Government making settlement ultra vires of its powers is liable for mesne profits to person dispossessed.

Where a settlement by the Government is ultra vires, the possession of the person claiming under the Government is wrongful possession and the Government is liable for mesne profits to the person dispossessed. [P 637 C 2]

(h) Assam Land and Revenue Regulation (1 of 1886), S. 154 (1)(a)—Composite proceedings partly settlement and partly partition and entirely foreign to Regulation—Civil Court can pronounce such proceedings ultra vires.

Although the validity of a mere settlement cannot be questioned in a civil Court under S. 154

(1) (a), there is no bar to the civil Court pronouncing a composite proceeding partly a settlement and partly a partition entirely foreign to the regulation to be ultra vires. [P 639 C 1]

Pares Lal Shome (in No. 56), *Basak and Mukerji* (in No 68)—for Appellants. *Sen Gupta, Birendra K. De and Ramaprasanna Sen Gupta*—for Respondents.

D. N. Mitter, J.—The suit in which these two appeals arise was brought by the plaintiff, now respondent, for several reliefs, viz: (ka) for declaration of plaintiffs' mourashi maliki right by settlement and by right of adverse possession for upwards of 12 years to 1/3 share of the two beels (fisheries) known as Dhola and Baruri beels described more fully in the schedule to the plaint and of the Chapras, Nalas, khals and Kuris attached thereto; (kha) for a declaration that according to the provisions of the Assam Land and Revenue Regulation of 1886 the plaintiff is entitled after the expiry of the period of the settlement of 1902 to get fresh settlement at a proper Jama of lands described in the schedule and of the two said beels from Government; (ga) for a declaration that the Government has no right to separate the lands of the beels, Baruri and Dhola, from the other lands of pattas Nos 82 and 129 to assess any rent therefor separately in an arbitrary manner or upon the produce; (gha) for a declaration that the rent which has been demanded on behalf of the Government separately, and unjustly and illegally on account of the land in claim in the schedule is ultra vires, null and void; (cha) for a declaration that with respect to land mentioned in the schedule the settlement which had been granted by the Government in favour of defendants 2, 3 and 4 may be declared void, ultra vires and inoperative; (chha chaa) for recovery of possession if during the pendency of the suit the plaintiff be said to have been dispossessed from the two beels or any portion thereof; (ja) for mesne profits from the month of Pous 1330 B. S. to the time of recovery of possession; (jha) for such other reliefs as plaintiffs may be entitled to and (niya) for costs and for these other reliefs embodied in prayer Una, Chha and Ja in respect of which plaintiff's claim has been dismissed and there is no controversy in the present appeal. The principal defendants to the suit were the Secretary of State for India in Council (Defendant 1)

who is the appellant in Appeal No. 68 of 1929 and Hanif Mahi, (Defendant 2), and Karimdi Mahi, (Defendant 3), who are appellants in Appeal No. 56 of 1929 and Madan Mahi, defendant 4, who was party respondent to both these appeals but who has died during the pendency of the appeal. The learned Senior Government Pleader asked for an adjournment in order to bring the legal representatives of defendant 4 on the record. But as these two appeals were very old appeals having been filed in 1929, Dr. Sen Gupta appearing for the plaintiff-respondent objected to the adjournment contending that defendant 4 was not a necessary party to these appeals as the settlement in favour of defendant 4 has been cancelled and agreed that the decree against defendant 4 may be discharged.

The suit was instituted by Brajendra Kishore Rai Choudhury (plaintiff 1), against 47 defendants. Defendants 1 to 4 were described as the principal defendants; amongst the pro forma defendants 5 to 41 were described as the co-sharers defendants; 42 to 47 were lessees under plaintiff 1 and have on their own application been transferred to the category of plaintiffs and are now plaintiffs 2 to 7. The case stated in the plaint is that the plaintiff is the owner in possession in maliki right by settlement and by right of adverse possession of 1/3 share of Baruri covered by illam patta bearing No. 117 ⁴³⁸⁷⁴/₈₂ present No. 2 and No. 149 ⁴³⁸⁷⁴/₈₃ present No. 3 and of the two Beels Baruri and Dhola covered by Illam Pottah bearing No. 118 ⁴³⁹¹³/₁₂ present No. 1 which are fully described in the boundaries in the schedule and that he has been in possession by granting settlement to tenants; that the lands covered by the Beels were waste lands unfit for reclamation and were settled originally under the waste lands rules; that the plaintiff and his predecessors with great care and at enormous cost erected embankments and have turned them into a highly valuable fishery; that the plaintiff has acquired by settlement and by adverse possession for more than 12 years the status of landholder within the meaning of the Assam Land and Revenue Regulation and that he is entitled to get fresh settlement from the Government

not only of the two Beels but the entire lands described in the schedule; that after the last cadastral survey the lands in the schedule together with other lands were given by Government in Ilak settlement in 1902 for a period of 20 years and the settlement expired in March 1922; that notwithstanding the expiry of the lease the Government accepted for the years 1922-23 from plaintiff and other proprietors mentioned in the patta the entire rent for the entire lands covered by the patta as the Government was bound under the law to do; that there is a custom as to how the rate of rent per bigha is to be fixed for lands settled when patit lands are re-claimed or when the condition of the same is changed and according to the said custom Ilam lands are given in settlement; that if there is any Beel in any Ilam mahal or if any lands in Ilam mahal are converted into Beel, there is no custom that only the lands appertaining to the said Beel should be separated from Ilam mahal or that the land of the Beels should be given in settlement separately, that the Government has right to grant settlement separately of only the Beel lands or to assess revenue upon the produce of the Beel in an arbitrary manner; that on receipt of a notice signed and issued by the Subdivisional Officer of Moulavi Bazar, an agent of defendant 1 on 17th June 1923, the plaintiff came to know that a proposal was made to settle the Beels Baruri and Dhola with the plaintiff at an annual rental of Rs. 500 for a period of three years from 1329 to 1331 B. S.; that on receipt of the said notice the plaintiff appeared before the Subdivisional Officer of Moulavi Bazar and filed a petition of objection on the allegations that the Government had no right to assess any rent arbitrarily and separately only for the two Beels; that the petition of objection having been dismissed by the Subdivisional Officer of Moulvi Bazar, defendants 2 and 3 and defendant 4 (Madan Mahi) on accepting the rental of Rs. 500 fixed by Government, took settlement of the said two Beels from the Government for a period of three years on 17th September 1923 and on 20th September 1923; that the Government however had already realized from the plaintiff and the other proprietors mentioned in the aforesaid two Pattas Nos. 82 and 129 the entire rental for 1329 B. S., at the previously

fixed rate; hence the Government had and has no right to accept the rent of Rs. 500 again for 1329 B. S., on account of the lands of the disputed two Beels of Baruri and Dhola; that the plaintiff having refused to take settlement of the Beels Baruri and Dhola at an annual rental of Rs. 500 in accordance with the improper and unjust proposal of the Government, only the lands appertaining to the said two Beels were settled with defendants 2, 3 and 4 on behalf of defendant 1 upon which the principal defendants in collusion with each other attempted to dispossess the plaintiff and his Ijaradars, the pro forma defendants from the lands of the said two Beels in Pous 1330 B. S. Upon this state of the pleading the plaintiff has asked for the reliefs mentioned in the beginning of the judgment.

The defence of the Secretary of State falls under several heads: (1) That the suit is barred by the provision of the Assam Land and Revenue Regulation (2) The Civil Court has no jurisdiction to try and decide questions raised in prayers 'Ga' to 'Cha'. (3) Rights are enjoyed subject to the power of legislation vested in the Government. From the beginning of the Land Revenue Settlement it has been an invariable rule of law that at every new settlement there must be a new classification and a new rate of assessment to be determined by the Settlement Officer under the direction of the Government and with its approval. Government is the sole judge of the propriety of the classification and the suitability of the rate, and the amount of revenue settled by the Government officer is final. This has been the law always and this is the law now. It is also not a correct proposition of law that fisheries included in a lease cannot be assessed and offered for the settlement separately from the other lands of the patta. There is nothing in the Assam Land and Revenue Regulation to prevent such splitting up. (4) It is not true that there was no rule for splitting up a patta into two or more pattas. Even in the case of the present pattas, old patta No. 82 was split up into two new pattas, Nos. 2 and 3, and the old patta No. 129 was split up into two new pattas, Nos. 1 and 2, at the last re-settlement and the plaintiff and his predecessors accepted settlement of the split up pattas without any objection, protest

or murmur. It is not a correct proposition of law that Government has no power to settle the Beels separately or to assess them for their own profits. Government has not assessed them in an arbitrary manner. (5) In course of time the Dhola and Baruri Beels falling within the 4 pattas mentioned have become one fishery and it is inconvenient, nay well nigh impossible, to fish them separately and it was this circumstance which gave the plaintiffs a footing in those portions of the fishery which fell outside the pattas out of old patta No. 82 of which he was one of the settlement holders. Though he was not entitled, as of right, to settlement of those portions of fishery falling within the two pattas out of old patta No. 129, as he was not the settlement-holder thereof and had not acquired the status of the landholder in respect of the same, yet the Settlement Officer determined in the exercise of his own discretion to offer him settlement of those portions also on the strength of his possession as the plaintiff has neither any right nor any possession of the rest of the lands of the two pattas; this necessarily involved the separation of the fishery from these lands.

The defence of defendants 2 and 3 is substantially the same as that of the Secretary of State, but special defence was pleaded with reference to the claim of the plaintiff to 1/3rd share of Dhola Beel by virtue of adverse possession. These defendants maintained that the plaintiff has not acquired any title to Dhola Beel as they have not been in adverse possession of the same for more than 12 years. A further defence was taken that the plaintiffs obtained an unjust and illegal order for temporary injunction in the present suit by various devices and the High Court set aside the same on appeal. These defendants claimed compensation under S. 95, Civil P. C. On this state of the pleadings as many as 25 issues were framed: see pp. 110 to 112, Book A. The principal controversy, however, centred round issues 16, 17 (a) (b) (c), 18 and 19. The Subordinate Judge of Sylhet, after taking oral and documentary evidence which are voluminous, has come to the conclusion that plaintiffs are entitled to all the reliefs prayed for except the relief in the prayer clauses 'Una' 'Chha' and 'Ja'. He also held that plaintiffs are entitled to mesne

profits against all the defendants jointly up to 31st March 1925, but held that the Secretary of State was not liable for mesne profits after that period. As against defendants 2 and 3 it has been held that they are liable up to the period of their last fishing before delivery of possession.

It is against this decree of the Subordinate Judge that two appeals have been preferred: one by the Secretary of State and the other by defendants 2 and 3. Some of the grounds of the two appeals are common and we will deal with them first. It is contended for the appellants in both the appeals that the Subordinate Judge has done wrong in holding that separate settlement of the two Beels without assessment of the rest of the lands of the estate was illegal and ultra vires, and that the joint settlement of the two Beels was illegal. It is argued that there is no provision of the Assam Regulations which prohibits a Revenue Officer from assessing revenue on a part of the estate and making a settlement thereof with the original holders at a particular revenue and settling the rest of the estate later at a particular revenue. It is also argued that so far as Dhola Beel is concerned the plaintiff 1 cannot be regarded as a land-holder within the meaning of the Regulation because no settlement of Dhola Beel was made with him or his predecessor-in-interest, and it cannot be said that the right which the plaintiff acquired by adverse possession in one-third share of the said Beel was a right legally derived from a previous landholder within the meaning of S. 6 (b) of the Assam Land and Revenue Regulation, 1886. It was further contended that the civil Court has no jurisdiction to question the validity of the assessment and that therefore the decree of the Subordinate Judge must be varied if the other contentions fail by deleting from prayer 'Kha' the words 'at a proper Jama' in line 4 of the said prayer as also by deleting from prayer 'Ga' the words 'or upon the produce' in line 5 of the said prayer.

In order to understand the contentions raised on behalf of the appellants the following facts require to be stated. The lands mentioned in the schedule to the plaint along with the Beels belonged to Government as waste lands locally known as Ilam lands. The

history of Ilam lands is given in the admirable introduction to the Assam Land Revenue Manual at pp. 93 to 103. There is one passage in the introduction which may be quoted below:

Certain principles were laid down by the Bengal Government in 1869 which among other things declared the proprietary right in Ilam lands to belong to Government and that Government was at liberty to dispose of them as it thought proper.

These lands of Baruri held under an Ilam Pattah No. $\frac{43874}{82}$, referred to later

in this judgment as Pattah 82, belonged to (1) Bama Sundari, (2) Rajendra Das, (3) Rajendra K. Roy Chowdhury, father of plaintiff, (4) Bissessari Debya, mother of plaintiff, and (5) Akboy Nath Roy. The interest of (1), (2) and (5) is $\frac{2}{3}$ rd passed by private treaty to Alim Mahi, father of defendant 2, and Golamdi Mahi, father of defendant 3, and $\frac{1}{3}$ rd devolved on plaintiff 1. In 1902 patta 82 was split up into two pattas, pattas Nos. 2 and 3 and was settled with plaintiff 1 and father of defendant 2 and defendant 3 for 20 years ending with 31st March 1922. With reference to Dhola Beel it may be stated that the original patta was 43913/129 referred to as patta 129 throughout this judgment. It was originally held by some persons whose interest was sold in 1877 for arrears of revenue, and went into khas possession of Government. Under Ilam patta dated 23rd August 1872 it was settled along with other properties by Government with Madhab Kar for 17 years from 1285 B. S. to 1301 B. S. corresponding to 1878.79 to 1894-95. After expiry of this settlement in 1895 settlement operations were taken up by Government. In 1902 this patta 129 was resettled with Madhab Kar for 20 years from 1902 ending on 31st March 1922. This patta was split up into patta Nos. $\frac{1 \text{ and } 2}{129}$. The disputed lands of

Dhola Beel appertained to this patta. On 23rd January 1903 Madhab sold portions of the lands of pattas 1 and 2 including Dhola Beel to Inus Mahi. In 1903 Alim Mahi, father of defendant 2, instituted a suit against Madhab and his vendees in the Sub-Judge's Court at Sylhet for specific performance of a contract of sale which was entered into with Madhab previous to sale. The suit was amicably settled between Alim Mahi and Inus Mahi by selling the said portion to

Alim Mahi father of defendant 2 and two others on 15th February 1904. Defendant 4, Madan Mahi, also purchased other lands of patta 129 (1 and 2) from Madhab Kar and both the names of Alim and Madan were registered as settlement holders of the patta. Golamdi, father of defendant 3, also acquired a share in pattas 1 and 2 by purchase. On 31st March 1922 the period of settlement of all these pattas expired and re settlement became due. The re-settlement was started. The Settlement Officer started proceedings under Ss. 29 and 30 of the Regulation (Assam Regulation). The Settlement Officer submitted a general proposal of assessment and submitted the same to Government. The regularity of proceedings is in question in this suit. The Assam Government approved of the scheme of re-settlement and issued a general order directing that the re-settlement should be made for three years from 1st April 1922 pending decision of the question of the term of the next settlement and provisional patta should be issued for three years for the two Beels only. The Government decided that the Beels be formally assessed as waste lands and should form a separate class and should be assessed on a percentage of the average net income, 50 per cent of the average income. (See letter Ex. 'F' Vol. B p. 82). It is contended that the Government could make the separate assessment. Under S. 29 Government made a rule—R. 61—Settlement Rules, i. e. 51 new rule, No. 70-A, i. e. 61 new rule.

The Settlement Officer under S. 31 ascertained the amount of revenue for the said Beels and he fixed Rs. 500 as the revenue for the two Beels. Then settlement was made by defendant 1 with defendants 2, 3 and 4: see order-sheet in Vol. F, p. 1277, Ex. E. A notice had previously been served on plaintiffs, and defendants 1, 2 and 3, to take the settlement: see Ex. 18, p. 1285, Vol. P. On the issue of the said notice objections were taken by defendants 2 and 3 (see p. 84 B. K. B.). The objection related both to separation and assessment. Defendants 2 and 3 objected to assessment, see Ex. 7, p. 84, Vol. B. The plaintiff was excluded under S. 35, p. 1280, Vol. F. Defendants 2 and 3 and then No. 4 also got the settlement. It is argued for the Government that that was a perfectly legal procedure: p. 1290, Vol. F. It will appear from Ex. B-2, Vol. F-1292, that the order admitting de-

fendant 4 to the settlement was set aside and the settlement was made with defendants 2 and 3 with regard to Dhola Beel. It is contended that plaintiff cannot acquire any title by adverse possession. It is contended that plaintiff did not appeal to the authorities against the settlement. The settlement with regard to the rest of the lands other than the beels was made and accepted by the plaintiff in April 1925 and the settlement was made for 15 years, 1st April 1927 to 31st March 1942: B. K. B., p. 147, Ex. 2 (c). In other words by patta 82/2 settlement was made of the Baruri Beel (147-B) and by 82/9 (not pointed) settlement was made of the rest of the lands with plaintiff and defendants 2 and 3. The Beels were separated and similar settlement of Dhola Beel by patta 129/1 and the rest of the lands by patta 129/2, on 19th December 1923, the present suit had been instituted by the plaintiff. The plaint was subsequently amended on a petition filed on 25th September 1926 (see p. 60 B. K. A.) and a prayer for mesne profits was added.

At the outset we desire to observe that the Subordinate Judge should not have allowed two letters, Exs. 9 and 9-a, pp. 112 and 104, Book B which passed between the Government and the Commissioner, Surma Valley and the Superintendent and the Remembrancer of Legal Affairs of Assam and Surma Valley respectively to go into evidence seeing that these letters were written in view of a compromise between the Government and Brajendra after notice of the suit had been served by the plaintiff, for these letters must be taken to be without prejudice to the rights of the parties. We can state at once that although the Subordinate Judge was considerably influenced in his decision regarding the ultra vires nature of the settlement which is impugned in this suit we have kept our mind free from anything which has been said in these letters and we propose to deal with the legal questions raised by these appeals on a construction of the provisions of the Assam Regulations. This leads us to consider the main question in controversy in these appeals, as to whether the settlement of a part of the estates, covered by the pattas 82 and 129 was ultra vires of the statute or not. The question turns on the construction of some of the relevant sections

of the Assam Land and Revenue Regulation (Regulation 1 of 1886 as amended by Regulation 2 of 1889 and Regulation 2 of 1905). Under S. 3, Cl. (b) an estate includes (1) any land subject either immediately or prospectively to the payment of land revenue for the discharge of which a separate engagement has been entered into. Under S. 3, Cl. (g) "landholder" means any person deemed to have acquired the status of a landholder under S. 8. The status of a landholder is acquired in the following manner under S. 8 which runs as follows:

(a) Any person who has before the commencement of this Regulation held immediately under the Government for ten years continuously any land not included either in a permanently settled estate or in a revenue free estate, and who has during that period paid to the Government the revenue due thereon, or held the same under an express exemption from revenue; and (b) except as provided by S. 15, any person who has whether before or after the commencement of this Regulation acquired any such land under a lease granted by or on behalf of the Government, the term of which is not less than ten years, shall be deemed to have acquired the status of a landholder in respect of the land.

With regard to lands covered by patta No. 82 there can be no question from the facts narrated above that plaintiff 1 has acquired the status of a landholder and this has not been disputed. With regard to Patta No. 129 regarding Dhola Beel, it has been strenuously contended on behalf of the appellants that the plaintiff has not acquired the status of a landholder. On the evidence which we shall discuss later, when dealing with the special defence of defendants 2 and 3, we have no doubt that the plaintiff has acquired as against the said defendants a right to one-third share of the Dholla Beel by adverse possession for more than the statutory period of 12 years, and as such shall be deemed to have acquired a right over lands of Patta No. 129 in respect of which a separate engagement was admittedly entered between the predecessors-in-interest of defendants 2 and 3 as also defendants 2 and 3, under S. 6, Cl. (b) of the Regulation. It has been strenuously contended by the Senior Government pleader that right acquired by adverse possession is not a right legally derived from any right mentioned in Cl. (a) of the said section which includes the rights of landholders. We are unable to accept this contention. The law does recognise a right founded

on adverse possession for more than the statutory period to be a legally derived right. Just as property can be acquired from another by sale, by gift, lease or mortgage, so property of another can be acquired by the adverse possessor where he holds the property for more than 12 years dispossessing the rightful owner. In 48 I A 499 (1) at p. 507 the Judicial Committee observed that an interest not directly created by the taluqdar but allowed to grow up by his sufferance and negligence is an encumbrance within the definition of S. 161, Ben. Ten. Act, and that there was a current of decisions in India to that effect. In 44 Cal 412 (2) it was held by Sanderson, C. J., as he then was, and A. T. Mukherjee, J. that a person in adverse possession of an entire estate held under the Regulations might by lapse of time acquire a proprietary interest in that estate and would be liable for payment of Government revenue. There can be no question of these authorities that a right acquired by prescription is a legally derived right within the meaning of S. 6, Cl. (b) of the Regulation. The Indian law, like the English law, practically transmutes long possession of real property into ownership by bringing to an end the right of the owner. S. 28, Lim. Act, Statute 3 & 4 Will IV, c. 27, S. 34.

Under S. 9 of the Regulation a landholder shall have a permanent heritable and transferable right of use and occupancy in these lands subject to certain conditions mentioned in Cls. (a), (b), and (c) of the said section. Under S. 32 Cl. (1) the Settlement Officer shall offer the settlement to such persons (if any) as he finds to be in possession of the estate and to have a permanent heritable and transferable right of use and occupancy in the same or to be in possession as mortgagees of person having such a right. The word "estate" is important. Under this section after the expiry of the term of two patta 82 and 129 on 31st March 1922 the Settlement Officer should have offered the re-settlement of the entire estate and not of portions of the two estates. The Regulation does not contemplate the partition of an estate

1. Bipradas Pal v. Kamini Kuar, 1922 P O 48 = 66 I C 674 = 48 I A 499 = 49 Cal 27 (P O).
2. Mohim Chandra v. Peary Lal Das, 1917 Cal 213 = 39 I C 213 = 44 Cal 412 = 21 O W N 537.

except in the manner provided for in the provisions regarding partition as embodied in Ch. (6) of the Regulation. The partition could be done by consent which is not the present case. In making the temporary settlement of a part of the estate, namely the Beels, the Settlement Officer has clearly contravened the provisions of the Regulation. The question is whether this contravention makes the action of the Settlement Officer ultra vires of the statutes. In our opinion it has that effect. It is one of the essentials of the offer of re-settlement that the re-settlement would be of the whole estate; if such offer has been made and the revenue had been increased considerably the plaintiff could not have questioned the re-settlement in favour of defendants 2 and 3 on his refusal to accept the settlement. S. 154 would have prevented him from questioning the assessment in the civil Court. That section lays down:

Except when otherwise expressly provided in this Regulation or in rules issued under this Regulation no civil Court shall exercise jurisdiction in any of the following matters: (a) questions as to the validity or effect of any settlement or as to whether the conditions of any settlement are still in force.

The offer of an estate for re-settlement after partitioning the same was in excess of the authority of a Settlement Officer. S. 154, Cl. (1) (a) refers to cases where an act of the Settlement Officer is in conformity with the essential provisions of the Regulation which gives him jurisdiction to act, but there has been irregularities in the mode of carrying out the act. As for instance where the re-settlement had been offered of the whole estate but the assessment of revenue has been based on a new basis which might have increased the assessment considerably. To such a case 154 (1) (a) might apply. The following authority which was cited at the Bar gives the true limit of the jurisdiction of tribunals whose powers are limited by the Statutes: see 5 P C 417 (3) at p. 442:

Their Lordships understand the final judgment of that Court to state, as the grounds upon which the order ought to be quashed, that the Judge of the Court of Mines who made it had acted without jurisdiction and that he had been misled into doing so by the fraud of the petitioning creditors. The question upon this appeal is whether the materials before the Court justified either conclusion. And as these

two points, want of jurisdiction in the Judge, and fraud in the party procuring the order, are essentially distinct, it will be well to consider them separately. In order to determine the first it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But these conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts of a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes.

If as we hold for the reasons above given, that the offer of re-settlement to the plaintiff and defendants 2 and 3 was not in accordance with the statutes, it follows that the re-settlement of the two Beels in favour of defendants 2 and 3 was ultra vires of the statute, and on the basis of that re-settlement it was not permissible to defendants 2 and 3 to dispossess the plaintiff for under S. 34 of the Regulation in so far as it is material:

when a settlement has been accepted the revenue fixed thereby and no more shall be payable from such date, and for such term, as the Chief Commissioner may fix in this behalf; or, if at the expiry of that term no new settlement has been made, until a new settlement has been made.

The plaintiff was therefore entitled to hold on after the expiry of the term ending with 31st March 1922 on the previous revenue. We now proceed to consider the grounds taken on behalf of the Government with reference to the decree granted to the plaintiff by the Subordinate Judge in respect of prayers Kha and Ga of the plaint. It is contended that the decree should be varied by striking out the words 'at a proper jama' from prayer Kha and the words 'or upon the produce' in prayer 'Ga.' We think that this contention is well founded for under S. 154 (1) (a) of the Regulation it is not open to the plaintiff to question the validity of the assessment. The declarations with regard to prayers (Kha) and (Ga) must therefore be varied by striking out the words in the two prayers mentioned above respectively. It remains now to consider the question as to whether with reference to Dholla Beel the plaintiff has acquired a title to one-third share by adverse possession for more than the statutory period. This is a defence peculiar to defendants 2 and 3's appeal.

3. The Colonial Bank of Australasia v. William, (1874) 5 P C 417=43 L J P C 39=30 L T 237=22 W R 516.

namely Appeal No. 56 of 1929. It appears that in a previous litigation between the plaintiff and defendants 2 and 3 it was decided by the Munsif, the District Judge and eventually by the High Court that plaintiff 1 had acquired a title by adverse possession in the Dhola Beel to the extent of his share against Madhab Kar or his successors, and that the plaintiffs in that suit claiming through Madhab Kar had no subsisting right in the one-third share held by the defendants who were the present plaintiff and others: see judgment of the High Court BK. 'B', p. 106, Ex. 10 (g). The decree of the High Court, although it cannot operate as *res judicata* against defendants 2 and 3, because the suit in which the appeal to the High Court arose, was tried by a Munsif who had no jurisdiction to try the present suit, still the finding on the question of adverse possession was the finding of a Court which was dealing with facts nearer to their kin than the facts are to the High Court now and it certainly creates a paramount duty on the appellants in this appeal to displace that finding: see 48 I A 49 (4) at p. 55. It remains to consider whether the appellants have been able to discharge the burden which lay on them of showing that the finding was wrong. Very strong reliance has been placed on the evidence of Nazabdi, plaintiff's witness, who is one of added plaintiffs in the suit where he states: "My father paid rents to Madhab Kar when I was young: Vol. A, p. 89," but the same witness in re-examination said that "Madhab Kar had no possession of Dhola or Baruri Beels." So this admission of payment of rent to Madhab Kar cannot help the defendants, for he has made the position clear in re-examination. Besides, the Subordinate Judge observed that Nazabdi's admission of payment of rent to Madhab Kar cannot help the defendants as his lease comprised many other Beels, also of Patta No. 129 regarding which there is no dispute: p. 123, Book A. The plaintiff has by the production of documentary evidence, i. e., Touzis Exs. 1 to 1 (Z) 21 and Jama Kharach, Exs. 2 to 2-L from 1281 B. S. up to 1329 B. S. established that he was in possession through a fisherman who executed *kabuliats* in his favour and that

he was dispossessed in Pous 1330 B. S. by the defendants under the settlement which is impugned in this suit. The Touzis and the Jama Kharach papers support the *kabuliats* Exs. 3, 3j, 3c and 3h. Far from displacing the finding arrived at by the Munsif, the District Judge and the High Court in the judgments Exs. 10e, 10f and 10g that Madhab Kar never possessed Dolla Beel and that plaintiff 1 and his co-sharer in Patta No. 82 possessed them all along with Baruri Beel, a duty which was cast on defendants 2 and 3, the plaintiffs have by producing abundant documentary and oral evidence shown that the said findings were right. This defence of defendants 2 and 3 must therefore fail.

It remains now to consider the question of mesne profits. The Subordinate Judge has made defendant 1 (Secretary of State) liable jointly with defendants 2 and 3 for mesne profits up to 31st March 1925. It has been argued by Dr. Basak that Government was not all liable for mesne profits seeing that they made the offer of temporary settlement to plaintiff 1 and he refused settlement because it was not profitable. The liability of Government for mesne profits is now established by the most recent decision of their Lordships of the Judicial Committee in 62 I A 53 (5). In that case it was held in circumstances mentioned below that the Government was liable in the same way as a trespasser, for mesne profits:

In 1890 the Government obtained possession under Bengal Act 4 of 1863, S. 3, of an island char which had emerged from the river Padma, and settled and assessed the land according to the rules in force. In 1902 the respondents brought a suit claiming a fourth share of part of the char lands, with mesne profits, on the ground that the land in suit was a re-formation *in situ* of land of which there were co-proprietors. They ultimately obtained possession under a judgment of the Privy Council delivered in 1917;

and in the appeal before the Privy Council, in 62 I A 53 (5), the question related to mesne profits only. We have no doubt that as the Settlement by the Government was *ultra vires* possession of persons claiming under the Government was wrongful possession and the Government was liable for mesne profits. The next point taken is that in any event Government's liability should be limited

4. *Midnapore Zemindary Co. v. Nares Narayan Roy*, 1922 P O 241=64 I C 231=48 I A 49=48 Cal 460 (P O).

5. *Secy. of State v. Saroj Kumar*, 1935 P O 49=154 I O 1=62 I A 53=62 Cal 499 (P O).

to the revenue which the Government obtained for the one-third share of plaintiff 1. The Government was receiving Rs. 500 per year from defendants 2 and 3 and that may be taken to be the minimum profit which was available from the two Beels or fisheries, and plaintiff could have obtained one-third of Rs. 500 in his share, if he had obtained settlement. The relief of mesne profits as against defendant 1 will be varied in this way. The plaintiffs are entitled to get their one-third share of Rs. 250 for 1330 B.S. as the defendants are liable according to the finding of the Judge for half the fish of that year. As regards 1331 B.S. defendant 1 will be liable to pay one-third of Rs. 500.

We now proceed to consider the objection of defendants 2 and 3 to the amount of mesne profits for which they were made liable. The Subordinate Judge has held that Rs. 2,600 per year would be the net profits from the fisheries in question. He has referred to certain evidence which we have examined. It seems to us that the claim for mesne profits is exaggerated, and the witnesses also have placed before the Court figures which do not represent the actual profits. It seems to us that it would be right to proceed on the basis of the findings of the Settlement Officer who has held an inquiry with regard to mesne profits during the cadastral survey proceedings, which were held in the presence of all the parties, and on that basis the mesne profits should come to about Rs. 1,000 per year. On this basis the Subordinate Judge's decree must be varied in this way. The plaintiffs are therefore entitled to get their one-third share of Rs. 250 for 1330 B.S. and of Rs. 500 for 1331 B.S. as also for the period after 1331 B.S. up to the period of the last fishing before delivery of possession. With regard to the objection of defendants 2 and 3 that they are entitled to compensation for improper injunction under S. 95, Civil P. C., we think there is no substance in it, seeing that the same has been taken into account by the Subordinate Judge in the assessment of mesne profits.

Both the appeals are allowed in part and the judgment of the Subordinate Judge must be varied in accordance with the observations mentioned in the previous part of the judgment. The costs of these appeals will be in the following pro-

portion: The respondents will get two-thirds of the costs, that is, two-ninths from the Secretary of State and four-ninths from defendants 2 and 3. Defendants 1, 2 and 3 will get one third of their costs from the plaintiff. The order of the lower Court as to costs will stand. It has been brought to our notice that notices to the minor substituted respondents 10/5 to 10/8 and 10/9/3 have been duly served, but their proposed guardians ad litem have not entered appearance. It is also reported by the serving peon that respondent 10/12 is dead. This will not affect our decision seeing that these persons were all heirs of defendant 4 who, as has been pointed out before us, had no interest in the suit and as such his heirs are not necessary parties to this appeal. As a matter of fact Dr. Sen Gupta agrees that the decree as against them should be discharged.

There is a clerical error in the decree of the first Court which needs to be corrected. In place of the words "Dag 81" in the said decree the words "Dag 431" should be substituted. This amendment is obviously necessitated by the clerical mistake occurring in the decree as will appear from the plaint printed at p. 44 of the first of the paper book of appeal from Original Decree No. 56 of 1929, i. e., Book A. A table has been annexed to this judgment at the end showing references to the different volumes by the figures of the alphabet for facility of Court purposes. There are also cross-objections on behalf of the plaintiff-respondent which are not pressed and are dismissed. No order as to costs is made in the cross-objections.

Rau, J.—I agree in the order proposed by my learned brother, but would like to add a few observations. The settlement of the two beels for the three years from 1st April 1922 to 31st March 1925 was in reality more than a settlement. These two beels had previously formed part of two different estates; what the Settlement Officer did, in effect, was to partition the two estates into three new ones and then re-settle one of the three. The partition was effected without any application from the land-holders concerned and was not authorized by any provision of the Assam Land and Revenue Regulation. We are therefore concerned here not with the validity of a mere settlement,

such as is referred to in S. 154 (1) (a) of the Regulation, but with the validity of a composite proceeding which was partly a settlement and partly a partition entirely foreign to the Regulation. S. 154 of the Regulation is no bar to the civil Court pronouncing such a proceeding to be ultra vires.

This is not to say that all the issues framed and decided by the learned Subordinate Judge were within the competence of the civil Court. I refer in particular to issues 16 and 17 (c) set out in his judgment. Issue 16 runs thus: "Have plaintiff 1 or other settlement-holders converted the lands into fisheries or have they effected any improvement in the fisheries in dispute? If so, is this a legal bar to the Government enhancing the revenue of the fisheries settled as estate on part of the estate?"; and issue 17 (c) thus: "Is the assessment of the fisheries at other than bigha rate illegal as beyond the power of Government?" Both these issues were decided in plaintiff's favour, but it is clear that under S. 154 (1) (b) of the Assam Land and Revenue Regulation the civil Court has no jurisdiction to decide either, since they are questions as to the amount of revenue to be assessed or as to the mode of principle of assessment. I may also point out that in the decision of these issues, the learned Subordinate Judge appears to have treated certain executive instructions in the Assam Land Revenue Manual regarding enhancement of revenue as if they were statutory rules not to be broken on pain of illegality.

V.B./R.K.

*Decree modified.***A. I. R. 1936 Calcutta 639**

M. N. MUKERJI AND JACK, JJ.

Manmatha Pal Choudhury — Defendant 1—Appellant.

v.

Saroj Ranjan Singha and others—Respondents.

Appeal No. 141 of 1934, Decided on 5th June 1936, from original decree of Addl. Sub-Judge, Nadia, D/- 30th April 1934.

Receiver—Powers of—No title of receiver against owner—Right to realize rent depends upon appointment of receiver.

It is not the law that a receiver, unless he be a receiver in insolvency, is vested with title to the property itself as against the owner. And so far as the right to realize the rents is con-

cerned, such right depends entirely on the appointment of the receiver : 11 I C 102, Rel. on. [P 640 C 2]

Amarendra Nath Bose and Hemanta Kumar Bose—for Appellant.

Panchanan Ghose and Hari Prosanna Mukerji—for Respondents.

M. N. Mukerji, J.—This is an appeal by defendant 1 from a decree passed against him in a suit for khas possession, for rent and for mesne profits in respect of a durpatni tenure. One Mathura Mohan Pal Choudhury held a putni, which had its origin in 1818, of Mehal Taraf Mahatpur comprising 57 mauzabs and appertaining to Touzi No 334 of the Nadia Collectorate, the said touzi belonging to the Nadia Raj. Prior to his acquisition of the putni, Mathura Mohan had a durpatni in some of the mauzabs. The appellant holds some mauzabs in durpatni and others in sepatni. Mathura Mohan died leaving two daughters, Sarat Kumari and Joydurga and the plaintiffs are the sons of the former. He also left a will by which he bequeathed all his properties to his two daughters in equal shares. The two daughters executed an agreement in 1316 (1909) and the plaintiffs have been in possession of a moiety share in the properties since their mother's death. In 1922, Joydurga, the surviving daughter, commenced a suit praying for a declaration of her absolute right in a moiety share of the properties left by her father. This litigation went up to the Privy Council and the result was a declaration that she had only a life interest and the agreement also was upheld. For arrears of putni rent for the period Baisakh to Aswin 1334 (April to October 1927) the putni was sold under Reg. 8 of 1819 on 1st Augrabayan 1334 (17th November 1927) and was purchased by the Maharaja of Nadia, the proprietor of the touzi. The putni having been created prior to the Regulation, the sale under the Regulation was void. Several suits were then instituted for setting aside the sale: One by the plaintiff, another by the appellant, and several others by holders of some of the under-tenure. Pending these suits the appellant entered into a compromise with the Maharaja on 14th Bhadra 1335 (30th August 1928), under which he obtained a putni lease from the latter in respect of all the mauzabs that he was holding in durpatni and seputni under the plaintiff.

Later on however the other suits, amongst which the plaintiffs' suit was one were decreed, the sale being set aside. The date of this decision was 30th April 1930.

On 17th April 1931, the plaintiffs instituted the present suit for khas possession on the ground that there was forfeiture incurred by the appellant in taking a patni lease of the mauzabs on the basis of the compromise which amounted to a denial of the plaintiff's title for rent from Kartic 1334 (October 1927) to Sravan 1335 (August 1928); and for mesne profits from Bhadra 1335 to end of 1337 (September 1928 to date of suit). Various other litigations cropped up, to the particulars of which it is not necessary to refer; and all that is necessary to say is that the Collector of Nadia was appointed receiver by this Court on 24th July 1931. The Collector, it is admitted, has, as such receiver, realised the rents of the appellant for the years 1336 and 1337. The plaint of this suit was filed insufficiently stamped. The deficit was made up and the suit registered on 18th July 1932. The Subordinate Judge dismissed the prayer for khas possession holding that there was no forfeiture and has made a decree for rent in plaintiff's favour for the period ending with 1335. From this decree the present appeal has been preferred, and at the hearing the decree has been challenged upon three grounds.

It has been contended, in the first place, that the plaintiff had no title to recover the rents at all. The plaintiffs derive their title from the Ikrarnama between the two daughters of Mathura Mohan to which reference has already been made. The Subordinate Judge has construed the effect of the Ikrarnama in connexion with the plaintiffs' prayer for ejectment and in that connexion has observed that the decision of the Judicial Committee, whatever it may have been, was not binding on the appellant who was a stranger; and that inasmuch as the right which the plaintiffs acquired under the Ikrarnama was not an absolute right to the properties, they were not entitled to claim ejectment as against the appellant. He has in this connexion used some expressions which are somewhat unfortunate, viz., that

the plaintiffs are in permissive possession of the disputed property on the basis of the Ikrarnama;

also that

the plaintiffs did not get any absolute right in their mother's share of the property but inasmuch as they are in possession without any right, their possession is simply a permissive one or it is a case of leave and license to possess without any title.

Now, whatever the character of the plaintiffs' title to the properties may be their title to recover the rents from the appellant can scarcely be denied, and such title has been rightly found in their favour by the Subordinate Judge. It is an admitted fact that they had been realizing such rents from the appellant ever since they came into possession and it is not easy to see how the appellant can dispute their title to recover the rents that he has to pay. The Judicial Committee in 33 C W N 1117 (1) held that the Ikrarnama was binding upon her, observed that under its terms the plaintiffs were entitled to remain in possession of their mother's moiety of the estate during Joydurga's life and rejected the contention that it was a disposition of a mere expectancy. That a contention of this nature is not fit to prevail has been expressly laid down by the Judicial Committee in the later decision in 57 I A 10 (2).

Secondly, it has been urged that the property vested in the Receiver and the title to recover the arrears of rent did also vest in him, and so the plaintiffs had no title to recover the rents. Reliance for the purpose of this contention was placed on the decision in 15 C L J 339 (3). That was a case in which the Receiver contested the right of the owner of the property to recover the rents in defiance of his right and in that way was a case very different from the present. It is true that there is a passage in the judgment in the case, which shorn of its context may lend some support to the contention. But it is not the law that a receiver, unless he be a receiver in insolvency, is vested with title to the property itself as against the owner. And so far as the right to realize the rents is concerned, such right depends entirely on the terms of the appointment of the receiver. That the Collector, as receiver,

1. Sreejoy Durga v. Saroj Ranjan, 1929 P O 214=120 I O 53=33 C W N 1117 (P O).
2. Ma Yait v. Official Assignee, 1930 P O 17=121 I O 225=57 I A 10=8 Rang 8.
3. Bhubaneswari Koer v. Ajodhaya Singh, (1912) 15 C L J 339=11 I O 102.

had no right to realize the arrears for any period prior to 1336 is clear from an order that this Court made. Lastly, it has been urged that the plaintiffs are not entitled to interest on the arrears. It is not clear from the decision of the Court below on what ground the claim was resisted, and all we get in the written statement and also in the judgment is that it was pleaded that the interest claimed was excessive or unfair. A paragraph in the judgment dealing with the question whether there was demand and willingness to comply subject to a condition has been referred to before us. But that paragraph evidently deals with the question whether forfeiture was waived. If the appellant wanted to have exemption or deduction of interest, it was for him to put in a proper plea and have it adjudicated on proper materials. Two facts however are perfectly clear.

There was no justification whatsoever for withholding the rents due up to the date of the compromise and if any rent due for any subsequent period had been tendered it would never have been received, for by such acceptance the plaintiffs would have to waive their claim on the ground of forfeiture. It is fair therefore, that the plaintiffs should get interest on arrears due up to Sravan 1335 and not for any arrears for the remainder of 1335. The decretal amount however should carry interest at the rate allowed by the Court below. Subject to the variation made above, the appeal will be dismissed. Costs to parties in proportion to their success.

Jack, J.—I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 641

M. C. GHOSE, J.

Dharanikar Parah and others—Plaintiffs—Appellants.

v.

Chairman of Commissioners of Tamluk Municipality and others—Defendants—Respondents.

Appeal No. 924 of 1935, Decided on 18th June 1936, against appellate decree of Sub-Judge, 3rd Court, Midnapur, D/- 31st January 1935.

Bengal Municipal Act (15 of 1932), S. 129 (f)—Definition of "owner"—Definition not exhaustive—Decision of "ownership" is matter for Municipal Commissioner's discretion—Commissioners deciding "occupancy

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raiylats" as owners—Decision is not ultra vires.

Section 129, Bengal Municipal Act leaves the decision of the matter of deciding "ownership" to the Commissioners themselves and not to the Court. It may be stated that the definition of "owner" is not exhaustive. It begins with "owner includes etc." But there may be 'owner' other than what is stated in the definition. An owner may be a person who actually occupies the land. It depends upon the circumstances of each case. In a case where the plaintiffs are the occupancy raiylats holding agricultural lands within the Municipality and they receive rent from nobody and on the contrary they pay rent to the landlords the term 'owner' may be applied both to the holder of the occupancy right in the land and to his landlord. In the Municipal Act it is left to the discretion of the Commissioners to determine which of the two shall be taken to be the owner. Where the Commissioners thought it to decide that the owners of the occupancy right shall be considered to be the owner within the Municipality it cannot be said that they have exceeded their right. The right is given to them absolutely under S. 129 (b), Bengal Municipal Act (1932). [P 642 C 2]

Atul Chandra Gupta and Sarat Chandra Janah—for Appellants.

Amarendra Nath Bose, Bijan Kumar Mukherji, A. S. M. Akram and Saroj Kumar Maiti—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit against the Commissioners of the Tamluk Municipality. The suit was instituted by eight persons for a declaration that a resolution of the Commissioners passed on 23rd February 1934 was ultra vires and illegal and without jurisdiction and was the result of an illegal proceedings of Commissioners; that the assessment lists as made were illegal that the plaintiffs are not liable to be assessed in the manner indicated in the said resolution. The suit was instituted under O. 1, R. 8, Civil P. C. Many other rate payers joined as plaintiffs until the plaintiffs numbered no less than 269. The suit was dismissed by the trial Court. That decree was affirmed in appeal. Upon hearing the learned advocate for the plaintiffs-appellants the facts appear as follows:

The plaintiffs are the occupiers of lands within the Municipality. They use the lands for the purpose of cultivation, growing paddy and other crops therein. They pay rent for their lands to their landlords. They receive no rent from any person. The question was considered for a long time by the Municipal Commissioners whether in the circumstances the plaintiffs should be considered as owners within the meaning of the Municipal Act or

whether their landlords, whom they pay rent for their holdings, should be considered the owners liable to pay the Municipal rates.

The Commissioners at a meeting of 23rd February 1934 decided by majority acting under S. 129 (b), Bengal Municipal Act that with regard to the tenanted lands, the ownership of a Mukarari raiyati or an occupancy raiyati or an under-raiyati with occupancy right for Mukarari right to be taken as a deciding test of ownership. These plaintiffs are affected by the decision as they are holders of land with occupancy rights. The first question is whether the meeting of 23rd February was a lawful meeting. It is urged that there was no proper notice served on the Commissioners for the meeting of that day. That, however, as the learned Subordinate Judge pointed out, is of no importance, for all the Commissioners without exception attended the meeting of 23rd. The question of no notice, therefore, is immaterial. They all having attended the meeting, the resolution was discussed and passed by a majority and at a subsequent meeting it was duly confirmed. It cannot therefore be held that the meeting was ultra vires or illegal. The main question urged by the learned advocate for the plaintiffs-appellants is that the test of ownership which the Commissioners resolved upon is ultra vires. An "owner" is defined in S. 3 (38) of the Act. According to that Act:

"Owner" includes the person for the time being receiving the rent of any land or building or any part of any land or building whether on his own account or as agent or trustee for any person or society or for any religious or charitable purpose, or as a receiver, or who would so receive such rent if the land, building or part thereof let to a tenant.

The lands of the plaintiffs do not contain any building. They are purely agricultural lands used for the purpose of growing paddy and other crops. It is urged on their behalf that as they are not the persons receiving rent, they cannot be owners within the meaning of the definition. In support of this contention a decision of the Patna High Court in 1934 Pat 357 (1), was cited. In that case the Commissioners of Arrah Municipality had decided under the corresponding section of the Bihar and Orissa Municipal Act 1922 that as regards the agricultural

lands the landlords who received rent for those lands would be considered the owners and not occupiers who occupied such lands. Against that decision of the Commissioners the landlord filed an appeal to the High Court and failed. It is to be noted that S. 129, Bengal Municipal Act leaves the decision of the matter to the Commissioners themselves and not to the Court. It may be stated that the definition of "owner" is not exhaustive. It began with "owner includes etc." But there may be "owner" other than what is stated in the definition. An owner may be a person who actually occupies the land. It depends upon the circumstances of each case. In the present case the plaintiffs are the occupancy raiyats holding agricultural lands within the Municipality. They receive rent from nobody. They pay rent to the Raja of Mohisadal and other landlords. The term "owner" may be applied both to the holder of the occupancy right in the land and to his landlord as will appear clear when such a piece of land is acquired under the Land Acquisition Act. Both the landlord and the occupancy holders have right of ownership to the land and the extent of their right is considered by a Land Acquisition Officer in case of acquisition. In the Municipal Act it is left to the discretion of the Commissioners to determine which of the two shall be taken to be the owner. In this case of Arrah Municipality the Commissioner thought it right to take the landlords to be the owner. The Commissioners of the Tamluk Municipality thought fit to decide that the owners of the occupancy right shall be considered to be the owners within the Municipality. It cannot be said that they have exceeded their right. The right is given to them absolutely under S. 129 (b), Bengal Municipal Act (1932) which states:

The Commissioners at a meeting shall determine what class of ownership shall be accepted as the test for determining whether lands within a Municipality are held under one title or agreement.

As to the case of each one of the plaintiffs, the learned Subordinate Judge was right in stating that when each of them is assessed by the Commissioners, it is open to him to make objection to the said assessment and the Commissioner will then appoint an objection Committee whose duty will be to adjudicate each case upon its merits. As to the general proposition, in my opinion, the Municipal

1. Harihar Prosad v. Municipal Commissioners, Arrah, 1934 Pat 357=152 I C 647=13 Pat 693=15 P L T 424.

Commissioners were within their right in deciding the matter according to their judgment under S. 129, Bengal Municipal Act. The appeal is dismissed. Parties will bear their own costs in this appeal. Leave to appeal under S. 15, Letters Patent is refused. The cross-objection is not pressed and is, therefore, dismissed with costs.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 643

D. N. MITTER AND PATTERSON, JJ.

Anukul Chandra Haldar — Claimant No. 1 (h)—Appellant.

v.

Gurupada Haldar—Claimant No. 1 (a) and others—Respondents.

Appeal No. 186 of 1934, Decided on 28th May 1936, from original decree of President, Calcutta Improvement Tribunal D/- 29th August 1934.

Will—Construction—Earlier clause making complete bequest in favour of son—Later clause restricting it—Later clause should be read as not to be inconsistent with earlier clause.

Where in an earlier clause of a will there is a bequest of all the properties in favour of the son of the deceased, the later clause restricting the bequest should be so read as not to be inconsistent with the earlier provisions of the will in favour of his son. An endeavour should be made in construing the will to reconcile inconsistent clauses: 8 M I A 66 (PC) and 5 Cal 438 (PC), *Rel. on.* [P 644 C 2]

Radhica Charan Chatterji and Charu Chandra Choudhury—for Appellant.

Basak, Subodh Ch. Basak, Surendra M. Mallik, Ram Chandra Mukerji and Bhupendra Nath Roy Chowdhury—for Respondents.

D. N. Mitter, J.—This is an appeal by Anukul Chandra Haldar, one of the claimants in proceedings before the President, Calcutta Improvement Tribunal, arising out of acquisition of certain premises in Mudiali Road for a project of the Improvement Trust known as a Street Scheme No. 33, Southern Avenue, S. 1, in Ward No. 27, Calcutta Municipality. The President has awarded the entire compensation money in accordance with his award which comes to about Rs. 3,54,000 odd to claimant No. 1 (a) Gurupada Haldar and his wife claimant No. 1 (b) Sukumari Debi. It appears that the present appellant Anukul Chandra Haldar put in a statement of claim under S. 9, Land Acquisition Act, before the Land Acquisition Collector, Calcutta, on 30th May

1932 in which he alleged that the famous goddess Sri Sri Iswari Kali Mata Thakurani, and the gods Sri Sri Iswar Shyam Roy Thakur and Sri Sri Iswar Nakuleswar Thakur are the sole owners and proprietors of the premises proposed to be acquired. He stated in that petition that he and his uncle (his father's step-brother) Gurupada Haldar are the joint shebaites of the said gods and goddesses. Upon this he claimed for a joint compensation for the acquisition of this property alleging that the said premises being debuttar property the claimant and the said Gurupada Haldar are not competent to alienate the same. Upon this a claim petition was put in by Srimati Sukumari Debi on 13th June 1932 in which she alleged that she was the Mourashidar of the premises in question and that her husband Gurupada Haldar was the superior landlord thereof. She claimed compensation for the acquisition of the said premises. Upon this the Land Acquisition Collector seems to have made a joint award of the compensation money, which has been awarded by the Collector, in favour of Gurupada Haldar, his wife Sukumari Debi, and the other claimants Nos. 1 (c) to 1 (g) who are the purchasers of the portion of the premises in question from both Gurupada Haldar and Sukumari Debi as well as in favour of the present appellant Anukul Chandra Haldar, the total compensation being Rs. 2,54,749-14-1. Gurupada and Sukumari were apparently not satisfied with the award made by the Collector.

A reference under S. 18, Land Acquisition Act, was made on behalf of Sukumari Debi in which she alleged that she was the Mourashidar of the premises which were sought to be acquired, under Gurupada Haldar; and she wanted an increased compensation. There were petitions for reference under S. 18 by some other claimants also. The learned President who dealt with these references came to the conclusion that the property that was sought to be acquired was the property of one Kenaram Haldar, Gurupada being his son by his third wife Hemangini Debi, and that the said property has been bequeathed in absolute right to Gurupada Haldar who had granted a Mokalari Mourashi lease in favour of his wife. The President held that there was merely a nominal charge for worship of the said deities on the property bequeathed by Kinuram to his son Gurupada in absolute

interest. On the question of compensation the President came to the conclusion that the compensation awarded by the Collector was inadequate and that he increased it to the sum which has already been mentioned, namely Rs. 3,54,000 odd, to be divided between Gurupada and his wife Sm. Sukumari Debi. He rejected the contention raised on behalf of Anukul that the property sought to be acquired was debuttar property and that the same was inalienable. He held that the property was secular property and belonged to Kinuram who had full power of disposing of the same by his will.

Against this award of the learned President the present appeal has been brought by Anukul, and on his behalf two contentions have been put forward by the learned Advocate for the appellant. It has been contended firstly that on a proper construction of the Will of Kinuram Haldar, who died on 27th April 1894, it should have been held by the learned President that the premises sought to be acquired belonged really to certain deities who are named in the Will; that there was a bequest in favour of these idols; that therefore the property was inalienable and no portion of the compensation money should have been awarded either to Gurupada or to his wife Sukumari Debi. The second contention was that in any event under the provisions of S. 32, Land Acquisition Act (Act 1 of 1894), a certain sum of money should have been retained by the President and it should have been invested in approved securities seeing that in any event by the Will a charge was created on all the properties bequeathed by Kinuram Haldar for the purpose of the Sheba of the several deities mentioned in the Will. It becomes necessary therefore to examine the provisions of the Will which is printed at p. 102, part 2 of the paper book, and which has been marked as Ex. 2 in the case. The material portion of the will to which it is necessary to refer for the purpose of repelling the first contention of the appellant before us is as follows:

Excepting the properties described in the 2nd paragraph, I hereby bequeath all these moveable and immoveable properties, ancestral and self-acquired, and the Government Promissory Notes, and the bonded warehouse shares and the money lying in deposit in the Savings Bank and all the other (properties) which I have, to my son Sriman Gurupada Haldar born of the womb of my third wife; after my death Gurupada Haldar will become entitled to all my proper-

ties in absolute right, and shall enjoy the same down to his sons, grandsons and so on and heirs in succession; to that no objection on the part of anybody will be entertained (Cl. 3). I bequeath by this Will to my said son Sriman Gurupada Haldar, in absolute right, all the Palas of Sri Sri Iswari Kali Thakurani and Sri Sri Iswar Nakuleswar and other (deities), to which I am entitled (Cl. 4). Out of the income of the properties left by me, the expenses of the Seva of the Siva Thakurs established by me, viz. Sri Sri Iswar Kalyaneswar, Sri Sri Iswar Sarbeswar, Sri Sri Iswar Kasiswar, Sri Sri Iswar Anandeswar and Sri Sri Iswar Jogeswar and of the Sri Sri Iswar Syam Roy Thakur; Sri Sri Sri Iswari Kali Thakurani and Nakuleswar Thakur and other dieties established by my ancestors shall be borne. The executrix shall perform the Seva of the said Thakurs and Thakuranis; after her death my son Sriman Gurupada Haldar shall do the same down to his heirs in succession; my properties remain liable for the Seva of all these deities (Cl. 5).

There can be no doubt having regard to the provisions of Cl. 3 of the Will which have been just quoted that there has been an absolute bequest in favour of Gurupada Haldar of the properties mentioned therein. By the said clause all the properties which Kinuram died possessed of passed to Gurupada except the properties described in para. 2 of the Will, viz. 5 cottas of land within holding No. 66 in village Kalighat, Division 6, Sub-Division 1 and the legacy of Rs. 1,000 referred to in the same Cl. 2 of the will. The contention that the property is debuttar is based on Cl. 5 of the Will which has just been quoted in extenso. It is contended that the clause which gives absolute interest to Gurupada has practically been superseded by the subsequent clause, viz., Cl. 5, where all the properties of Kinuram are made liable for the Sheba of these deities and reference has been made to S. 88, Succession Act of 1925, in support of this contention. We have no hesitation in rejecting this view of the construction of the Will which has been submitted to us, for it is absolutely clear from Cl. 3 that there is a bequest of all the properties in favour of Gurupada Haldar, and Cl. 5 should be so read as not to be inconsistent with the earlier provisions of the Will in favour of his son. An endeavour should be made in construing the Will to reconcile the inconsistent clauses. But one can see nothing in Cl. 5 to sustain the contention raised by the appellant that this clause gives any of the properties to any deity. There are no words in Cl. 5 of the Will which can possibly lend colour to this contention that there

is gift in favour of the idols, Cl. 5 is absolutely clear. All that is stated is that it is the desire of the testator that out of the properties left by him the expenses of certain deities established by the testator as also of other ancestral deities of Kinuram should be met and for that purpose properties left by Kinuram should remain liable for the Sheba of those deities.

In other words properties left by Kinuram should be charged with the worship of these deities. The construction which the appellant contends for is directly opposed to what has been repeatedly laid down by their Lordships of the Judicial Committee in construing a Will of this kind. We may refer in this connection to the very early case in 8 M I A 66 (1), where it was held that even where a Hindu by will gave all his moveable and immoveable property to his family idol, and after stating that he had four sons, he directed that his property should never be divided by them, their sons or grandsons in succession, but that they should enjoy the surplus proceeds only, and the will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and maintain the family, further directed, that whatever might be the surplus, after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the testator directed, that after the expenses attending the estate, the idol and maintenance of the members of the family, whatever net produce and surplus there might be, should be divided annually in certain proportions among the members of the family; the bequest to the idol was not an absolute gift, but was to be construed as a gift to the testator's four sons and their offspring in the male line as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property, after providing for the performance of ceremonies and festivals of the idol, and the provisions in the will for maintenance. The terms of the will in 8 M I A 66 (1) were much more favourable to the idol than in the present case.

There is no question of dedication to the idol in the present case. Besides, this clause creating a charge for the wor-

ship of the deities is preceded by the clause of giving the properties absolutely to the son of the testator. The construction of the provisions in the will in 8 M I A 66 (1) which was decided in the year 1859, came up for consideration by their Lordships of the Judicial Committee of the Privy Council in 5 Cal 438 (2), where it was held with reference to somewhat similar provisions of the will that the property was a secular property charged with the worship of ancestral deity. The learned advocate for the appellant very frankly admitted that the case 8 M I A 66 (1) was directly opposed to his contention in the present case. We have no doubt that the President rightly held that this property which included the acquired premises was secular property which it was open to Kinuram to dispose of by a will.

In this connexion it is important to remember the circumstance that shortly after the death of Kinuram Haldar an attempt was made by Ram Chandra Haldar the father of the present appellant to set aside the will on the ground that Kinuram had no disposing power over the properties which have been disposed of by the will and it appears that on 5th September 1894 a plaint was filed on the original side of this Court by Ram Chunder Haldar against Hemangini Debi executrix to the will of Kinuram and mother of Gurupada Haldar as well as against Gurupada who was then an infant for a declaration that the will was void and incapable of being given effect to and that the whole of the property which Kinuram died possessed of was debuttar and that Kinuram had no power of testamentary disposition over it and that the same descended to the plaintiff and the defendant Gurupada Haldar jointly in the course of succession according to the Hindu law. It appears that on 4th March 1896 the plaintiff presumably finding it difficult to sustain his claim on the original side of this Court did not appear either in person or by counsel, and this suit was dismissed: see Ext. B. p. 121 of part 2, of the paper book.

It remains to consider the other contention as to whether the properties, the subject matter of the acquisition were

1. Sonatun Bysack v. Sreemutty Juggutsoondree Dossee, (1859) 8 M I A 66=2 Suther 37=1 Sar 721 (P C).

2. Ashutosh Dutt v. Doorga Churn Chatterjee, (1880) 5 Cal 438=6 I A 182=4 Sar 58 (P C).

not charged with the worship of the deities. The learned President while dealing with part of the case has said that there was a nominal charge for worship but notwithstanding that, Gurupada had full and unfettered right over it. There is no question that Gurupada had the right of alienation over the properties which are now the subject matter of compulsory acquisition under the Land Acquisition Act. At the same time if there is a charge for worship it is desirable that the monies that might be spent for these deities should be secured out of the compensation money awarded to Gurupada Haldar. We have been taken through the evidence as to what was spent by Kinuram for these deities and we have been referred to Ext. HH the account book of Kinuram Haldar for 1299-1300 B. S. and it appears that a very small sum used to be spent for the worship of "Shiva". The expenses are shown in the accounts printed at p. 68 onwards of the part 2 of the paper book. It may be that having regard to the passage of time the expenses at this date cannot be met at the said small sum. Taking into consideration the present condition of the prices of things we think that a sum of Rs. 10 per mensem would be sufficient to meet the expenses of the Sheba of the deities.

In other words the expenses would be Rs. 120 per annum and capitalizing that by twenty years we think that a sum of Rs. 2,400 or say Rs. 2,500 should be sufficient to meet these expenses. In that view we direct that out of the compensation money which has been awarded to Gurupada Haldar a sum of Rs. 2,500 be detained by the President of the Improvement Tribunal and Gurupada Haldar might be asked to deposit in approved Government securities of the real value of Rs. 2,500 with the President to secure the charge of worship and the interest is to be paid to Gurupada who has been entrusted with the worship of the deities under Cl. 5 of the will of Kinuram and that interest of the securities which will be deposited by Gurupada Haldar will be paid to him for the Sheba of the deities. Subject to this slight modification in the judgment of the President of the Tribunal the appeal stands dismissed. The appellant will pay to Dr. Basak's client a sum of Rs. 500 as costs of this appeal. The sum of Rs. 500 includes the costs of the

preparation of paper book as well as the hearing fee. It is stated that by an order of this Court Sukumari Debi took the sum which was awarded to her on furnishing as security of Rs. 50,000 in immoveable property. Now that the appeal is disposed of in her favour she is permitted to be discharged from that security.

Patterson, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 646

R. C. MITTER, J.

David Elias Duek Cohen—Plaintiff—Appellant.

v.

Baidyanath Mukerji and another—Defendants—Respondents.

Appeal No. 823 of 1935, Decided on 26th June 1936, from appellate decree of Dist. Judge, 24-Perganas, D/- 30th April 1935.

Mortgage—English mortgage—Mortgagee given possession—Mortgagor undertaking to repay loan by certain date—Condition of reconveyance present—Simply because mortgagor undertakes to pay taxes cannot change nature of English mortgage—S. 58, Cl. (a), T. P. Act, must be looked into.

Where the mortgagor binds himself to repay the money lent on a certain day and he conveys the property absolutely to the mortgagee and there is the provision for reconveyance by the mortgagee to the mortgagor on repayment of the loan, and on substitution of security the original security is to be released by the mortgagee but only through a reconveyance, and on sale of portions of the mortgaged premises, the same is to be realised by the mortgagee on fulfilment of certain conditions but also through such a reconveyance, simply because mortgagor undertakes to pay the taxes, etc., on the mortgaged property will not change the character of the mortgage from an English mortgage. In India a mortgage is the transfer of an interest in specific immoveable property; in substance it is not the transfer of the whole interest of the mortgagor to the mortgagee. In determining such questions Cl. (a) of S. 58, T. P. Act, cannot be ignored: 1932 Cal 775 and 40 C W N 846, *Rel. on*; 1935 Cal 659, *Explained*.

[P 648 C 2]

Carden Noad, Jatindra Mohan Choudhury and Rabindra Nath Choudhury—for Appellant.

Bijan Kumar Mukerji, Promod K. Roy, Bhupendra Nath Das Gupta (Jr.), Someswar P. Mukerji, A. C. Sen and Amod C. Sen—for Respondents.

Judgment.—In this appeal, which has been preferred by the mortgagor, the legality of the appointment of a receiver by the mortgagee is in question. The

Court of first instance declared the said appointment illegal, and restrained the person so appointed from taking possession of the mortgaged premises and from realising rent from the tenants in possession. The learned District Judge has however held otherwise and has dismissed the appellant's suit. Premises No. 57 (formerly No. 28) Ballyganj Circular Road, which comprised an area of 10 bighas 10 cottas 13 chittaks with buildings originally belonged to Miss Mary Jones. She had mortgaged the same to the Administrator-General of Bengal, who is the executor to the estate of Sagore Dutt, deceased. She sold the said premises, subject to the said mortgage to the appellant. The appellant executed on 27th July 1928 a mortgage in favour of her of the said premises for a sum of Rupees one lac. One of the clauses of the mortgage bond, the terms and conditions of which will have to be examined hereafter in detail, is that the mortgagor will have the right to dispose of any portion of the mortgaged premises and the mortgagee will have to realise and reconvey the said portion to the mortgagor or his nominee, provided that the price received for the same, less brokerage, was paid to the mortgagee.

In pursuance of this right reserved to the mortgagor, the appellant has sold about 7 bighas 2 cottas odd land out of the mortgaged premises, and the remaining area of about 3 bighas 8 cottas odd land together with the building standing thereon is still subject to the mortgage. Interest being admittedly in arrears for over six months Mr. Deveria, acting on behalf of Miss Jones, and acting under a power of attorney executed by her on 12th February 1926, appointed, under the provisions of S. 12, Trustees and Mortgagees Powers Act, respondent 1, Mr. Baidyanath Mukerji, a pleader of Alipur, receiver on 16th June 1933. This gentleman having attempted to realise rent from the tenants occupying the mortgaged premises, the mortgagor, namely the appellant, brought the suit out of which this appeal arises, for a declaration that the said appointment was illegal, and from restraining Mr. Mukerji, from taking possession of the mortgaged premises or from realising rent or from disturbing the appellant's possession. The appellant's Counsel has presented his case before me on the following grounds : (i) As the mortgage is not an English mortgage, the ap-

pointment of Mr. Mukerji by the mortgagee as receiver is invalid. (ii) Even if the mortgage is an English mortgage, the Court only can appoint a receiver, S. 69-A added to the Transfer of Property Act, by Act 20 of 1929, having abrogated S. 12, Trustees and Mortgagees Powers Act. (iii) The appointment of a receiver could not be made at the time at which it was not made according to the terms of the mortgage instrument as the mortgage money had not at that time become due and payable. (iv) At any rate the mandatory provisions of S. 12, Trustees and Mortgagees Powers Act, have not been complied with, as Mr. Mukerji, was nominated receiver by Mr. Deveria, before the expiry of ten days from the time when the letter written by the latter asking the appellant to nominate a receiver reached him. And (v) Mr. Deveria had no power under the terms of his power of attorney to appoint the receiver.

Besides meeting the points raised by the appellant's Counsel Dr. Mukerji, appearing on behalf of respondent 1, has raised a further point. He says that even if the mortgage be not an English mortgage, it is undoubtedly an anomalous mortgage, and according to the provisions of S. 98, T. P. Act, the rights and liabilities of the mortgagor and mortgagee must be determined in accordance with their contract. He further contends that by the contract the mortgagee has been given the power to appoint a receiver in accordance with the provisions of the Trustees and Mortgagees Powers Act. In the view I am taking of the first point raised by Mr. Carden Noad it is necessary to deal with this further point raised by Dr. Mukerji, although I must admit that there is great force in his argument. In order to decide the first point it is necessary to recite the main terms of the mortgage instrument.

The mortgagor admits receipt of one lac of rupees and promises to repay it with interest on 27th July 1938. He expressly conveys No. 57, Ballygunj Circular Road, absolutely to the use of the mortgagee but subject to the provision that on repayment of the mortgage money with interest it is to be reconveyed to him by the mortgagee. The mortgagor undertakes to pay rates and taxes and other impositions "now or hereafter to become payable" in respect of the mortgaged premises. Part payments of the principal are to be

made on fifteen days' notice. The mortgagor reserves the right to substitute with the consent of the mortgagee other properties as security for the mortgagee's dues and the mortgagee cannot withhold this consent if the properties proposed to be given as substitutes are of a certain value defined in the third clause of the instrument. On such substituted security being given the premises then included in the mortgage are to be reconveyed to the mortgagor by the mortgagee. The mortgagor reserves the right to sell any portion of the mortgaged property, and the mortgagee is bound to release and reconvey the said portion so sold at the cost of the mortgagor to him or his nominee, provided that the price obtained, less the brokerage commission, was paid to the mortgagee. In default of payment of the mortgage money or interest on 27th July 1938 or in default of payment of any money which the mortgagor undertook to pay, the mortgagee will have the right to enter into possession and realise rents and profits. The instrument then provides that it is to be considered as an English mortgage as defined by the Transfer of Property Act and

the power of sale and provisions ancillary or auxiliary thereto conferred upon the mortgagee by the said Act or by Ss. 6 to 19 inclusive of Act 28 of 1866 (I. C.) or any statutory modification thereof shall apply and be deemed to be incorporated in these presents but without the restriction of the last mentioned Act (Act 28 of 1866 I. C.) contained as to giving notice, provided also and it is hereby agreed and declared that the power of sale hereinbefore provided shall not be exercised unless and until default shall be made in the payment of the said principal sum of Rupees one lac or any part thereof or any other moneys that may become for the time being due and payable together with interest, if any, thereon on 27th July 1938 or at any other time when the same may become due and/or payable.

It is contended by the counsel for the appellant that the clause by which the mortgagor undertook to pay taxes and rates, the clause for substitution of security and the clause for sale of portions of the mortgaged premises by the mortgagor make the mortgage which would otherwise have been an English mortgage not an English mortgage but an anomalous mortgage. His contention proceeds upon the basis that by an English mortgage the mortgagee is made the full owner till redemption, and on redemption only the title is re-vested in the mortgagor by the act of reconveyance by the mortgagee. In

support of his contention he relies upon the cases in 62 C L J 28 (1) and 25 Mad 220 (2). I cannot accept the contention that the mortgage here is not an English mortgage. The mortgagor binds himself to repay the money lent on a certain day; he conveys the property absolutely to the mortgagee and there is the provision for re-conveyance by the mortgagee to the mortgagor on repayment of the loan. On substitution of security the original security is to be released by the mortgagee but only through a re-conveyance, and on sale of portions of the mortgaged premises the same is to be realised by the mortgagee on fulfilment of certain conditions but also through such a re-conveyance. The only other thing pointed out by Mr. Noad is that by his undertaking to pay rates and taxes the mortgagor retained to himself some of the obligations of an owner. He says that indicates that absolute ownership was not really intended to be conveyed to the mortgagee. I do not quite follow this argument. The deed conveys absolutely the mortgaged premises to the mortgagee in express terms, subject to the proviso for redemption. I do see that when by contract the mortgagor undertakes to discharge some of the liabilities which ordinarily are to be discharged by an owner, how can he be said to have retained some of the rights of the owner. To follow the contention to its logical effect, when the mortgagor retains possession under a contract embodied in the mortgage, the mortgage cannot be considered to be an English mortgage even if all the three elements of an English mortgage, as defined in S. 58, T. P. Act, be present, for in that case it may be urged with greater force that the mortgagor by contract retains the valuable part of ownership. In India a mortgage is the transfer of an interest in specific immoveable property; in substance it is not the transfer of the whole interest of the mortgagor to the mortgagee. In determining such questions, in my view Cl. (a) of S. 58, T. P. Act, cannot be ignored. The view I am taking is supported by two decisions of the Division Bench, namely in 36 C W N 709 (3) and 40 C W N

1. Satya Charan Srimani v. Ramkinkar Banerji, 1935 Cal 659=159 I C 1001=62 C L J 28.

2. Narayana Ayyar v. Venkata Ramana Ayyar, (1902) 25 Mad 220 (F B).

3. Fala Krista Pal v. Jagannath Marwari, 1932 Cal 775=140 I C 788=59 Cal 1314=86 C W N 709=56 C L J 187.

846 (4) at p. 854. In 62 C L J 28 (1) the learned Judges were also inclined to follow: 36 C W N 709 (3); and although one of the learned Judges (Guha, J.) relied upon the fact that the mortgagor undertook to pay rents royalties for coming to the conclusion that one of the mortgages was not an English mortgage, but the other learned Judge (Lodge, J.) did not think it necessary for the case before them to decide whether the said mortgage was an English mortgage or not. That observation of Guha, J. at the bottom of p. 33 of the report relied upon by the Counsel for the appellant cannot therefore be considered to be the decision of a Division Bench and so binding on me.

I accordingly, hold that the mortgage which the appellant executed in favour of Miss Mary Jones is an English mortgage. By the terms of S. 69, T. P. Act, before amendment, and by the contract between the parties also, S. 12, Trustees and Mortgagees Powers Act, has been incorporated in this mortgage. In my judgment S. 69-A, introduced into the Transfer of Property Act by Act 20 of 1929 (I.C.), has not repealed or modified that section, namely S. 12 of Act 28 of 1866; but the only effect of the amendment in my judgment is that S. 12 of Act 28 of 1866 is not to be deemed to be incorporated in an English mortgage, *proprio vigore* executed after the amending Act came into force. In this case the mortgage was executed before the amending Act and the terms and incidents thereof, including the term and conditions introduced into the deed by virtue of S. 69, T. P. Act, as in force at the date of the mortgage, including the term about the appointment of receiver by the mortgagee without recourse to Court have not been modified or affected by reason of the amendment by Act 20 of 1929 by which the last paragraph of the original S. 69 has been taken out of the statute. Interest for more than six months was admittedly due at the time of the appointment of respondent 1 as receiver. As I construe the mortgage instrument the power of sale could not be exercised before 27th July 1938 or till the mortgagor made default in payment of taxes and rates, etc., but the power of appoint-

ment of receiver could be exercised before the said date or before the said events, if interest for six months was due. I accordingly overrule the first three points urged on behalf of the appellant.

Regarding the fourth point, the facts are these: Mr. Deveria wrote a letter to the appellant on 2nd June 1933 requiring him to nominate a person as receiver. The appellant received the letter on 6th June 1933 and did not nominate a person as receiver. Mr. Deveria appointed respondent 1 as receiver on 16th June 1933. The learned District Judge has held that the period of 10 days mentioned in S. 12 of Act 28 of 1866 is to be counted from the date of the letter and not from the date of the receipt of the same by the appellant. Here he is wrong. Time is to be counted from the date of delivery of the letter to the appellant. The statute plainly gives the mortgagor a period of 10 days to make his choice. But I do not think that the appointment made on 16th June 1933 is invalid, because in my judgment the mortgagor, by his contract as embodied in the mortgage is not entitled to 10 days' time as provided for in S. 12. The words there are to this effect: "but without restriction in the last mentioned Act (Act 28 of 1866) contained as to giving notice." This in my judgment is sufficiently comprehensive. I accordingly overrule the fourth point also urged on behalf of the appellant.

Regarding the last point I hold that under Cl. (2) of the power of attorney which Mr. Deveria held for Miss Jones he could exercise the power he has exercised in this case. The attorney is given the power "to execute or enforce powers of sale or other rights, power of receiving incident to such mortgages, charges or securities." This point however was not raised in either of the Courts below and if raised in the Court of first instance could have been met by the plea of ratification by the principal, or the assumption that Mr. Deveria had not the power of appointing a receiver of the mortgaged premises. It would accordingly be wrong to allow the appellant to urge this point for the first time here. I accordingly overrule all the points urged on behalf of the appellant and dismiss this appeal with costs. It must be however made clear that respondent 1 is the receiver in respect of that portion of premises No. 57 Ballygunj Road which is still under

4. Satya Priya Ghoshal v. Borid Baran Mukerji, (1936) 40 C W N 846.

mortgage. Leave to appeal under S. 15 of the Letters Patent is refused.

B.D./R.K.

Appeal dismissed.

*** A. I. R. 1936 Calcutta 650**

R. C. MITTER, J.

Monindra Lal Chatterjee—Defendant—Appellant.

v.

Hari Pada Ghose and others—Plaintiffs—Respondents.

Appeal No. 1625 of 1935, Decided on 3rd July 1936, from appellate decree of Dist. Judge, Birbhum, D/- 10th September 1935.

(a) Civil P. C. (1908), O. 1, R. 1—R. 1 applies to joinder of causes of action also.

Rule 1 applies not only to the joinder of plaintiffs, but also to the joinder of causes of action in one suit. So under that rule several causes of action can be joined in one suit if some common question of law or fact would arise. [P 651 C 2]

Where the defendant was the agent of two sets of principals appointed at different times and by different acts, and the principals sued him for rendition of accounts and having regard to the scope of agency some common questions of fact and law were bound to arise:

Held: that the principals could join their causes of action in one suit, and hence there was no misjoinder of parties: 1918 Cal 858, *Rel. on.* [P 651 C 1, 2]

* (b) Contract Act (1872), S. 201—Agency—Termination—Joint and several principals—On death one agency terminates only as regards representative of deceased principal but continues as regards surviving principal—Surviving principal may sue for rendition of accounts within three years of termination of agency as against him.

Where there are two or more principals and they are joint and several, and if one of them dies, the agency terminates only as regards the representatives of the deceased principal, but it continues as regards the surviving principal. So the period of limitation for the suit against agent for rendition of accounts does not begin to run as against the surviving principal from the death of the deceased principal: *Phillips v. Hull Alhambra Palace Co.*, (1901) 1 K B 59; 1917 Cal 436; 1918 Mad 279 and 1916 Cal 680, *Rel. on; Case law discussed.*

[P 652 C 2; P 653 C 1]

Bejoy Kumar Bhattacharjee and Amarendra Mohan Bagchi—for Appellant.

Gopendra Nath Das—for Respondents.

Upendra Kumar Roy—for Deputy Registrar.

Judgment.—This appeal is on behalf of the defendant. It is directed against the judgment and decree of the learned District Judge, Birbhum, which have affirmed the judgment and decree of the

Munsif of Suri. The defendant has been held liable to render account from 1313 to 1337 B. S., and a Commissioner has been appointed to take accounts. Hari Pada Ghose, plaintiff 1, Guru Pada Ghose, the father of the minor plaintiff 2, and plaintiff 3, Gokul Mohini Dassi, wife of Rakhal Das Sarcar, now dead, were the owners of some zemindary and other properties. Hari Pada and Guru Pada were both minors before 1313; the latter who was the eldest of the two attained majority in 1313. At the time when both of them were minors, Rakhal Das Sarcar was appointed their guardian by the District Judge. As such guardian he appointed the defendant-appellant an agent of the minor's estate. His wife also appointed the same gentleman as her agent. The duties of the defendant were to collect the rents and profits of all their properties, to put in Government revenues and rent due to the superior landlords and to pay the net profits to his principals.

The plaint states that he submitted regular accounts to Rakhal Das Sarcar acting as guardian of the said minors and to him, as the husband of plaintiff 3, till 1313, when Guru Pada attained majority; but since then he has not submitted complete accounts for a single year. The plaint further states that after Hari Pada and Guru Pada attained majority he continued as their agents, and after Guru Pada's death in Magh 1335 (February 1929) he continued as the agent of Hari Pada and Guru Pada's minor son till 1337 or the beginning of 1338 on the same terms. There is no further question that he continued as the agent of plaintiff 3 since his appointment till the beginning of 1338. The plaintiffs have accordingly sued him for accounts for the period 1313 to 1337, as he refused to render accounts in spite of repeated demands made since the commencement of the year 1338. The plaint was filed on 17th April 1934. The main defences now maintained are that the suit is not maintainable and that it is bad for misjoinder of parties and causes of action, and that it is barred by limitation; at least the claim for accounts up to the death of Guru Pada, the father of plaintiff 2, is so barred. Both the Courts below have overruled these defences and have granted the plaintiffs a decree for accounts from 1313 to 1337.

The points urged by Mr. Bhattacharjya are the following: (i) That the suit is bad for misjoinder of parties and causes of action; (ii) that the claim for accounts up to the death of Rakhal Das Sarcar is not maintainable on the plaint as filed; (iii) that the defendant's agency under Guru Pada and Hari Pada terminated on the death of Guru Pada, and the claim for the period up to Guru Pada's death is barred by limitation; and (iv) that the claim after the death of Guru Pada is also barred by limitation as the suit has been instituted beyond three years of the termination of the defendant's agency under plaintiffs 1 and 2. Regarding this last mentioned point the learned Subordinate Judge found that the defendants' services were dispensed with not in Pous 1337 as alleged by him, but in the beginning of the year 1338. He did not precisely find on what date of Baisakh 1338 the defendant ceased to be the plaintiff's agent, but assuming that his services ceased on 1st Baisakh 1338, which corresponds to 15th April 1931, the suit would be in time if filed on 15th April 1934. It was filed on 17th April 1934, and Mr. Bhattacharjya contended that it was filed too late by two days, but as soon as it was pointed out that 15th and 16th April 1934, were civil Court holidays, he did not pursue the point further and conceded that there was nothing in it. The fourth point therefore need not be considered further.

Regarding the first point there cannot be any doubt that two suits have been combined into one. The defendant was employed as an agent by Gokul Mohini by a separate power of attorney. This agency has continued from before 1313 till the beginning of 1338 without any break. The agency of defendant 1 under Guru Pada and Hari Pada was a separate agency. The properties which defendant 1 was to manage were no doubt the same, viz., the joint properties of Gokul Mohini and Guru Pada and Hari Pada, but the defendant was the agent of two sets of principals appointed at different times and by different acts. But having regard to the scope of the agency and the defence taken some questions of fact and law were bound to arise and have in fact arisen. The Court of first instance overruled this point on this ground and the point was not further mooted by the defendant before the lower appellate Court where the

defendant was the appellant. On the principle formulated in 45 Cal 111 (1) I overrule this point.

The second point urged by Mr. Bhattacharjya, is based on the following facts: He says that the plaintiffs admit in their plaint that they have received from the defendant complete account papers up to a certain time. In their plaint they do not say that the defendant was asked to explain those papers and had refused. Under these circumstances Mr. Bhattacharjya says that the plaint is bad as it does not succinctly state the contents of those account papers so received from the defendant and does not indicate what items appearing in them are under challenge by the plaintiffs. This contention of Mr. Bhattacharjya is supported by the observations made in 52 Cal 766 (2) at pp. 781-782 and is a sound one, but it does not affect the decree made. The decree for rendition of accounts is from 1313 to 1337. The admission in the plaint is that complete papers had been submitted up to the time when Guru Pada and Hari Pada were both minors, and no such papers have been submitted by the defendant after Guru Pada had attained majority, which was in the year 1313. The principle formulated in 52 Cal 766 (2) does not accordingly help the defendant in respect of the claim after 1313.

The third point urged by Mr. Bhattacharjya raises a very important question. He says that the defendant was appointed an agent of Guru Pada and Hari Pada by their guardian Rakhal Das Sarcar. He continued to be the agent of the said persons till February 1929 (Magh 1335) when Guru Pada died. On that event he says that the agency terminated and a suit for accounts for this period has to be brought within three years from February 1929, under the second part of Art. 89, Lim. Act. He further says that the continuance of the employment of defendant by Hari Pada and Guru Pada's son under the same terms and conditions after February 1929 is really in the eye of the law a new agency, and in the suit as filed by the plaintiffs can only get a decree for accounts from Magh 1335

1. Ramendra Nath Roy v. Brojendra Nath Dass, 1918 Cal 858=41 I C 944=45 Cal 111=21 C W N 794.
2. Bharat Chandra Chakravarty v. Kiran Chandra Roy, 1925 Cal 1069=90 I C 944=52 Cal 766.

(February 1929) till Chaitra 1337. This argument cannot apply to Gokul Mohini's claim because the defendant was her agent under a separate power of attorney and there has not been a termination of that agency till the beginning of 1338. The claim of Hari Pada and plaintiff 2, Guru Pada's son, has to be examined carefully.

Where one man employs an agent, there cannot be any difficulty. S. 201, Contract Act, which does not make an exception in favour of a special contract, says that the agency is terminated by the death of either the principal or the agent. If the same person continues to be employed on the same terms as before under the legal representative of the deceased principal, in the eye of the law a new agency is constituted, and for the purpose of limitation a suit for accounts for the old agency must be brought within three years of the termination of the said agency e. g. from the principal's death, assuming that there had been no previous demand and refusal to account: 43 Cal 248 (3) at pp. 254-255; 40 C W N 245 (4). This, I gather, is also the principle formulated by the Judicial Committee of the Privy Council in 44 Cal 1 (5) where Lord Parmoor said that the legal representatives of Nanda Kumar Barua had a right to demand accounts from the agent appointed by Nanda Kumar for a period of three years from the death of Nanda Kumar under the last part of Art. 89, Limitation Act.

Cases, however, where two or more persons appoint an agent by the same act or instrument, and where only one of such principals dies, present difficulties. These cases cannot be answered simply by the terms of S. 201, Contract Act. The principle that the death of the principal terminates the agency as embodied in S. 201, Contract Act, is a principle taken from the English law. In England, however, cases where the appointment of an agent had been made by a firm have presented difficulties when one member of the firm subsequently died. It has

been held that death of one of the partners does not ipso facto terminate the agency, but the scope of the agency and the business for which the agent was employed are material factors: 6 H & N 575 (6) and (1901) 1 K B 59 (7). In 21 C W N 620 (8), a case which has been followed by the Madras High Court in 35 M L J 294 (9), Mookherjee, J. examined the position in detail and laid down the law in these terms:

We cannot consequently hold as an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one terminates the authority of the agent not merely as regards the deceased, but also as regards the remaining principal. We have in each case to determine the true intention of the parties to the contract, from the terms thereof and from the surrounding circumstances.

In that case, as also in 35 M L J 294 (9), members of a joint Mitakshara family had appointed one of them as agent for a certain purpose. It was held that the death of one of the members who had appointed their coparcener as agent, did not affect the agency at all, the agency continued not only under the surviving coparceners who had concurred in the appointment, but also under all the coparceners including sons and descendants of the deceased coparcener. This view that the agency continued, so to say, under the joint family as before, may be due to the special facts of those cases and to the peculiar position of a joint Mitakshara family. That fact may account for the continuance of the agency not only under the survivors, but also under the descendants of the deceased principal, but I do not see why in other cases the agency should not continue under the surviving principals only in the absence of any evidence that all the principals were, as Mookerjee, J. points out, in 21 C W N 620 (8), and to use his convenient expression, "joint principals" and not "joint and several principals" and "the power given to the agent is not joint and several." It may terminate so far as the representative of the deceased principal

3. Madhusudan Sen v. Rakhal Chandra, 1916 Cal 680=30 I C 697=43 Cal 248=19 C W N 1070.

4. Bir Bikram v. Jadab Chandra, 1935 Cal 817=160 I C 388=62 C L J 464=40 C W N 245

5. Nobin Chandra Barua v. Chandra Madhab Barua, 1916 P C 148=36 I C 1=44 Cal 1=21 C W N 97 (P O).

6. Taskar v. Shepperd, (1858) 6 H & N 575=30 L J Ex 207=4 L T 19=9 W R 476.

7. Phillips v. Hull Alhambra Palace Co., (1901) 1 K B 59=70 L J K B 26=83 L T 431=49 W R 223=17 T L R 40.

8. Re Sital Prosad, 1917 Cal 436=41 I C 288=21 C W N 620.

9. Ponnusami Pillai v. Chidambaram Chettiar, 1918 Mad 279=44 I C 849=35 M L J 294.

is concerned and to that extent only. This accords with the view taken in 43 Cal 248 (3), a case which I have already noticed. The power of attorney which Rakhal Das Sarcar as guardian of his wards executed in favour of the defendant has not been produced. The defendant's statement that he never saw it and never knew of its terms does not seem to me to be either convincing or truthful. If he wants to maintain the position that the death of Guru Pada terminated his agency under Hari Pada also, it was incumbent on him to prove from the terms of the power of attorney, either by producing the power of attorney or from secondary evidence, that Guru Pada and Hari Pada were "joint principals" and not "joint and several principals" in the words of Mookerjee, J. S. 109, Evidence Act, in my judgment, places the burden of proof on him.

I accordingly hold that on the death of Guru Pada the defendant continued to be the agent under Hari Pada. The same agency continued and Hari Pada can by invoking Art. 89, Limitation Act, get accounts from him from 1313 to 1337.

On Guru Pada's death, however, the old agency under him terminated and a new agency under Guru Pada's son, namely, under plaintiff 2, sprang up. Plaintiff 2 was bound to sue for accounts of his father's time within three years of his father's death which occurred in February 1929. If he had not been a minor at his father's death and at the date of this suit his claim from 1313 to Magh 1335 (February 1929) would have been barred by time, but his minority has saved his claim for this period. S. 6, Limitation Act, covers the case and there is no need for him to invoke S. 7 at all. I accordingly overrule this point also. The result is that this appeal is dismissed with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 653

M. C. GHOSE, J.

Jaques and others — Defendants—Appellants.

v.

Narendra Lal Das — Plaintiff — Respondent.

Appeal No. 1922 of 1934, Decided on 22nd June 1936, from appellate decree of Addl. Sub-Judge, Sylhet, D/- 4th August 1934.

Limitation Act (1908), Art. 2 — Police officers exceeding their lawful authority and causing hurt when acting bona fide in exercise of what they understood to be their duty under Criminal Procedure Code — Suit for compensation is governed by Art. 2.

When a public officer acts bona fide in the exercise of his lawful authority but needlessly exceeds his authority then a suit would lie and the limitation prescribed by Art. 2 would apply. [P 655 C 2]

Where police officers exceeded their lawful authority and caused hurt when acting bona fide in exercise of what they understood to be their duty under Criminal Procedure Code:

Held: that Art. 2 governed the case and the suit for compensation brought more than 90 days after injury was barred.

[P 655 C 2 ; P 656 C 1]

S. M. Bose, S. M. Akram and Bijan Kumar Mukherji—for Appellants.

Paresh Lal Shome and Priya Nath Dutta—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for damages. The plaintiff is a man of Habiganj. Defendant 1 was the Assistant Superintendent of Police of Sylhet. Defendant 2 was the Deputy Superintendent of Police at Habiganj. Defendant 3 was the Sub-Inspector in charge of Habiganj Police Station.

The plaintiff's case is that from April 1930 peaceful and well-regulated processions and meetings were held in Habiganj Sub-Division according to the programme of the Indian National Congress; that on 18th June 1930 the Sub-Divisional Magistrate of Habiganj without any justification issued an order under S. 144, Criminal P. C., prohibiting such meetings and processions and that the people of Habiganj considered the order to be illegal and unjustifiable and were determined to disobey the same. Accordingly at 3.30 p. m., on 1st July 1930, nine civil resisters called Satyagrahis started in procession through the principal street of Habiganj town, followed by a motor lorry in which there were three men including the plaintiff with red cross badges on their dress. They meant to render first aid to the Satyagrahis who might be wounded or injured by the Police; that the civil and military Police under the instructions of the three defendants assaulted the nine Satyagrahis and then advanced towards the lorry in which the plaintiff and two other members of the ambulance were and without justification assaulted the plaintiff. Defendant 3 struck him a blow and other constables assaulted him with the result

that he fell down unconscious, his left elbow joint was dislocated and it has been permanently injured. The plaintiff claimed damages of Rs. 509.

The defence was that the Sub-Divisional Magistrate was justified in issuing the order under S. 144, having regard to the intense excitement of the people during the period of propaganda of the Civil Disobedience Movement by meetings and processions and that the procession of the Satyagrahis together with the so-called ambulance lorry carrying the plaintiff and others and the people following the lorry formed one and the same assembly in violation of the order under S. 144, Criminal P. C., and that defendant 1 judging the assembly to be an unlawful assembly in exercise of the authority vested in him under S. 127, Criminal P. C., commanded the assembly to disperse and when his command was disobeyed, he ordered his constables to disperse the assembly by force; that the lorry men had no legal right to make use of the red cross and that only minimum force was used in dispersing the crowd; that defendant 1 had ordered the policemen that no blows would be struck above the waist and that when the men in the lorry refused to disperse, the policemen only struck the sides of the lorry and there was a scramble amongst the occupants who jumped off and fell one upon another but that the defendants were not aware of any injury received by the plaintiff. The trial Court decreed the suit and the decree was affirmed in appeal. The learned Subordinate Judge in a long and careful judgment has found that the order of the Sub-Divisional Magistrate under S. 144, Criminal P. C., was invalid and illegal. He found that from January 1930 there was a great agitation in the whole of the sub-division and meetings and processions were organized throughout the sub-division. Civil disobedience was launched with the result that the people were excited to break the salt laws and forest laws, not to pay Chowkidary tax, to abandon schools and to burn foreign cloths. Lectures were delivered asking the people to go to jail and even to sacrifice their lives and that they should not be afraid of bloodshed; that the Government Officers were molested in various ways and on a certain day of a Hartal the Magistrates had a great difficulty in reaching their offices. The learned Subordinate Judge

found that the Magistrate could reasonably be of opinion that the situation prevailing at the time was sufficiently urgent to call for an order under S. 144, Criminal P. C., but that the order was invalid and illegal, inasmuch as it did not comply with the provisions of Cl. (3), S. 144, Criminal P. C., which runs as follows:

An order under this section may be directed to a particular individual or to the public generally when frequenting or visiting a particular place.

The order of the Magistrate was to forbid the meetings and processions throughout the sub-division of Habiganj. The Court of appeal below held that such a wide order was not contemplated by Cl. (3), S. 144, Criminal P. C., which meant a particular place which the public would be asked not to visit. On the question whether the nine volunteers and four lorry men formed one and the same assembly, the learned Subordinate Judge held that their common object was not the same. The object of the nine Satyagrahis was to defy the Magistrate's order and the object of the red cross men including the plaintiff was not to defy the Magistrate's order but to give first aid to the nine Satyagrahis in case they were wounded by the police. It is urged by the learned Standing Counsel that the Court of appeal below has not taken a correct view. These men all came from the camp of the Civil Disobedience Movement. Nine of them dressed up as Satyagrahis who offered themselves to be injured by the police and their friends, the plaintiff and others put on red cross badges on their dress and followed in a lorry to give them first aid when they were wounded by the police.

On a proper view, it is clear they formed one and the same assembly; the front men were out to defy the orders of the Government and the men in the lorry were behind them to aid and abet them. They were followed by a crowd of about 1,000 people. The lorry was at some distance behind the nine men who were marching ahead. But when in front of the local Treasury Office the policemen stopped the nine men, a large number of men gathered between them and the lorry. The Court of appeal below has criticised the defendants because they took the aid of the armed police. In this the Court committed an error. Actually defendant 1 used only his fists and the

constables used only lathis. No firearms were used. The order under S. 144 being found to be illegal the question is whether the defendants acted bona fide in the exercise of their rights under Ss. 127 and 128, Criminal P. C., in declaring the assembly unlawful and in commanding it to disperse. Considering the large number of men who were led by the persons who were openly defying the law, it cannot be said that the defendants who were in charge of the peace of the sub-division were wrong to hold that the assembly was unlawful.

Defendant 1 who was the Police Officer in charge was right to declare the assembly to be unlawful under S. 127 and was right to direct his policemen to disperse the assembly. The learned Subordinate Judge considers that the lorry men did not disobey the order to disperse; when they were ordered to disperse the driver of the lorry tried to back, but he was prevented by the police. He tried to drive forward; from that also he was prevented by the police. Then the policemen beat on the sides of the lorry and struck at the occupants. The Court of appeal below has held that in assaulting the occupants of the lorry the police acted wrongly. It is urged by the learned Standing Counsel that the view taken by the Court of appeal below is not correct. When the order was given for the assembly to disperse, apparently the greater number of the assembly quickly dispersed. The men dressed with red cross badges stayed in the lorry. It was clearly their duty to get down from the lorry, but instead of doing that they kept their seats on the lorry and refused to move. In the circumstances it cannot be said that the police exceeded their rights in striking the sides of the lorry and commanding the men to disperse.

As to the actual injury which happened to the plaintiff it has been proved that his left elbow joint was dislocated. He says that he was struck on the left arm by the constables and by such injury his left arm was dislocated. He stated in evidence that defendant 3 struck him. That story has been disbelieved by the Court of appeal below. It would appear from that that the plaintiff is not a witness of truth. It appears that he got his arm broken either by a direct stroke or in falling down from the footboard of the lorry after re-

ceiving a lathi blow. In any case the police who struck him must be held responsible for the severe hurt which was caused and it cannot be said that in causing the hurt to the plaintiff the policemen were within their rights. The plaintiff would therefore be entitled to damages if his claim be not barred by limitation.

It is urged that the suit is barred by limitation, that the proper Article to apply is Art. 2, Sch. 1, Lim. Act. That article applies to a suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India. The period of limitation is 90 days from the time when the act complained of takes place. It is urged that here the plaintiff claimed compensation from the Police Officers for doing an injury to him which they did in the course of the dispersal of an unlawful assembly under the Criminal Procedure Code and therefore this is the proper Article and as the suit was not brought within 90 days, the plaintiff cannot succeed. The Courts below have held that the Article applicable is Art. 22 for compensation for any other injury to the person. The period of limitation is one year from the time the injury is committed. It is urged by the learned Standing Counsel that Art. 22 would apply in the case of tort against a private person or against a public officer acting mala fide. But when a public officer is acting bona fide in pursuance of the law and commits a tort Art. 2 is the proper Article to apply. That Article which lays down a short period of 90 days for a suit is for the protection of public officers who have acted bona fide in the exercise of their duties.

It has been held in many cases that Art. 2 will not protect a public officer who has acted mala fide under colour of his office. In this case it is clear that the three defendants acted bona fide in exercise of what they understood to be their duty under the Criminal Procedure Code. The injury that was caused to the plaintiff was done in the exercise of that duty, but in doing the injury they exceeded their lawful authority. If the act complained of is believed to be actually authorised by law, then no question of limitation would arise, as in that case the action itself would not be maintainable. It is when a public officer acted bona fide in the exer-

cise of his lawful authority but heedlessly exceeded his authority, then a suit would lie and the limitation prescribed by Art. 2 would apply. The present is such a case, and as the suit was brought more than three months after the injury was received by the plaintiff, the plaintiff's claim is barred by limitation. In the result the appeal is allowed and the plaintiff's suit is dismissed with costs in all the Courts. Leave to appeal under S. 15 of the Letters Patent is refused.

D.S./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 656**

MUKERJI AND S. K. GHOSE, JJ.

Khoka Das — Decree-holder — Appellant.

v.

Mahendra Nath Biswas and others — Respondents.

Appeal No. 478 of 1934, Decided on 24th June 1936, from original order of Sub-Judge, Khulna, D/- 28th July 1934.

Costs—Decree for—Enforcement of—Suit for possession—Different sets of defendants entitled to different interests in property — Decree against defendants for costs payable by defendants jointly — Plaintiff treating as satisfied his claim for costs in respect of defendant A—No intention of parties to treat entire order for costs as satisfied—Plaintiff held entitled to proceed against defendants other than A for proportionate share of costs —In calculating proportion, respective shares of defendants in property should be taken into account.

In a suit for possession of property different sets of defendants were entitled to different interests in the property. A decree against them was made in respect of the properties and one joint order for costs payable by the defendants jointly was made. Under a compromise with defendant A the plaintiff released him from his liability for the costs, but there was no intention of the parties to treat the entire order for costs as satisfied :

Held: that in such circumstances the decree-holder was entitled to proceed against other defendants than A for realization of a proportionate share of the costs. [P 658 C 1]

Held further: that in calculating the proportion of costs the proportion of the respective shares of the defendants in the property should be taken into account: 11 I C 450, *Not Foll.* [P 658 C 2]

Prakash Chandra Mazumdar and Santindra Nath Roy Chowdhury—for Appellant.

Sarat Chandra Roy Chowdhury and Sris Chandra Dutt—for Respondents.

Judgment. — This is an appeal by a decree-holder from an order passed by the Subordinate Judge of Khulna dismissing

an application for execution of a decree for costs. The question which arises for consideration in the appeal is one of some nicety. The decree was passed in a suit which the decree-holder as plaintiff had instituted for recovery of possession of four items of property and also for certain other reliefs. There was a very large number of defendants in the suit. As regards property No. 1, the suit was dismissed. One Jogendra Nath Shome, who was defendant 1 in the suit, claimed 8 annas share in properties Nos. 2 and 3 and the other 8 annas share in those properties was claimed by defendants 2 to 6. In property No. 4, the said defendant 1 claimed to be owner of the landlord's interest and in that property the tenants' interests were claimed by certain persons amongst whom were defendants 22 and 22-Ka. The plaintiff succeeded in obtaining a decree for possession in respect of properties Nos. 2, 3 and 4, and also certain other reliefs amongst which was a relief in the shape of a decree for account as against defendant 1, Jogendra. Two appeals were thereupon preferred to this Court from that decree; Appeal No. 71 of 1931 by defendant 1 and Appeal No. 43 of 1931 by defendants 2 to 6.

In the former appeal there was a compromise arrived at as between the plaintiff and defendant 1, and that appeal was disposed of on 12th April 1933 in accordance with the terms of the said compromise. In that appeal the other defendants had been made respondents but they were not parties to the compromise and the appeal was dismissed in so far as it was against them. The latter appeal remained pending and after running its usual course was eventually dismissed on a date with which we are not concerned here. During the pendency of the latter appeal, an application for execution which has given rise to the appeal now before us was filed by the plaintiff as decree-holder, and it was only for execution of the portion of the decree of the Subordinate Judge by which costs were awarded to the plaintiff as against defendants 1, 2 to 6 and 22 and 22-ka jointly. The Subordinate Judge has held that by reason of the compromise which the plaintiff had entered into with defendant 1, the plaintiff had absolved and released that defendant from all liability in respect of costs as provided for by the decree under exe-

cution and that, therefore, the present application for execution in respect of the said costs, which had been awarded to the plaintiff as against the defendants jointly including defendant 1, could not be allowed to be proceeded with as against the defendants other than defendant 1. It is from this order that the present appeal has been taken.

One of the contentions that have been urged before us on behalf of the decree-holder is that as a matter of fact under the compromise which was effected as between the plaintiff and defendant 1 and which was given effect to by the decree of this Court in Appeal No. 71 of 1931, there was no release granted to defendant 1 or satisfaction recorded as between the decree-holder and the said defendant in respect of the decree for costs. In this connexion, reliance has been placed upon the different clauses of para. 5 of the petition of compromise which set out the terms of the said compromise. We are of opinion that this contention is not well founded and if the terms contained in the several clauses of that paragraph have to be given effect to simultaneously it must be held that so far as defendant 1 is concerned, it was not the intention of any of the contracting parties that that defendant should have any further liability under the order for costs which had been made in the decree of the trial Court which is the decree now under execution. Whatever may have been said in Cl. (a) of that paragraph, it is perfectly clear to our mind upon a reading of Cl. (g) of the paragraph that it was the intention of the parties that the claim which the plaintiff has as against defendant 1 under the order for costs that had been made in the decree was to be treated as satisfied.

In Cl. (g) there is a specific reference to the fact that defendant 1 had spent a large sum of money over the litigation and it was expressly stated that in consideration of that fact as also for certain other considerations a sum of Rs. 1,600 was being paid by the plaintiff to the said defendant. We are clearly of opinion that the decree in so far as it was a decree as against defendant 1 was not intended to be kept alive for the purpose of execution even after the compromise effected as between that defendant and the plaintiff.

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The question, therefore, that has to be considered is whether in circumstances such as these when a decree for costs has been passed in favour of the plaintiff and against the defendants jointly, the plaintiff by adopting this particular course, namely, having absolved defendant 1 from liability in respect of the costs can be permitted to proceed as against the parties other than defendant 1 for realizing the said costs. On this question, one matter that has to be considered at the very outset is whether by the compromise it was intended that the entire decree for costs as against all the defendants should be treated as satisfied. Well, on this point whatever may have been the intention of the parties it is not possible for us to hold that upon the language that was used in the petition it could be held that such was the intention of the parties; and indeed it seems to us somewhat improbable that such could have been the intention seeing that the other appeal, viz. Appeal No. 43 of 1931 which had been preferred by some of the other defendants, remained pending in this Court at the time. Now the whole question, therefore, is whether as a matter of law it can be said that the decree became incapable of further execution in so far as it was against the other defendants and, if not, then to what extent was it executable as against them.

A very learned argument has been addressed to us by the learned advocates who have appeared on behalf of the parties in this case, but it seems to us that the decision that we will have to give will depend entirely upon the consideration of the peculiar equities of the particular case now before us. Here, it was a case in which a number of defendants in their character as tort-feasors had wrongfully entered into possession of the property which belonged to the plaintiff, and it was to recover possession of such properties that the plaintiff instituted the suit. Different interests were claimed by the different sets of defendants in the properties that were the subject-matter of the suit. Appropriate decree was made as against the different sets of defendants in respect of the properties and, one joint order for costs was made in favour of the successful plaintiff payable by the defendants jointly.

In those circumstances, if the plaintiff treats as satisfied his claim for the costs,

in so far as they could be realized from one of the defendants, then ordinarily and in the absence of any other facts which may be considered to be relevant, the principle to be followed is that the other defendants who are also liable under the decree jointly with the one in respect of whom the claim had been treated as satisfied, may plead either that the entire claim has been satisfied or that the plaintiff decree-holder having released one of the joint defendants from his liability, for the costs is entitled only to proceed against them for realization of their share of the costs pro tanto. The first of these pleas, as we have already stated, cannot succeed because we are not able to put upon the terms of the compromise the interpretation that by it the parties intended that the entire order for costs was to be treated as satisfied. The result, therefore, must be that the decree-holder would be entitled to proceed as against the other defendants for realization of a proportionate share of the costs.

The next question, therefore, is on what principle has the proportion to be calculated. There is a decision of this Court in 14 C L J 354 (1), in which it has been held that the costs should be treated as distributed in equal proportion amongst all the defendants. The rule laid down in that case, however, in our opinion, should not be treated as an inflexible rule but a rule which with propriety may be applied to a case in which the facts are similar to those as in the case in which that rule was laid down. So far as the present case is concerned, the matter will have to be decided upon considerations of equitable principles. We find that defendant 1 claimed an 8 annas share in the properties Nos. 2 and 3, and the other 8 annas share in those properties was claimed by defendants 2 to 6, and that while defendant 1 claimed the landlord's interest in property No. 4 the tenants' interest in that property was claimed by defendants 22 and 22 Ka. By the compromise the plaintiff must be regarded as having given up his claim for costs which is proportionate at least to the 8 annas share in properties Nos. 2 and 3 and the landlord's interest in property No. 4, if not to the tenants' interest in that property as well, a question which we are not called upon here to

decide. In such circumstances, we think it would be quite in consonance with principles of equity to hold that the plaintiff as decree-holder will be able to realise by execution as against defendants 2 to 6 only a quarter share and no more of the costs awarded to him under the decree of the trial Court. The appeal, in our opinion, should succeed to the extent indicated above and we order accordingly. The appellant will be entitled to his costs of this Court, hearing-fee being assessed at three gold mohurs.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1936 Calcutta 658

MUKHERJI AND S. K. GHOSH, JJ.

Emperor

v.

J, a Pleader—Opposite Party.

Reference No. 7 of 1935, Decided on 1st June 1936, made by Dist. Judge, Mymensingh, D/- 26th September 1935.

Legal Practitioner—Carelessness—Pleader checking account books of his client and filing application for withdrawal of money from Court—Money found already withdrawn—No ground for proceeding under Legal Practitioners' Act — Yet, pleader warned to be more careful.

A pleader filed an application for withdrawal of money in Court deposit, and it was found that the money was already withdrawn, but the pleader had checked the account books of his client to ascertain the amount to be withdrawn from the Court:

Held: that there was no sufficient material before the Court to proceed under the Legal Practitioners' Act, but it was noticed that the pleader should be more careful in such circumstances. [P 659 C 2]

S C. Basak and Bijan Kumar Mukherjee—for the Crown.

Amarendra Nath Basu, Gopal Chandra Das, Prasanta Bhushan Gupta and Satyendra Kishore Ghose—for Pleader.

Order.—We are not prepared to take too severe a view of the conduct of the pleader concerned in this case. The pleader appears to have been a practitioner of about 25 years standing and, as far as can be gathered from the papers before us, he commands a considerable practice. For the purposes of the affidavits which he swore, and in which he went out of his way to make a statement that the facts deposed to by him were true to his knowledge, he did, as a matter of fact, make such enquiry as was open to him to make. From the evidence that has been recorded in this case it appears that

in the course of that enquiry the books of the office of the client himself were consulted and when it was found that the moneys were not entered therein and a list was prepared for his use stating the amounts which had not been withdrawn and for which applications for withdrawal had to be made, he bona fide put in the application and swore to the affidavits which had to be filed therewith. There was no dishonesty on the part of the pleader and indeed Dr. Basak appearing on behalf of the Crown has said that there are no materials whatsoever upon which he can contend that the conduct of the pleader was in any way dishonest. What has been complained of before us and what seems to have struck the learned District Judge, as appears from the letter by which he has forwarded this reference to this Court, is that the carelessness of the pleader was such as required to be firmly dealt with in order that others may not take advantage of such carelessness or other pleaders may not resort to the tactics of colluding with the clients and put in applications for withdrawal of moneys which had already been withdrawn. The learned District Judge has rightly observed in that letter that there was gross negligence and lack of care on the part of the pleader in the discharge of his professional duties and that his conduct amounted to professional negligence which should be taken notice of by this Court, because otherwise pleaders would think that they could safely be careless and collude in matters like this with unscrupulous clients, and he has proceeded to observe further that

it would not be beyond the bounds of possibility that the pleader deliberately turned the blind eye to any check that he might apply at the request of the admittedly guilty law agent who was convicted for misappropriating the money originally withdrawn.

So far as the last-mentioned conclusion is concerned, we do not find any materials on the record on which we can say that this particular case in putting forward the six applications which form the subject matter of this case, the pleader deliberately connived at a false claim put forward by his client. The pleader in this particular case had to deal with the very large number of withdrawal applications of which all the others were genuine cases. At the same time, it is quite true that it is expected that when the Court requires the assistance of the pleader for

the purpose of enabling it to satisfy itself that the money is due and had not been withdrawn the Court certainly expects a greater degree of care on the part of the pleader. Having regard to all these circumstances, however, we feel that we are not able to hold that the conduct on the part of the pleader amounted to such misconduct as would justify the Court in proceeding to take action under the Legal Practitioners' Act against him. We, therefore, discharge the reference. We hope that the pleader concerned will be more careful in matters of this description in future, and we have no reason to suppose that the present proceedings that have been taken against him and have been pending for all this time will not serve as a warning to him for that purpose.

B.D./R.K. *Reference discharged.*

A. I. R. 1936 Calcutta 659

LORT-WILLIAMS AND CUNLIFFE, JJ.

Elimuddin Sarkar—Petitioner.

v.

Umed Ali Bepari and others—Opposite Parties.

Criminal Ref. No. 55 of 1935, Decided on 13th November 1935.

Criminal P. C. (1898), S. 145 (6)—Former dispute—Order under S. 145 (6) in favour of one party—Subsequent dispute relating to same property and between same parties or parties deriving their interest from same parties—Order in former dispute held binding on parties in subsequent dispute.

In a dispute concerning certain land between two parties an order under S. 145 (6) was made in favour of one party. In a subsequent dispute relating to the same property and between same parties or between parties deriving their interest from the same parties, the Magistrate reversed the order made in the former dispute:

Held: that the Magistrate's order was wrong. The two disputes being related to the same property and between same parties or parties deriving their interest from same parties, the order in the former dispute was binding on the parties in the subsequent dispute. Consequently as provided by S. 145 (6) the party declared to be entitled to possession in the former dispute was entitled to be protected against disturbance of such possession until evicted therefrom in due course of law; otherwise it would be possible for the opposite party to continue to harass his opponents by instituting successive proceedings under S. 145. The party alleging that it was aggrieved had its remedy in a civil Court, where the questions of title and possession could be settled as between contending parties.

[P 661 C 3]

N. K. Basu and Nirmal Chandra Chakravarty—for Petitioner.

H. S. Suhrawardy and A. S. M. Akram—for Opposite Parties.

Lort-Williams, J.—This is a Reference under S. 438, Criminal P. C., made by the Sessions Judge of Dacca. It relates to an order under S. 145 passed by the Sub-Divisional Magistrate of Manikgunj on 7th December 1934 in respect of lands comprising Sheet No. 1 of the Cadastral Survey of Mouza Purulia. In 1919 the present applicant's mother-in-law Fakrunnessa Chaudhurany, who was the predecessor-in-interest of the applicant's son who is the present malik of Touzi No. 97 of the Pabna Collectorate to which the disputed property belonged, obtained an order under S. 145, Criminal P. C., declaring the possession of herself and her tenants to the entire area covered by Sheet No. 1 of Mouza Purulia. This order was the result of proceedings taken in respect of a dispute between her and her tenants on the one hand and U. N. Roy, the Malik of the property covered by the adjoining Sheet No. 2 of Mouza Purulia, on the other; Elimuddin, the principal member of the first party in the present proceedings was a party to that case. That order came before this Court in Criminal Revision No. 985 of 1919 and was upheld. In 1921 the property belonging to U. N. Roy was purchased by Hara Sundar Majumdar, and as a result of further trouble between his tenants and the tenants of the present applicant's party, a second proceeding under S. 145, Criminal P. C., was drawn up in 1922. This matter came before the High Court, and in Criminal Revision No. 468 of 1922 reported in 27 C W N 171 (1) their Lordships, B. B. Ghose and Chotzner, JJ. quashed the proceedings on the ground that the original order of 1919 was binding on the parties and that fresh proceedings were improper. They held that it was clearly the duty of the Magistrate to see that the possession of the first party adjudged under the previous order was not disturbed.

In 1927 further trouble arose and the present applicant's party secured an order under S. 144, Criminal P. C., in respect of the same property. Subsequently, the boundary of Sheet No. 1 was demarcated with pegs in a proceeding under the Survey Act of 1875 and this demarcation was confirmed by the Collector of Dacca in 1928. There was no appeal against this order. In 1933 there was further dis-

turbance, with which it is not necessary to deal in this judgment, and in May 1934 there was a further disturbance, as a result of which the Sub-Divisional Officer of Manikgunj passed a further order under S. 144 in favour of the present applicant's party and in respect of the same property. This order came before the High Court and was dealt with by Guha and Bartley, JJ. in Criminal Revision No. 693 of 1934 (2). Their Lordships held that the original order of 1919 was not binding in the sense that fresh proceedings under S. 145 were not barred. Accordingly, they quashed the proceedings under S. 144. The present applicant was not a party to those proceedings. In the meantime, the applicant's party had instituted cases of rioting, trespass and theft against the members of the opposite party who were convicted. One of these cases was dealt with by this Court in Criminal Revision No. 1191 of 1934 when the conviction was upheld on the ground that the applicant's party was secured by the order of 1919 in their possession of the disputed property, that possession not having been challenged in any civil Court. The present order was passed against the applicant Hamid and 38 others. The learned Sessions Judge recommends that this order of the Subdivisional Officer of Manikgunj should be set aside. The grounds given for the opinion expressed by the Sessions Judge are that the property and the parties in the present proceedings and in the proceedings in 1919 are identical, that is to say, the parties in the present proceedings are either the same or they derive their interest from persons who were parties to the 1919 proceedings.

The learned Judge then proceeds in his letter of reference to refer to what he considers to be conflicting decisions of this Court, namely the decision reported in 27 C W N 171 (1) and the decision of Guha and Bartley, JJ., to which I have already referred. In my opinion, it is not clear that these decisions are in conflict. The first decision proceeded upon the assumption that the property and the parties concerned were the same. But the decision of Guha and Bartley, JJ. so far as we have been able to ascertain both from the record

1. *Aran Sardar v. Hara Sundar Mazumdar*, 1923 Cal 95=71 I C 225=24 Cr L J 97=27 C W N 171=37 C L J 39.

2. *Harpad Mazumdar v. Dhani Ahmad Sardar*, 1935 Cal 494=1935 Cr O 886=157 I C 674.

and the remarks addressed to us by the learned advocates, proceeded upon the assumption that the parties, at any rate, were not the same and, therefore, the order of 1919 could not be a bar to the proceedings in 1934 between different parties. Mr. N. K. Basu, in his argument before us, has proceeded upon the same lines and sought to show that both the property and the parties are different, and that they are different in the present proceedings from the property and the parties with which the proceedings of 1919 were concerned. He has failed to show this distinction by means of any document upon the record. The learned Judge has stated in his letter of reference that both sets of proceedings concern the same property and are substantially between the same parties. The order of 1919 was passed against the party of U. N. Roy. His interest passed in 1921 to Hara Sundar, the present owner of the property covered by sheet No. 2, and the present landlord of the tenants of the opposite party. This appears from the record. Mr. Basu has drawn our attention to the petition filed in Criminal Revision No. 693 of 1934 (2) in which it is stated that the Official Receiver of this Court was appointed Receiver of U. N. Roy's property and was at first made a party to the 1919 proceedings. This was without the leave of the Court, and this leave not having been obtained, the Receiver made an application to the Magistrate in the S. 145 proceedings for time in order that leave might be obtained. The petition, however, was rejected and the Magistrate passed a final order declaring possession of the first party. Subsequently, the Official Receiver moved the High Court in Criminal Revision No. 985 of 1919 decided on 13th January 1920. The High Court discharged the Rule, but observed as follows:

It has been pointed out to us that the order may be construed as affecting the rights of the Receiver. In that view we think that as no formal leave from the High Court was obtained to add him as a party, his name may be deleted from the proceedings. The order stands good otherwise.

Mr. Basu then sought to argue that his clients, the opposite party in the present proceedings, derived his interest from that Receiver and, therefore, is not bound by the order made in 1919. Mr. Basu, however, has failed to show any-

thing upon the record which supports this contention. According to his argument, this information was before their Lordships Guha and Bartley, JJ. in Criminal Revision Case No. 693 of 1934 (2), and it was this fact which was the basis of their judgment, namely that the parties in 1934 were not the same as those in 1919. This fact not appearing on the record which is before us, and which was before the Sessions Judge, we must proceed upon the assumption that the Sessions Judge is correct when he states that the parties to the two sets of proceedings were the same or derived their interest from the same parties. It is upon this basis, namely that the property and the parties are the same in the two sets of proceedings that my judgment herein is based. That being so, in my opinion the learned Sessions Judge is right in his contention that the proceedings in 1919 are binding upon the parties concerned in the proceedings of 1934. Consequently, as provided by S. 145, sub-s. (6), the party declared to be entitled to possession in 1919 is entitled to be protected against disturbance of such possession until evicted therefrom in due course of law. Otherwise it would be possible for the opposite party to continue to harass his opponents by instituting successive proceedings under S. 145. The party alleging that they are aggrieved have their remedy in a civil Court, where the question of title and possession can be settled as between the contending parties. Mr. Basu further attempted to show that the property affected by the two sets of proceedings is not the same. He failed, however, to show anything upon the record supporting his contention and we must accept the statement of the learned Sessions Judge that a map of the property was prepared by a Kunangoe after local enquiry and that the boundaries shown are identical with the boundaries with which the proceedings of 1919 were concerned, that is to say, the property comprised in sheet No. 1 of Mouza Purulia. The result is that the decision in this case turns upon questions of fact, namely that the property and the parties in the 1934 proceedings are identical. We accordingly accept the reference and set aside the order drawn up by the Sub-Divisional Magistrate of Manik-gung under S. 145, Criminal P. C., dated 7th December 1934.

Cunliffe, J.—I am of the same opinion. It is quite obvious that only in the most exceptional circumstances and, I should say, within the longest distance of time, would an order under S. 145, Criminal P. C., be upset. In considering this question, Rampini and Mookerjee, JJ. in 33 Cal 33 (3) at p. 49 said as follows after reviewing all the authorities with regard to the matter:

It appears to be clear to us that there is no inflexible rule of law, that a Magistrate, in deciding the question of possession under S. 145, Criminal P. C., is concluded by every previous order of a Civil or Criminal Court relating to the subject of dispute, and that the weight to be attached to any such previous order must depend upon the facts and circumstances of the particular case.

As my Lord has related, there have been conflicting orders in relation to this particular piece of land. I should have thought that the real basis on which any particular order under S. 145 could be reversed by a subsequent Court would be only on the ground that the parties affected by the previous order have been completely dispossessed. There is no such evidence of that having occurred here and for these reasons I concur with my Lord in accepting this reference.

D.S./R.K. *Reference accepted.*

3. *Khulada Kinkar Roy v. Danesh Mir*, (1906) 33 Cal 33=10 C W N 257=2 Cr L J 670=2 C L J 271 (F B).

A. I. R. 1936 Calcutta 662

MACNAIR, J.

In re Jalpaiguri Banking and Trading Corporation Ltd.

O. O. C. J. Decided on 25th November 1935.

Companies Act (1913), Ss. 153, 169—Stay of proceedings—Arrangement between company and its unsecured creditors including decree-holders for sanctioning scheme postponing payment of all such creditors—Such arrangement sanctioned by Court—Decree-holder creditor carrying on execution of decree against such compromise—Court has power to order stay of execution proceedings.

Section 153 contemplates the type of arrangement arrived at between the company and its unsecured creditors including decree-holders for the sanction of a scheme postponing payment of all such decree-holders. It does not contemplate merely a compromise or arrangement come to in or after a winding up order has been passed, and it provides in clear language that when such compromise has been sanctioned by the Court, such compromise shall be binding on the creditors. Hence the Court has power to stay the execution of a decree started by one of the decree-holders creditors questioning the

compromise and issue injunction to restrain him from proceeding further with such proceedings. The injunction would remain so long as the scheme is in operation: *Booth v. Walkden Spinning and Manufacturing Co. Ltd.*, (1909) 2 K B 368, *Disting.* [P 663 O 1,2]

Sudhish Roy—for the Company.

N. C. Chatterjee—for Kalipada Banerjee.

Order.—This is an application by the company that certain execution proceedings that have been undertaken by Rai Bahadur Kalipada Banerji in the Court of the Subordinate Judge of Jalpaiguri be stayed, so long as the scheme passed by this Court, remains in force. Kalipada Banerji obtained a decree against the Jalpaiguri Banking and Trading Corporation Limited in July 1934. Various payments were made under that decree and on 17th December 1934 the Company applied under S. 153, Companies Act, for the sanction of a scheme postponing payment of all unsecured creditors including decree-holders. A meeting was held and the scheme was passed in February of this year. In March there was an application by Kalipada Banerji to this Court in which he submitted that the scheme was not binding on him. That application was heard by my learned brother Cunliffe, J., who decided in a judgment reported in 39 C W N 875 (1), that the creditor Kalipada Banerji was not entitled as a decree-holder to be considered separately as a "class" of creditor. The scheme was sanctioned as I have said, and in view of this judgment of the learned Judge in this particular matter the creditor Kalipada Banerji is bound by that scheme and the compromise which was being entered into between the Company and its creditors. Kalipada Banerji however was not satisfied and has attempted to nullify the orders of the Court by getting his decree transferred to the Court of the Subordinate Judge of Jalpaiguri and attempting to execute it against the assets of the Company.

The main ground of opposition to the present application is that this Court has no jurisdiction to stay the proceedings in the Jalpaiguri Court because no such jurisdiction is vested in the Court under the Companies Act except under S. 169. S. 169 merely provides, it is argued, a stay of proceedings after presentation of a winding up petition and in no other circumstances is a stay of proceedings

1. *In re Jalpaiguri Banking & Trading Co. Ltd.*, (1935) 39 C W N 875.

possible. Reliance is placed on the case in (1909) 2 K B 368 (2). But that case is in many respects different to the present. There an order had been made that meetings of the creditors and of the members of the Company should be summoned to consider whether a scheme should be come to between the Company and its creditors and members. Before the order had been made summoning the meetings a creditor obtained judgment and the application in that case was by the Company for stay of execution of that judgment. In his judgment Darling, J. states the question which the Court was called on to decide, and says :

I am far from saying that, if the meetings of the creditors and of the shareholders of the Company had been held, and if the proposed scheme of arrangement had been agreed to at those meetings and had been sanctioned by the Court, a stay of execution on a judgment obtained against the Company might not be ordered. It is however not necessary to decide that point for that stage has not yet been reached in this case. All that has happened here is that the Judge has made an order for the summoning of meetings of creditors and shareholders, and until those meetings have been held it is impossible for anyone to say whether the scheme will or will not be agreed to.

Stress is laid on the same point by Jelf, J. in his judgment in the same case. He points out that the scheme had only been proposed and that it was impossible to say what would be the outcome of the meetings which were being convened for approving the Scheme. S. 153, Companies Act, which is similar to S. 120 of the English Act, on which the case to which I have just referred was based, provides that if a majority of three-fourths in value of the creditors agree to a compromise or arrangement, such compromise or arrangement shall, if sanctioned by the Court, be binding on all such creditors, as also on the Company, or, in the case of a Company in the course of being wound up, on the liquidator and contributories of the Company.

There is no doubt that S. 153 contemplates the type of arrangement which has been come to in this case and not merely a compromise or arrangement come to in or after a winding up order has been passed and it provides in clear language that when such compromise has been sanctioned by the Court, such compromise shall be binding on the creditors.

2. Both *v. Walkden Spinning & Manufacturing Co. Ltd.*, (1909) 2 K B 368=78 L J K B 764 =16 Manson 225.

Mr. Banerji has already had one decree of this Court given against his contention that he was not bound by the compromise and he is now endeavouring to set that decree at naught by starting execution proceedings in the mofussil. In my opinion, this Court has the power to stop such proceedings and there will be an injunction restraining him from proceeding further with the execution of the proceedings of the decree in this suit dated 20th July 1934 now pending in the Court of the Subordinate Judge of Jalpaiguri. The injunction will remain so long as the scheme is in operation. The application is allowed with costs.

R.W./R.K. *Application allowed.*

A. I. R. 1936 Calcutta 663

D. N. MITTER AND PATTERSON, JJ.

Adhar Chandra Mondal — Plaintiff—Appellant.

v.

Dolgobinda Das — Defendant 1 and others—Respondents.

Appeal No. 107 of 1933, Decided on 4th March 1936, from original decree of Sub-Judge, Murshidabad, D/- 23-12-1932.

(a) Contract Act (1872), Ss. 2 and 69—Stranger to contract, when can sue—Darpatni kabuliati stipulating for payment into zamindari shiresta on behalf of patnidar—No trust created—Sapatnidar making payment of arrears of rent and averting sale of patni can claim reimbursement from patnidar and not darpatnidar.

A stranger to a contract cannot take the benefit of a contract between two other persons reserving a benefit to that stranger unless from the terms of the contract it is clear that a trust for the stranger was intended. Consequently where under a darpatni kabuliati the darpatnidar contracts with the patnidar that he would pay the darpatni rent into the shiresta of zamindar in the name of patnidar, and stipulates that in default of the payment of the assigned darpatni rent according to the kist he shall remain bound to pay what sum will fall due to the zamindar on account of interest for the defaulted kists in terms of patni kabuliati between the patnidar and the zamindar, there is no trust created in favour of the zamindar so as to entitle him to enforce payment by darpatnidar, nor is the darpatnidar "bound by law to pay" within the meaning of S. 69, if proceedings for sale of patni under regulations for arrears of rent are taken and sapatnidar pays the arrears and averts sale of patni so as to give him cause of action for reimbursement under S. 69 against darpatnidar: 1934 Cal 682 and 1914 Cal 129, *Dissent*; 1926 Cal 1009 and 1928 Cal 518, *Foll*; 1917 Bom 55; 32 All 410 (P O); 7 W R 377; 1922 P C 176 and 1930 Mad 382 (F B), *Ref.*; *English and foreign cases discussed.*

[P 667 C 1; P 671 C 1,2; P 672 C 1,2]

(b) Precedent — Conflict of decisions— Benches of same High Court—Proper procedure is to refer question to Full Bench.

Where a Bench of a High Court takes view on a question of law opposed to the view taken by other Bench or Benches of the same High Court, although that view may agree with a view of yet another Bench, the proper procedure to follow is to refer the question to the Full Bench to decide what so far as their High Court is concerned would be a binding decision.

[P 671 C 1]

(c) Bengal Patni Taluqs Regulation (8 of 1819), S. 13—Non-registration of name of purchaser of patni tenure—Effect of.

Until registration of the name of a purchaser of patni tenure is effected in the landlord's sherista, the transfer does not affect the zamindar's right and in spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed upon the tenure: 1928 Cal 94, *Foll.*

[P 672 C 2]

Mukherji, Benoyendra P. Bagchi and Kumud Bandhu Bagchi—for Appellant.

Ramaprosad Mukerji, Sambhu Nath Banerjee, Bejoy K. Mukherji, Bankim Chandra Roy and B. N. Mukerji—for Respondents.

D. N. Mitter, J.—The plaintiff whose suit for contribution has been dismissed by the Subordinate Judge of Murshidabad has preferred this appeal. The facts on which his right of contribution is founded lie within a narrow compass and may be briefly stated: Estate No. 199 of the Murshidabad Collectorate belongs to a lady Daibakumari and to the Nawab Bahadoor of Murshidabad in the shares of 12 annas and 4 annas respectively. On 2nd September 1907 the Nawab Bahadoor granted a patni lease in respect of the 4 annas share of his said zemindari to Daibakumari, the proprietor of the 12 annas share. On 29th April 1905 Daibakumari granted a darpatni to Tarini Dhar in respect of 4 annas share of the zemindari. On 9th August 1905 Tarini Dhar created a sepatni in favour of Adhar Chandra Mandal, the plaintiff, of some mouzas comprised in his darpatni and he granted sepatni of the remaining mouzas to defendants 4 to 11. On 20th February 1923, Tarini sold the darpatni interest to Nirod Barani (defendant 2) as benamidar for her husband Dolgobinda who is defendant 1 to the suit. From 1332 B. S. onwards the darpatnidars used to pay the superior (patni) rent to the zemindar under the terms of the darpatni kabuliyat which regulate the rights between the patnidar and dar-

patnidar to which detailed reference will be made hereafter. The patni rents for 1335 to 1336 B. S. fell into arrears and proceedings under Regn. 8 of 1819 were taken to sell the property on 1st Baisakh 1336. In order to avert the sale the plaintiff had to pay Rs. 1173-9-6. The Patni rents for 1336 and 1337 B. S. fell due and two other Astam proceedings were taken for the sale of the patni under the regulation, and in order to avoid the sale the plaintiff sepatnidar had to pay a further sum of Rs. 2,602-10-0 to the zemindar.

The plaintiff has sued for recovery of the aggregate sum of Rs. 3,776-3-6 and as neither the patnidar nor the darpatnidar paid the said sum on demand by the plaintiff, the plaintiff has impleaded in the suit both the patnidar and the darpatnidar and has sought for relief in the first instance against the darpatnidar (Nirod Barani, defendant 2, and her husband, defendant 1), and in the alternative against the patnidar's (Daibakumari's) adopted son who is defendant 3 to the suit. The case made in the plaint is that defendant 1 remained bound to pay the zamindar, the Nawab Bahadoor, the patni rent payable by Daibakumari Bibi according to the terms of the darpatni kabuliyat executed by Tarini Dhar and actually made amicable payments. The gist of the action is stated in para. 7 of the plaint where it is stated that defendants 1 and 2 were bound by law to pay the rental aggregating Rs. 3,776-3-6, and as they did not pay, the plaintiff was forced to pay alone the entire sum and hence the suit in which this appeal arises.

The defence of defendant 1 to the suit is that he had nothing to do with the patni which had been purchased by defendant 2 with her own money and that the suit against him should be dismissed and costs awarded. The defence of defendant 2 Nirod Barani is that she purchased the patni with her own money, that the payments made by plaintiffs were voluntary payments and that the defendant was not bound to pay the amount of patni rent to the zamindar, and further that the plaintiff was not bound and had no right in law to pay the amount under the Regulation. Defendant 3 stated in his defence that he was the adopted son of Daibakumari and pleaded that he had sold away, on the

basis of a registered deed of sale, the 4 annas patni interest which he owned in the Mahals in Touzi No. 199 to defendant 6 Serowgi on 20th Magh 1335 to the full knowledge of the plaintiff, and that he was not liable. On these pleadings several issues were framed and arose for decision. It is necessary to state only two issues for the purposes of the present appeal. They are issues 5 and 6. Issue 5 is as follows: Were defendants 1 and 2 bound to pay the money which was paid by plaintiff? Issue 6 is in these terms: Can the plaintiff recover the amounts claimed? If so, from whom?

The conclusion of the Subordinate Judge on issue 5 was that the patnidar was the person bound to pay the rent to his superior landlord and that, although by the terms of the darpatni patta the darpatnidar was bound to pay the rent payable by the patnidar to the zamindar but as the Nawab Bahadur of Murshidabad could not sue defendant 1 or defendant 2 for the patni rent as he was no party to the contract between the patnidar and darpatnidar, defendant 1 or defendant 2 was not bound by law to pay to the zamindar; and in support of his view he relied on a decision of Page, J. (as he then was) and Cumming, J. in 53 Cal 922 (1). The Subordinate Judge dismissed the suit against defendants 1 and 2 on this ground. He dismissed the suit against the patnidar, defendant 3, on the ground that Daibakumari (predecessor of defendant 3) sold her patni rights to Joy Chand Serowgi defendant 6 in 1335 B. S.; the patni rent for the period in question was not payable by her.

This appeal has consequently been brought by the plaintiff, and on his behalf it has been contended by Dr. Mukerji that the Subordinate Judge has gone wrong on both the points. He contends that it should have been held that S. 69, Contract Act, applied to the present case and that the darpatnidar was "bound by law" to pay the patni rent to the Nawab Bahadoor by reason of the terms of the darpatni kabuliyat and that the zamindar (Nawab Bahadur) could enforce the covenant in the darpatni kabuliyat against the darpatnidar although he was no party to the same, and that the view of Page, J. in 53 Cal 922 (1) has been dissented from in

later decisions of this Court, in particular by Lord-Williams, J. and M. C. Ghose, J. in 38 C W N 682 (2). Dr. Mukerji has argued further that even if the decision of Page, J. on which the trial Court has relied be held to be right, it does not affect plaintiff's right to contribution as defendant 1 or defendant 2 (darpatnidar) were bound by law to pay under the darpatnidar kabuliyat and a suit could lie at the instance of the patnidar and he has relied in support of this contention on certain observations of the learned Judges of the Bombay High Court in 42 Bom 93 (3) at p. 98 where it is said

that bound by law does not mean bound by law to the plaintiff but that the defendant at the suit of any person might be compelled to pay.

It becomes necessary to examine the two contentions respectively a little carefully, more particularly the first of the above contentions as the decisions of this Court seem to be in conflict. Taking the first ground contended for that a suit would lie at the instance of the Nawab Bahadur for recovery of the patni rent from the darpatnidar it appears to us that this contention is opposed to the general rule that no rights can be acquired by third parties under a contract unless by the creation of a trust, and the question whether a trust was created in favour of the Nawab Bahadur would depend on the construction of the darpatni pottah in the present case (Ex. 3), p. 1, part 2 executed by Daiba Kumari in favour of Tarini Prosad Dhar. We propose in the first instance to discuss the English law relating to the general rule just indicated. Sir William Anson in his principles of the English Law of Contract, Edn. 17 (1929) (p. 279) expounds the English law on the subject as follows:

(a) It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. The case in 1 B & S 393 (4), is conclusive against this view; (b) Equity Judges have used language sometimes, very explicit, to the effect that where a sum is payable by A for the benefit of B, B can claim under the contract as if it had been made with himself

2. Khired Behary v. Man Gobinda, 1934 Cal 682=152 I C 351=61 Cal 841=38 C W N 682.

3. Somashastri v. Swami Rao, 1917 Bom 55=49 I C 482=42 Bom 93=19 Bom L R 939.

4. Tweedle v. Atkinson, (1861) 1 B & S 393=124 R R 610=8 Jur (N S) 332=30 L J Q B 265=121 E R 762=4 L T 468=9 W R 481.

1. Jiban Krishna v. Nirupama Gupta, 1926 Cal 1009=96 I C 846=53 Cal 922=30 C W N 812.

The impression that in any such case a third party who is to be benefited acquires equitable rights *ex contractu* arises as was explained by Jessel, M. R., in 16 Ch D 125 (5), from the fact that an agreement between two parties might well be so framed as to make one of them trustee for a third Whether a trust has or has not in any particular case been created must be a matter of construction as may be seen by reference to the case in 25 Ch D 89 (6) and 25 Ch D 103 (7). In the case last cited Lindley, L. J. put the matter very tersely thus :

But an agreement between A and B that B shall pay C gave C no right of action against B. I cannot see that there is in such a case any difference between Equity and Common Law. It is a mere question of contract. It is said that Mr. Peace has an equity against the company because the company has had the benefit of his labour. What does that mean? If I order a coat and receive it I got the benefit of the labour of the cloth manufacturer but does any one dream that I am under any liability to him. It is mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work.

Professor Langdell has put the English Common Law view in the following clear and vigorous language :

A person for whose benefit a contract is made if he is a stranger to the consideration, cannot maintain an action on it. This latter proposition is so plain upon its face that it is difficult to make it plainer by argument. A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise. In the case of a promise made to one person for the benefit of another there is no doubt that the promisee can maintain an action not only in his own name but for his own benefit. If therefore the person for whose benefit the promise was made could also sue on it, the consequence would be that the promisor would be liable to two actions. In truth a binding promise to A to pay 100 to B confers no right upon B in law or equity. It confers an authority upon the promisor to pay the money to B, but that authority may be revoked by A at any moment: (see Langdell on Contract, Art. 62).

In Leake on Contract, Edn. 7, p. 301 it is said:

A contract can create no right or liability in a person who is not a party to it unless he can claim or be charged through a party, as in the case of a cestui que trust claiming through a

trustee, or a principal claiming or being charged through an agent.

From the statement of the law in the leading text books we now turn to the leading English decision on the subject. In 6 Ch A 671 (8) Lord Hatherley, L. C. uses language to suggest that in equity, where a sum is payable by A B for the benefit of C D, C D can claim under the contract as if it had been made with himself. In *In re Empress Engineering Co.* (5) Sir George Jessel, Master of the Rolls, was of opinion that the principle laid down in *Touche v. Metropolitan* (8) can be justified on the ground that an agreement between the two parties might be so framed as to make one of them a trustee for a third. In (1919) A C 801 (9), where the Charterer sued the Shipowner for the amount of the broker's commission as trustee for the broker, the claim was allowed as against the Shipowners on the footing of a trust. This is manifest from the speeches of some of their Lordships to which reference will presently be made. Lord Chancellor Birkenhead said:

My Lords, so far as I am aware, that case has not before engaged the attention of this House, and I think it right to say plainly that I agree with that decision and I agree with the reasoning, shortly as it is expressed, upon which the decision was founded. In this connection I would refer to the well-known case *In re Empress Engineering Co.* (5). In the judgment of Sir George Jessel, M. R. the principle is explained which in my view underlies and is the explanation of the decision in 8 Ex 299 (10). The Master of the Rolls uses this language: 'So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of third person. As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the cestui que trust can take the benefit of the contract.' It appears to me plain that for convenience, and under long-established practice, the broker in such cases, in effect, nominates the charterer to contract on his behalf, influenced probably by the circumstance that there is always a contract between charterer and owner in which this stipulation which is to enure to the benefit of the broker, may very conveniently be inserted. In these cases the broker, on ultimate analysis, appoints the charterer to contract on his behalf. I agree therefore with the conclusion arrived at by all

5. *Empress Engineering Co., In re*, (1881) 16 Ch D 125=43 L T 742=29 W R 342.

6. *Murry v. Flavell*, (1884) 25 Ch D 89=53 L J Ch 185=49 L T 690=32 W R 102.

7. *Rotherham Alum and Chemical Co.*, (1884) 25 Ch D 103=53 L J Ch 290=50 L T 219=32 W R 131.

8. *Touche v. Metropolitan Ry. Warehousing Co.*, (1870) 6 Ch A 671.

9. *Les Affreteurs Reunis v. Leopold Ealford*, (1919) A C 801=88 L J K B 861=121 L T 393=35 T L R 542=24 Com Cas 268.

10. *Robertson v. Wait*, (1853) 8 Ex 299=22 L J Ex 209=1 W R 132.

the learned Judges in *Robertson v. Wait* (10), that in such cases charterers can sue as trustees on behalf of the broker.

Lord Wrenbury observed in the same case:

We have here to do with a contract between two parties reserving a benefit to a third. The two parties are the Shipowners and the Charterers, the third party is the broker of one of them, who is to be remunerated in respect of a contract which is being made for the hire of a ship. The particular form of contract in question is of course prepared by or is under the eyes of the broker who is negotiating the matter. It is sent to the principals for signature, and they sign it, and there is contained in it a clause which reserves a benefit to the broker. Under these circumstances an action is brought by the broker against the shipowner for the commission which is expressed to be payable to him under the contract between the shipowner and the charterer, a contract to which he himself, I agree, was not a party. By agreement between the parties the record is to be treated as if the charterers were joined as a plaintiff in the action. The case is one in which an action can be brought on behalf of a person to whom a benefit is reserved although he is not a party to it. That is the subject of the decision in *Robertson v. Wait* (10).

And again Lord Wrenbury remarks:

Directly it is conceded that the broker although not a party to the contract, can sue on the contract, inasmuch as he can sue by the charterer as trustee for him, it appears to me that the case really is over.

In 30 Ch D 57 (11) the rule of the Common law and the exceptions to the rule have been stated by Lord Justice Cotton thus:

Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person, a person who is not a party to the contract, cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as cestui que trust under that contract, then B would, in a Court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated.

It seems to us that the reason for the rule that none but those in privity with the consideration can maintain an action on the promisee is found in the original conception underlying assumpsit. This remedy of assumpsit was founded on the notion of giving redress for damages incurred by the non-fulfilment of a deceitful promise; only the person who suffered the damage in question could therefore

bring a suit upon breach of the promise. This rule was clearly a procedural one and was peculiar to the action of assumpsit. The statement of the rule that the stranger to the consideration cannot maintain assumpsit does imply according to English Courts that the promisor owes no legal duty to the person for whose benefit the contract is made. Thus Lindley, J. in *Rotherham Alum* (7) once said that if an agreement is made between A and B that B shall pay a sum of money to C the inability of C to sue is not due to any defect of remedy. "It is," said he, "a mere question of contract." The remedy by the action of assumpsit is as broad as the limits of contractual liability. If it were otherwise then one would have expected that the English Courts should have recognised the right of a stranger to sue upon a contract made for his benefit now those forms of action have been abolished by the Judicature Acts. English Courts have refused to sanction the actions, generally, although exceptions have been introduced to the general rule by introducing the theory of trust, agency etc. In (1915) A C 847 (12) at p. 853 Lord Haldane L. C. said:

My Lords, in the law of England certain principles are fundamental: one is that only a person who is a party to a contract, can sue on it, our law knows nothing of a *jus quaestum terties* arising by way of contract; such a right can be conferred by way of property, as for example under a trust.

The rule deducible from the authority above cited is that it is a general principle both at Common law and at equity, that a stranger to the contract cannot sue on it although the stranger takes a benefit under it. There are however several apparent exceptions from this principle. At one time it was considered that the nearness of relationship of one party to the contract with the party to be benefited by it gave the latter the benefit of the considerations and the right to sue on it. The Physician's Case cited in 1 Ventr 6 (13) was a leading authority on this point. There A made a promise to his physician, that if he would effect a certain cure, he would pay a sum of money to the physician's daughter and it was held that she might sue. 1 Ventr

12. *Dunlop Pneumatic Tyre v. Selfridge*, (1915) A C 847=84 L J K B 1680=113 L T 386=31 T L R 399=59 S J 439.

13. *Bourne v. Mason*, (1680) 1 Ventris 6=86 E R 5.

11. *Gandy v. Gandy*, (1885) 30 Ch D 57=54 L J Ch 1154=53 L T 306=33 W R 803.

318 (14) at p. 332 was another case of this type illustrating the exception from the general principle on the ground of nearness of relationship. There in assumpsit the plaintiffs who were husband and wife declared that the wife's father being seized of land which had subsequently descended to the defendant was about to fell £1000 worth of timber to raise a portion for his said daughter; and the defendant promised the father that, if he would forbear to fell the timber, he would pay the daughter £1000. It was held negating the contention that the father alone could have brought the action, that the husband and wife could sue on the ground of nearness of relationship. This last case was approved of by Lord Mansfield, C. J. a century after in 2 Cowper 437 (15) at p. 443 but these two cases were in the year 1861 considered and deliberately disapproved in 1 Best & Sm 393 (4) and can no longer be considered law.

Another exception to the general principle is illustrated by cases where *A* having as trustee for *B* contracted with *C*, *B* was held entitled to sue both *C* and *A* for the performance of the contract; the case in 6 Ch A 671 (8), already referred to is a case of this sort. So too in 25 Ch D 89 (6) where a widow who was the *cestui que trust* of a trust created by partnership articles was allowed to sue upon them. There are cases of agency which may be considered as furnishing another apparent exception from the rule, see 3 S W 417n (16). In some of the American States there was some early recognition of the right of the third person to sue. See the leading case in (1859) 20 N Y 268 (17). Mr. Street in his treatise on the Foundations of Legal Liability, Vol. 2, p. 157 points out that in the State of New York the right of the third person to sue on a contract made for his benefit was by this leading case fully established. The American doctrine laid down in the leading case is not binding on us and we are bound to follow the principle laid down by the Courts of Equity in England unless there are overriding authorities in Indian Courts which prevent us from doing so. I

am not unmindful also of the fact that in several other foreign countries like Germany and Italy the view is taken that in a contract between *A* and *B* for benefit of *C*, *C* can bring an action against the person by whom the benefit is to be conferred and there is an interesting article by an American writer in the Harvard Law Review Vol. 15, p. 43, showing the comparative statement of the law in different states including Japan, but we are not troubled with either the Roman Law or the law of other foreign nations but we have to determine the matter by rules of equity as obtained in England. We now turn to the Indian decisions.

The question of the applicability of the rule laid down in 1 Best & Sm 393 (4) to India where rights of parties have to be determined by equity, justice and good conscience came up for consideration by their Lordships of the Judicial Committee in 37 I A 152=32 All 410 (18) there on 25th October 1877 the appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time) he would pay to the respondent Rs. 500 a month in perpetuity for her betel leaf expenses from the date of her reception and charged certain properties with the payment with power to respondent to enforce it; it was held in a suit in 1901 by the respondent to recover arrears of this annuity from 1896, when husband and wife separated that respondent 1, although no party to the agreement was clearly entitled to enforce her claim and Mr. Ameer Ali who delivered the judgment of the Judicial Committee referred to the case in 1 Best & Sm 393 (4) and observed as follows:

First, it is contended on the authority in 1 Best & Sm 393 (4) that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied on was an action of assumpsit and that the rule of common law on the basis of which it is dismissed is not in their Lordships' opinion applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff. She is the only person beneficially entitled under it. In their Lordships' judgment although no party to the document she is clearly entitled in equity to enforce her claim; and then their Lordships proceed to state:

14. Dutton v. Poole, (1681) 2 Lev 210=1 Ventr 318.

15. Martyn v. Hind, (1776) 2 Cowper 437=1 Doug 142.

16. Hook v. Kinnear, (1818) 3 S W 417n=19 R R 251.

17. Lawrence v. Fox, (1859) 20 N Y 268.

18. Khwaja Muhammad Khan v. Husaini Begam, (1910) 32 All 410=7 I C 237=14 O W N 865=37 I A 152 (P C).

Their Lordships desire to observe that in India and amongst communities circumstanced as the Mahomedans, amongst whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts.

The next case to be considered is 41 Cal 137 (19) which contains the weighty opinion of Sir Lawrence Jenkins, C. J., and it is necessary to quote at some length the observations of the learned Chief Justice (with whom A. T. Mukerji, J. concurred) for this decision has been the subject of consideration in two later judgments of this Court and has been held to lay down the rule of equity somewhat too broadly. There the facts shortly put were these: In 1899 defendants 1 to 4 borrowed from plaintiff Rs. 300 on 18th August 1903; defendants 1 to 4 executed a registered instrument of transfer of all their property moveable and immoveable to defendant 5 for Rs. 2,000; Rs. 2,000 was not paid in cash and it was stated in the Kobala that out of the consideration money the sum of Rs. 330 due to plaintiff should be paid by defendant 5. On the same day there was an arrangement between plaintiff and defendant 5 by which the liability of defendant 5 was acknowledged and accepted and the Patta, the title deed of one of the properties was handed over to defendant 5. This money not having been paid by defendant 5 a suit was brought by plaintiff against defendants 1 to 4 as also against defendant 5. Both Courts dismissed the suit. In allowing the appeal Sir Lawrence Jenkins uses the following language with regard to the applicability of *Tweedle v. Atkinson* (4) to the facts aforesaid:

If we were governed by *Tweedle v. Atkinson* (4), there might possibly be a difficulty in our way, but it has to be borne in mind that *Tweedle v. Atkinson* (4) was a decision on a form of action peculiar to the Common Law Courts in England and that the case was influenced by the rule that no action in assumpsit could be maintained upon a promise unless consideration moved from the party to whom it was made. Here we have a definition of consideration which is wider than the requirement of the English Law: [S. 2 (d), Contract Act]. And it has been laid down by Sir Barnes Peacock in a Full Bench decision of this Court in relation to Courts in mofussil, (1867) B L R Sup Vol 675=7 W R 377 (20), that in those Courts the

19. *Debnarain v. Chunilal Ghose*, 1914 Cal 129 =20 I C 630=41 Cal 137.

20. *Rambuz Chittangeo v. Modhuscodum*, (1867) Beng L R Sup Vol 675=7 W R 377.

rights of parties are to be determined according to the general principles of equity and justice without any distinction as in England, between that partial justice which is administered in the Courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. The rules and the fictions which have been in many cases adopted by the Common Law Courts in England for the purpose of obtaining jurisdiction in cases which would otherwise have been cognizable only by the Courts of Equity are not necessary to be followed in this country where the aim is to do complete justice in one suit. More than that we now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweedle v. Atkinson* (4). That I take to be the result of the decision of the Privy Council in the recent case, *Khwaja Muhammad Khan v. Husaini Begum* (18). In the report of that case in 14 C W N 865 (18) at p. 868 there is an interlocutory remark of Lord Macnaghten which indicates the limits imposed on a Court of Common Law. He there says 'Supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in equity?' The answer of the learned counsel was 'Yes'. It is possible that this distinction can be explained by the history of the action of assumpsit which was a development of the writ of trespass. In the old writ in indebitatus assumpsit it was alleged that the defendant not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtly to deceive and defraud, has not paid and so forth. The breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience.

With regard to the observation of Sir Lawrence Jenkins, C. J. that the decision in *Tweedle v. Atkinson* (4) was influenced by the rule that no action in assumpsit could be maintained upon a promise unless consideration moves from the party to whom it was made it seems the learned Chief Justice was of opinion that the remedy by action of assumpsit is not as broad as the limits of contractual liability; but as against this view Lindley, J. uses language, in *Rotheram Alum Co.* (7) which has already been quoted before and which goes to show that inability of the stranger to sue is due to any defect of remedy but is a mere question of contract. Then again Sir Lawrence Jenkins, C. J. remarks at p. 146:

The bar then in the way of an action by a person not a direct party to the contract was probably one of procedure and not of substance.

Here again the view of Sir Lawrence Jenkins conflicts with the view of Lindley, J., who regards the bar to action as a matter of substance and not of form or procedure. Then the learned Chief Justice observes:

The case with which we are now dealing finds a close parallel in (1817) 3 Mer 583 (21) and also in the more recent cases of *Touche v. Metropolitan* (8) and *Gandy v. Gandy* (11).

There is a valuable exposition of the law by Lord Hatherley in the first of these last two cases which was adopted by Lord Justice Cotton in the second. The Lord Chancellor said:

The case comes within the authority that where a sum is payable by A B for the benefit of C D, C D can claim under the contract as if it had been made with himself. That appears to me to be a principle which is of distinct use in the consideration of this case. It appears to me that we have therefore in the circumstances of this case a condition of affairs in which it would be right to hold that the plaintiff is entitled to enforce his claim in this suit.

Lord Hatherley's observations must in our opinion be taken with reference to the context in which they appear, and if they are so taken then the following criticism by Page, J., (as he then was) in *Jiban v. Nirupama* (1), of Sir Lawrence Jenkins's view in 41 Cal 137 (19) seems justified: see 53 Cal 925 (1):

But these observations of Lord Hatherley must be taken with reference to the context in which they appear, and in 6 Ch App 671 (8), it is clear that Walker was treated as holding the sum which he received from the company under the agreement between himself and the company as a trustee for the plaintiff. Lord Hatherley's observations in *Touche's case* (8) were considered in *In re Empress Engineering Co.* (5). In that case Jones and Pride were solicitors who claimed in the liquidation of the company for work done upon instructions received by one of the promoters.

Referring to *Touche v. Metropolitan Railway Warehousing Co.* (8) Jessel, M. R. observed that:

In that case the Lord Chancellor finds, as a fact, that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones and Pride are cestuis que trust that alters the case. It appears to me that they are not. The promoters were liable to Jones and Pride who are simply their creditors. A being liable to B, C agrees with A to pay B. That does not make B a cestui que trust.

In *Jiban Krishna Mullick's case* (1) the facts were similar to that in present case. There A, a putnidar, created a darpatni in favour of B for Rs. 244 per annum. B created a sepatni by an instrument in

favour of C for Rs. 344 per annum, out of which Rs. 244 was to be paid to A for the darpatni rent, and Rs. 100 was to be paid to B, the darpatnidar. C paid the Rs. 244 to A for sometime and then fell in arrear. A sued C for rent and in this state of facts it was held that (1) mere payment of a sum of money by C to A could not be made the foundation of a legal obligation on the part of C to pay to A a like sum in like circumstances in the future. Moreover, there was no consideration passing to C from A to bind any such agreement; and (2) it was further held that as the instrument creating the sepatni was not executed for the purpose of conferring a benefit upon A, A was not entitled to sue C upon the agreement thereto contained either at law or in equity. In 55 Cal 1315 (22) Sir George Rankin, C. J. (as he then was) subjected the statement of the law by Sir Lawrence Jenkins in *Debnarains' case* (19) to considerable criticism and used language which would seem to suggest that the proposition formulated by Sir Lawrence Jenkins in that case was too wide. Sir George Rankin observed at p. 1326 of the report:

Not only, however, is there nothing in S. 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of 'promisor' and 'promisee.' The decision in *Tweedle v. Atkinson* (4) was a decision at law and was unaffected by the rules of equity. For this reason the Judicial Committee in *Khwaja Muhammad Khan v. Hussaini Begum* (18) regarded it as inapplicable to the facts of the case before them where the agreement included a specific charge on immoveable property. In my judgment it is erroneous on the basis of that case or on the observations of Jenkins, C. J., in *Debnarain Dutt v. Chunilal Ghose* (19), to suppose that in India persons who are not parties to a contract can be admitted to sue thereon, except where there is an obligation in equity amounting to a trust arising out of the contract. I say nothing as to whether special rules of law may be applicable to communities among whom marriages are contracted for minors by parents and guardians. But putting aside such cases I see no reason to think that the law in India contains a series of exceptions to the principle that a contract can only be sued upon as such by a party thereto. A trust may be founded on the contract and is capable of being enforced by a party to the trust in appropriate proceedings as was pointed out in 10 Hare 168=68 E R 882 (23).

22. *Krishnalal Sadhu v. Pramilabala Dass*, 1928 Cal 518=114 I O 658=55 Cal 1915=32 C W N 634.

23. *Page v. Cox*, (1851) 10 Hare 168=68 E R 882.

21. *Gregory and Parker v. Williams*, (1817) 3 Mer 583.

To hark back to such cases as 2 Lev 210 (14) and (1680) 1 Ventris 6=86 E R 5 (13), is, in my judgment, a clear mistake and the mistake is not cured by the circumstances that, under the Contract Act, the definition of 'consideration' is wider than in English Law.

The next case to be considered is the decision of Lord Williams, J. in the more recent case in *Kshirode Behari Dutt v. Man Gobinda Panda* (2), where the facts were similar to the facts of the case in *Jiban Krishna v. Nirupama* (1) and it was held that right of action lay in a third person under a contract between two persons which if performed will benefit such third person. Lord Williams, J., came to the conclusion directly opposed to the view taken by Sir George Rankin in *Krishnalal Sadhu's case* (22), as these cases seemed to be in conflict with *Debnarain's case* (19) which he proposed to follow. Lord Williams, J. did not follow the constitutional principle of referring the matter to a Full Bench when he dissented from two decisions of this Court, in *Jiban Krishna Mallik's case* (1) and *Krishnalal Sadhu's case* (22) just referred to for that is the proper procedure to take as the Courts of India have been reminded by their Lordships of the Judicial Committee of the Privy Council in 53 I A 164 (24). In that case Sir John Edge observed as follows on the question of the proper procedure in case of conflict:

Previous to that amendment in 1907 subs 2 and 3 had been variously construed by different Benches of the High Court at Calcutta none of which seems to have considered themselves bound by any previous decision on the subject by a Bench of that Court, and had not followed the constitutional principle of referring the question on which they differed from a previous decision of their own Court to a Full Bench to decide what, so far as the High Court was concerned, would be a binding decision on all the Benches of that Court. If such a question had been referred to a Full Bench the Chief Justice would no doubt have appointed a Full Bench to consider such an important reference and to decide the question referred.

An independent examination of English cases as also the decisions of the Judicial Committee shows that the view taken by Page, J. in *Jiban v. Nirupama* (1) and of Sir George Rankin, C. J., in *Krishnalal v. Pramila-bala* (22) is the right view to take and it follows therefrom that a stranger to a contract cannot take the benefit of the contract between two

other persons reserving a benefit to a stranger unless from the terms of the contract it is clear that a trust for the stranger was intended. This view also receives support from the high authority of their Lordships of the Judicial Committee in 26 C W N 514 (25) cited before us by Mr. R. P. Mookerji, the learned Advocate for the darpatnidar respondent. The facts in that case were that after a sale of certain properties the vendor sold another item of property to a third person and it was agreed between them that the latter should discharge the incumbrance on the property which the vendor had sold to the first purchaser free from incumbrance, it was held that a suit by the first purchaser against the second purchaser for recovery of the amount of the incumbrance was misconceived, the former being no party to the latter's purchase and no trust having been created in his favour. Lord Buckmaster said (at 515 bottom, of the report):

The plaint was a clumsy document and the suit as against Bindeswari was misconceived, for the plaintiffs were no parties to the deed of 7th September 1904 and no trust was created in their favour.

A Full Bench of the Madras High Court in 53 Mad 270 (26), after review of the cases English and Indian have reached the same conclusion as we have reached in the present case. That case states the general rule in the manner we have done but states four exceptions to the rule one of which is that "where a contract between A and B creates a trust in favour of C." The question whether a trust was created or not in the present case depends on the construction of the terms of the contract between two parties. In the present case it appears from the darputni kabuliyats, see p. 7, Part 2, that the darpatni rent was to be paid into the Sherista of the Nawab Bahadur of Murshidabad in the name of the patnidar and receipts taken from the zemindar and then at p. 8, line 5 it is stated:

If you fail to pay the assigned darpatni rent according to kists you shall remain bound to pay what sum will fall due to the Nawab Bahadur on account of interest for defaulted kists, in terms of our patni kabuliyat.

From these two clauses in the kabuliyat it is apparent that no trust was in

24. Bindheswari Prasad v. Maharaja Kesho Prasad, 1926 P C 79=95 I C 1025=53 I A 164=5 Pat 634 (P C).

25. Nathu Khan v. Burtonath Singh, 1922 P C 176=66 I C 107=26 C W N 514.

26. Subbu Chetti v. Arunachellam Chettyar, 1930 Mad 382=124 I C 55=53 Mad 270=53 M L J 420 (F B).

tended to be created in favour of the zamindar, the Nawab Bahadur, so as to entitle the Nawab Bahadur to sue the darpatnidar. On the other hand it seems to us that this stipulation was for the protection of the interest of the darpatnidar. We are therefore of opinion that the darpatnidar was not bound by law to pay the patni rent to the zamindar.

It is next argued that although the darpatnidar might be held not liable to pay the patni rent to the Nawab Bahadur still he would be bound to pay to the patnidar under the contract between him and the patnidar; and it is argued that for the purpose of S. 69, Contract Act, it is not necessary for the plaintiff to establish that money was payable to the Zamindar in the sense that a right of action should lie in the Zamindar. Reliance is placed on a decision of the Bombay High Court in *Soma v. Swamirao* (3); the following observations made in that case no doubt support the contention of the appellant:

Then the only question is whether the defendant is bound by law to pay that judi. Taking each step in order, I think it is very clear that he is 'bound by law' does not mean bound by law to the plaintiff but that the defendant at the suit of any person might be compelled to pay. Here we should have to begin with the original donor Krishnaji against whom, it is conceded, the plaintiff might bring a suit to recover this judi upon the covenants of the deed of 1878. Krishnaji in turn, it is conceded, might reimburse himself from Bisto according to the tenor of the deed of 1902 and the understanding and resultant contract of the parties.

Then it becomes merely a question of fact whether Bisto in turn could compel the defendant Swamirao to reimburse him, and that is the question which I have already answered in anticipation by indicating that in our opinion, notwithstanding the inartificial character of the deed of 1905, its real intention, that intention being well understood, was that the defendant undertook Bisto's obligation to pay the judi on plaintiff's land. Thus by three stages the plaintiff could put the law in motion in such a way that the result would show that the defendant was bound in law to pay the money in the payment of which the plaintiff was interested and which the plaintiff had thus in the first instance to pay. On that view we think that we find solid ground for doing what we do not doubt is justice in the case, i. e. compelling the defendant to carry out the original donor's obligations to pay the judi on the plaintiff's land.

Accepting the view taken in the Bombay case the question still remains whether the plaintiff, the sepatnidar can take advantage of his right to contribution which founded on principles of equity, seeing

that he himself was in default in the payment of sepatni rent to the darpatnidar. The facts show that a suit had to be instituted for realisation of the sepatni rent of the material period. Being himself in default at the time when the patni was advertised for sale he cannot get any relief in equity. We are therefore of opinion that the suit has been rightly dismissed as against the darpatnidars, e. g. defendants 1 and 2. In the case before Lord-Williams, J. all the parties were present before the Court and that circumstances made it possible for the learned Judge to give relief in the appeal before him instead of driving the parties to a separate suit. In the present case the Zamindar Nawab Bahadur of Murshidabad is not a party to the present proceedings, and even if the decision of Lord-Williams, J. is right, the present case can be distinguished therefrom.

The question next arises whether plaintiff is not entitled to a decree against the patnidar Daibakumari or rather against defendant 3 who is her adopted son. There can be no question that the patnidar was liable to pay the Zamindar's patni rent and he was therefore bound by law to pay the same but defendant 3 seeks to evade the liability in the suit on the ground that the interest of the patnidar had been transferred to another defendant in the suit namely Joy Chand Serogi, towards the end of 1335 B. S. Serogi is defendant in another capacity and no relief has been asked against him on the footing of his being the transferee of the patni interest. The patnidar defendant 3, does not produce the sale deed neither has the transferee got his name registered in the Zamindar's Sherista and under S. 13 of the patni Regulation the Zamindar is not bound to recognise the patnidar's transferee until certain conditions are fulfilled. In 54 Cal 1064 (27), to the decision of which I was a party, it was held that until registration of the name of a purchaser of a patni tenure is effected in the landlord's Sherista the transfer does not affect the Zamindar's right, and in spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed upon the

27. Krishna Chandra Chowdhury v. Dinanath Biswas, 1928 Cal 94=107 I C 357=54 Cal 1064.

tenure. In the present case as a matter of fact the proceedings under the patni Regulation were issued against Daibakumari and as a receipt Ex. 1-A (Part 2, page 47) shows that the present plaintiff paid the patni rent for Agrahayan 1336 as also for the other period in question. In these circumstances the Subordinate Judge was not right in dismissing the suit against the patnidar, defendant 3, on the ground that the plaintiff himself admitted in his deposition that Daibakumari, predecessor of defendant 3, sold her patni right to Joychand Serogi in 1335 B. S.

The result is that the appeal must be allowed and a decree for the amount claimed will be passed against defendant 3. The appeal is dismissed as against the darpatnidar defendants 1 and 2 with costs. It is allowed as against defendant 3 and the suit is decreed against him with costs of the trial Court. But the appellant is not entitled to any costs of this appeal as against defendant 3.

Patterson, J.—I agree.

V.B./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 673

JACK, J.

Abinash Chandra Kumar—Accused —
Petitioner.

v.

Dhani Buksh Mahammad—Complainant—Opposite Party.

Criminal Revn. No. 839 of 1935, Decided on 14th November 1935.

Criminal Misappropriation — Complainant pawning ornaments with accused — Complainant returning money and asking for return of ornaments—Ornaments not returned forthwith—Next day accused denying existence of pawn — Facts found against accused — Conviction under S. 406, Penal Code, held justified.

A complainant took a loan from the accused and pawned with him certain ornaments. When the loan was returned the accused, instead of returning the ornaments forthwith, asked the complainant to come over the next day to receive back the ornaments pawned. The next day accused denied the pawn. The trial Court found against the accused on all the facts:

Held : that the findings were sufficient for a conviction under S. 406, Penal Code.

[P 673 O 2 ; P 674 O 1]

S. K. Basu, Ramdas Mukherji and Debabrata Mukherji—for Petitioner.

Order. — This Rule was issued on the Deputy Commissioner of Jalpaiguri and 1936 C/85 & 86

the opposite party to show cause why the conviction of and the sentence imposed on the petitioner should not be set aside. The grounds set out in the petition are : (1) that on the findings arrived at by the learned Magistrate himself the conviction is illegal, (2) that the Magistrate having in effect found breach of trust having been committed in respect of the pledged ornaments the conviction under S. 406, I. P. C., in respect of the charge as framed in the case is not maintainable; (3) that the Court should have treated the case as one of a civil nature ; (4) that in the absence of a clear finding that the petitioner had acted dishonestly in violation of a trust the conviction under S. 406 is not sustainable ; (5) that the learned Magistrate failed to consider if the facts and circumstances of the entire case precluded the possibility of the petitioner having acted in the bona fide belief that he had a lien on the pledged ornaments ; and lastly, that the elements necessary to constitute the offence charged have neither been found nor established by the evidence.

The case for the prosecution is that the complainant had taken a loan of Rs. 12 from the accused by pawning two gold ear-rings with him; that on 24th February last the complainant went to the house of the accused and paid the sum of Rupees 17-4-0 which was due to the accused ; that the accused accepted the amount and went inside the house to bring out the ornaments but returned without them and asked the complainant to come on the next day ; that on the next day the complainant went to the house of the accused and asked for the ornaments but that the accused denied having ever lent any money to the complainant or having taken any ornaments as security for the loan from the complainant. On all these points the findings are against the accused except that the Magistrate stated that even if he did not deny the pawn altogether he committed misappropriation as he did not return the ornaments on the payment of the amount due as he should have done according to the contract between the parties. He finds that the accused did not return the ornaments perhaps with a view to misappropriate them entirely or to extort further money from the complainant by retaining them. He finds that the complainant paid off the entire dues of the accused amounting to

Rs. 17-4-0 but that the accused did not return the ornaments belonging to the complainant which he should have done forthwith and that the accused instead of returning the ornaments to the complainant denied the pawn and misappropriated the ornaments. These findings appear to be sufficient for the conviction of the petitioner under S. 406 inasmuch as they show that the accused dishonestly used or disposed of the property in violation of the trust created by a contract express or implied, the trust being the deposit of the ornaments as security for the loan.

As regards the second point it is true that there is an error in the form of the charge. But the error appears to be a clerical error. The charge states that the accused took Rs. 17-4-0 as the principal and interest of a loan given by him on the pawn of two gold ear-rings but that he did not return the ornaments and thereby committed breach of trust of the money and committed an offence punishable under S. 406. This appears to be a clerical error in the framing of the charge. The fact is that the ornaments were entrusted to the accused and that he committed breach of trust of them in not returning them after the repayment of the loan. There is therefore no substance in this ground as the accused has not been in any way prejudiced by this clerical error in the framing of the charge. The third point is that the dispute is one of a civil nature. It is true that cases of this kind are not generally admitted in a criminal Court, as generally there is some dispute about the amount payable and the criminal Courts are reluctant to take up cases of this nature. On this ground I had some hesitation in discharging the Rule. But in this case there was no dispute as to the amount payable; there is no evidence whatever that there was a dispute at the time of the transaction. So that although on the facts found the accused would be civilly liable there is no doubt that he is also criminally liable under S. 406.

As regards the fourth point, it is clear on the findings of the learned Magistrate that the petitioner acted dishonestly in the violation of the trust and therefore the conviction under S. 406 is sustainable. As regards the fifth point it is clear on the finding of the learned Magistrate that it is impossible to hold that the petitioner acted in the bona fide be-

lief that he had a lien on the pledged ornaments. The elements necessary to constitute the offence appear to have been found and there is evidence in support of the findings. The Rule must, accordingly be discharged.

B.D./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 674

M. C. GHOSE, J.

Kalipada Mondal — Accused — Petitioner.

v.

Kali Kinkar Chatterjee—Complainant—Opposite Party.

Criminal Revn. No. 627 of 1936, Decided on 24th July 1936.

Penal Code (1860), S. 406—Accused purchasing gramophone on instalment basis—Mere non-payment of instalment cannot be considered as criminal offence.

A person purchased a gramophone on monthly instalments. As there was no payment of any instalment for some months the seller went to his house and asked for the machine. The accused had not sold the machine and though he could not immediately produce the machine when demanded he produced it in the Court:

Held: that the matter was of civil dispute. It was the business of the seller not to sell his machine unless he could see reasonable prospect of monthly instalments. If traders passed on their goods to improvident and impecunious persons, they must suffer the loss. The mere non-payment of monthly instalments could not be considered as a criminal offence.

[P 674 C 2 ; P 675 C 1]

Sudhansu Sekhar Mukherjee—for Petitioner.

Probodh Chandra Chatterjee—for Opposite Party.

Order.—In this case the petitioner purchased a gramophone from the shop of the complainant, paid Rs. 80 and promised to pay Rs. 9 per month for ten months. This was in October 1934. Thereafter the petitioner paid nothing. About ten months afterwards the complainant went to his house and asked for the machine. The petitioner could not immediately produce it and a criminal complaint was lodged. The petitioner produced the machine in Court. He has been convicted under S. 406, I. P. C. Upon perusal of the papers it appears that it is a matter of civil dispute. It was the business of the complainant not to sell his machine unless he could see reasonable prospect of monthly instalments. If traders pass on their goods to improvident and impecunious persons, they must suffer the loss. The mere non-

payment of monthly instalments cannot be considered as a criminal offence. As for the delay in producing the machine, it was actually produced in Court. There is no finding that he had actually sold the machine. The conviction is set aside. The fine, if paid, is to be refunded.

D.S./R.K.

Conviction set aside.

A. I. R. 1936 Calcutta 675

CUNLIFFE AND HENDERSON, JJ.

Samarali and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 450 of 1936, Decided on 30th July 1936.

(a) Criminal Trial—Hostile witness—Duty of prosecution—It is not right for Public Prosecutor to declare prosecution witness as hostile—Only way in dealing with hostile witness lies with Judge.

It is not right for a Public Prosecutor to declare a prosecution witness as hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the Judge of the Court. It is the duty of the Public Prosecutor or of counsel representing the Crown to formally ask the leave of the Court to cross-examine the offending witness both with regard to the evidence he has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally.

[P 675 C 2 ; P 676 C 1]

(b) Penal Code (1860), S. 366—Procedure—Judge should specifically question jury as regards its conclusion on age of girl—English system is to be followed.

In trying a case under S. 366, it is the duty of Judges with jury to adopt in part the system which is prevalent in England, and that is to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge. The jury, unless it is specifically put to them, never really understand what their duty is under S. 366.

[P 676 C 1]

Joges Chandra Sinha—for Appellant.

Khundkar, Dy. Legal Remembrancer, and Fanindra Mohan Sanyal—for the Crown.

Cunliffe, J.—These appeals have been ably argued before us and are put forward on behalf of three men who were convicted by a Judge and jury at Mymensingh for crimes of abduction and rape upon a young Hindu married woman. The appellants are Mohammedans. In my opinion, this was a false case and it was made no more easy before the jury to come to a correct conclusion by the man-

ner in which it was handled by the learned Judge. As the learned Deputy Legal Remembrancer pointed out, it is perhaps difficult to put one's finger upon any striking piece of misdirection: but the whole of the summing up, in my opinion, was apt to mislead the jury by the learned Judge's misappreciation of the evidence which was laid before the Court. One of the most striking features of the case was that the witnesses whom one might have expected to have been called for the prosecution were called for the defence, while other witnesses whose names were originally mentioned as being prosecution witnesses concerning whom the defence alleged that they were at the bottom of the false charge made against these three men, were never called at all and the extra feature of the case is that one of the prosecution witnesses gave evidence which was quite inimical to the prosecution case and thereupon the learned Judge recorded in his diary that the Public Prosecutor declared this witness to be a hostile witness. He refers again to this event in the charge by using the expression.—'The witness was declared hostile by the prosecution'—a phrase which I imagined at first was a slip, but evidently it is a true version of what occurred. It is very difficult to appreciate exactly what effect it would have upon a jury. But I think it is fair to draw the conclusion that the Public Prosecutor in this Court has very much more influence than he ought to have, and if he has very much more influence than he ought to have, it would only be a step further to imagine that the jury think that his evidence or rather the way he presents his evidence is to be accepted at a greater value than the way in which the defence evidence is presented. The conclusion that I draw is not far fetched in that regard and it is not right to declare a prosecution witness as hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the Judge of the Court.

That is laid down quite correctly by S. 154, Evidence Act, and it is the duty of the Public Prosecutor in such circumstances or of counsel representing the Crown to formally ask the leave of the Court to cross-examine the offending witness both with regard to the evidence he

has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally. The case is also an unfortunate one, because one of the charges against the accused is under that dreadfully drawn S. 366 of the Code which is always giving trouble in these Courts, because we never know in an appellate Court really how the jury have made up their minds. It is an omnibus section dealing with both abduction and kidnapping and I think it is the duty of Judges with jury to adopt in part the system which is prevalent in England, and that is to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge. It was not done here. I very much doubt that the jury, unless it is specifically put to them, ever really understand what their duty is under S. 366. It is difficult even for a trained lawyer to appreciate and it must be extremely difficult for a layman. I am leaving to my learned brother a close analysis of this charge. I think the appeals must be allowed, the convictions and sentences set aside and the appellants set at liberty forthwith.

Henderson, J.—The prosecution case was briefly as follows: One night at about 10 o'clock Tarubala, P. W. 4, who is the wife of the complainant Jatindra Nag went out of the house to ease herself accompanied by her mother-in-law. She was suddenly attacked by a body of 8 to 10 persons, including the appellants and was forcibly carried off after being gagged. A search organised by the mother-in-law proved fruitless. The girl said in her evidence that the appellants had committed rape upon her at various places. Eventually the complainant received information from the thana to the effect that his wife had been found and was there. He accordingly, went and recovered her. It was never disputed by anybody that she was taken to the thana by the Chaukidar who gave evidence for the defence and who, as my learned brother has pointed out, ought really to have been called by the prosecution. There is divergence as to what happened at the thana. According to the police witnesses, the girl refused to return to her husband and the Sub-Inspector made her over to the witness Ram Kumar Das, with the request that he

would send her back either to her brother or eventually to her husband.

There were several startling features about the case and, in my opinion, the learned Judge altogether failed to put them before the jury in a proper manner. The charge was far too long, dealing with petty and unimportant matters and presented in a thoroughly confused manner. It was the sort of charge which has frequently been condemned by this Court, in which no attempt was made to marshal the evidence under the proper headings and I very much doubt whether the Jury derived any assistance from it at all. Now, the first thing to notice is that the explanation of the law was confused and unsatisfactory. The prosecution made a simple and straightforward case of abduction. Probably in view of the very unsatisfactory nature of the evidence with regard to the girl's age and the fact that she had given her age in the committing Magistrate's Court as 17, the prosecution thought that they were not justified in putting forward a charge of kidnapping. In spite of that, the learned Judge introduced it himself and did so in a thoroughly confusing way. His first direction of the law is in these terms:

If these points are proved, then the charge under S. 366 should be regarded as proved. If it is found that her age is above 16 years and she willingly went with the accused, then the charge under S. 366 fails.

Now, the natural inference to draw from this is that if the girl was not over 16, the charge under S. 366 would be established even though she went willingly. Of course, it would and if the learned Judge thought that a parallel line of enquiry should go on in this case, he should have altered the charge accordingly and given the appellants due notice of the fact that the age of the girl was going to be called in question. It could not be doubted that if she was below 16 and went away willingly with the accused they certainly were guilty of an offence punishable under S. 366. Instead of dealing with the matter on these lines, the learned Judge tells them not to convict of kidnapping under S. 366, because no such offence was charged, and then proceeds to introduce a lot of irrelevancy about S. 366. Now, if all the odd passages dealing with this matter are put together, the irresistible conclusion is that the jury must have been in a hopeless

muddle. We find it difficult to suppose that they really believed the evidence with regard to abduction and the directions of the learned Judge are such that they may well have thought that they were entitled to bring in a verdict of guilty of kidnapping. There are, of course, as the learned Deputy Legal Remembrancer points out, passages in the charge which should have prevented the jury from arriving at such a conclusion, but we are not concerned with isolated passages. We are concerned with the charge as a whole and the law has been presented in such a confused way that we really do not know what the Jury thought.

But it is not only with regard to the explanation of the law that the charge is unsatisfactory. There are several striking features about the case. The duty of the Judge was to marshal the evidence with regard to the points succinctly and clearly, so that the Jury would clearly understand the materials upon which they should take the facts into consideration. Instead of doing that, he delivered a charge which is a long and rambling account of what the various witnesses said a matter of which the Jury were perfectly aware without any direction. I do not propose to deal with every matter but with only the more important ones. Now, the first admitted fact to which I would refer is the existence of Ex. A. This is an entry made by the officer in charge of Gaffargaon thana on 29th May 1935, and recorded by the Sub-Inspector Syder Rahaman. The occurrence is said to have taken place on the 24th May. It was, therefore, prior to this entry. The learned Judge rightly told the Jury that if they believed that this information was really given by Jatindra, they could not convict the appellants. He, however, did not point out to them the circumstances which related to the question whether such information was, in fact, given. It was really a serious misdirection in the sense that the learned Judge was not dealing with the realities of the case with regard to this particular entry. On this point the learned Judge said this:

As the statement of the informant is noted in a gist form and as it is not read over to him to show that it has been correctly recorded, these General Diary entries have in reality very little evidentiary value, as the writer of the

entry can write anything according to his sweet will.

Of course, in any view of the matter, the learned Judge was over stating it when he said that such entries have very little evidentiary value. It is only when definite circumstances are proved to suggest that it has not been made in a bona fide way that its value could be called in question. Now, it is quite true that if Jatindra said that he did go to the thana and that he gave the information that his wife had been carried off by the appellants and others, then the observation of the learned Judge would have been to the point and of some use. But in the present case, they are entirely irrelevant and misleading. The case of the prosecution is that Jatindra never went to the thana at all and never gave any information. What the learned Judge should have put before the Jury was two theories: (1) that the Police Officer made this entry in the ordinary course of business, as he made hundreds of other entries; and (2) that he invented the whole thing out of his own head about a person whose existence, so far as we know, he may have been quite unaware of for no reason whatever. The very fact that a great deal of this entry is admittedly true is enough to show that the prosecution suggestion is purely fantastic. Another fact is that the girl was brought to the police station by the Chaukidar D. W. 3 and it was obviously necessary to instruct the jury how this admitted fact fitted in with the respective cases of the two parties. Now, it would be perfectly idle for the prosecution to suggest that the Chaukidar is not a real and genuine witness. He obviously is and the explanation which he gives is perfectly natural and straightforward. He was a witness who ought to have been examined by the prosecution and they ought not to have thrown his evidence overboard in the absence of very strong reasons.

The reason for doing so is a ridiculous explanation given by the prosecution witness, the girl herself. She solemnly suggests that she was sent to the thana by the accused. What reason the accused should have for doing so, it is impossible even to imagine. But she is not consistent even about this. First of all, she says that she was taken to the thana by the Chaukidar after he had consulted with the accused. Later on she says that the accused told

the Chaukidar to take her back to her own house. Instead of pointing out to the jury the circumstances in which the girl was produced at the thana, which strongly suggest that the prosecution case was entirely false, the learned Judge devoted a good deal of time to dealing with petty discrepancies in the depositions of witnesses which did not make the least difference one way or the other. Then another admitted fact is the existence of Ex. B, which is the entry in the General Diary with regard to the admitted fact that the girl was produced in the thana by the Chaukidar. An abstract of the statement alleged to have been made by the girl is included and it contains a reference to the alleged ill-treatment by a person referred to as her dadi sasuri. The prosecution pounced upon this word and proceeded to erect a huge theory that a Hindu girl would not refer to dadi sasuri, and it must have been introduced by some Mahomedans, presumably some of the appellants, although it is common ground that none of them was there.

The thana officer who is said to have engineered this falsehood was of course himself as well aware of the use of the word as anybody else. Instead of pointing out to the jury that there was no evidence to support this theory except the use of the word itself, the learned Judge expatiated on it at great length and appeared to attach enormous importance to it, the result being that he presented before the jury a highly coloured picture and entirely neglected what was on the other side. He failed to point out the whole of this entry part of which was admitted by everybody to be true and was therefore not invented by some unknown Mahomedans. It is quite obvious that when the girl was produced in the thana she must have made a statement of some kind and there is no reason to suppose that the Sub-Inspector, instead of recording what she really stated, invented something else for no reason at all. Then, again, the jury were positively misled with regard to the general effect of the evidence. The learned Judge should have placed it prominently before them in the forefront of the charge that they could not possibly convict, unless they believed the girl and her mother-in-law. Instead of doing that, he suggests that the evidence of certain other witnesses is sufficient to prove the charge. Further, his language

is so unhappy that the jury may well have thought that he intended to lay down that if they disbelieved the defence witnesses or were not satisfied with the genuineness of the entries in the General Diary, they would be justified in finding the accused guilty.

It only remains for me to say a word or two about the witness Ram Kumar Das. As my learned brother has pointed out, the Public Prosecutor ought not to have been allowed to declare him hostile and deal with him on those lines. It was for the learned Judge to decide whether he would allow the Public Prosecutor to cross-examine this witness. On turning to his deposition it appears that the witness had given a great deal of what was almost transparently false evidence in favour of the prosecution, and it was only a substratum of truth which came out at one place that induced the Public Prosecutor to declare him hostile. In these circumstances, the learned Judge would have exercised a wise discretion if he had rejected the application and left the cross-examination to the defence alone. From what has been said above, it will appear that the prosecution might have been able to establish a case with regard to kidnapping. But it is really very doubtful whether the evidence with regard to the age of the girl justified such a course. The learned Deputy Legal Remembrancer did not really ask for it and we have reached the conclusion that we ought not to send the case back for a re-trial. I therefore agree that this appeal must be allowed.

D.S./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 678

CUNLIFFE AND HENDERSON, JJ.

Giridhari Lal and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Admitted Appeals Nos. 146, 147, 174 and 314 of 1936, Decided on 21st July 1936.

Penal Code (1860), S. 420 — 'Cheating'—Offence does not depend upon accused's success in swindling amount of times but upon successful inducement of person cheated.

The question whether an offence has been committed under S. 420 does not depend upon the accused's success in swindling of the amount of times that he has managed to obtain pro-

perty by cheating but depends on the successful inducement of the person cheated. [P 680 C 1]

D. N. Bhattacharja, Fanindra Mohan Sanyal, S. C. Taluqdar, Joy Gopal Ghose, Amiya Prosad Moitra and Satindra Nath Mookerjee—for Appellants.

Khundkar, Anil Chandra Roy Choudhury and Nirmal Ch. Das Gupta—for the Crown.

Cunliffe, J.—The four appellants here were convicted by the Chief Presidency Magistrate of offences for cheating under S. 420 of the Code read with the conspiracy S. 120-B and they were also convicted of individual offences of cheating. The learned Magistrate refrained from passing separate sentences under the conspiracy charges but he sentenced each of them to two years' rigorous imprisonment on the bare cheating convictions. It is a very bad case indeed of organised and up to discovery successful attempts at swindling traders by means of the persons concerned putting themselves forward as being members of a reputable firm of buyers. The firm which they invented had no existence. They called it a firm of Gangadhar Beni Prosad, and their method was to hire and lock up a room, keep a durwan there and operate from this place obtaining goods by swindling. After they had obtained the goods they would resell them at prices under the market rate and it was through a police officer inspecting one of the accused customer's stocks that the goods were found and the crime was detected. One of the appellants has been at this game before and presented an appeal, none too successful one, so far as this Court was concerned. We think that the facts which were very adequately dealt with by the learned Chief Presidency Magistrate are quite unassailable and as far as they are concerned, the appellants have never had any chance of success at all. But they had the advantage of an interesting and able argument put forward by Mr. Bhattacharya who appeared for one whom I think I might safely call the leading appellant Giridhari Lal on grounds of law and procedure. Mr. Bhattacharya's contention amounted to this that in addition to the charge of conspiracy brought against these persons they were improperly charged with cheating in a manner contrary to the provisions of S. 234, Criminal P. C. That section which is complementary to the preceding S. 233 affords

an exception to the usual rule in the criminal case that each offence must be the subject of a separate charge. S. 234 lays down that if a person is accused of more than one offence of the same kind committed within a space of 12 months he may be charged with and tried at the same trial for any number of those offences not exceeding three. Mr. Bhattacharya argued here that the charges did, in fact, amount to more than three and he urged upon us that as they were put before the Court together with a charge of conspiracy they constituted an illegal procedure as laid down in the well-known case, decided in the Privy Council over 30 years ago, that in 25 Mad 61 (1).

The answer of the Crown to this point of law was that the *Subrahmania's case* (1) was decided when the only type of conspiracy offence which was recognised by Indian Penal Code was that form of conspiracy which is known as conspiracy by abetment, but that since the decision in *Subrahmania's case*, (1) a new and supplementary S. 120-B, extending the law of conspiracy in India and bringing it into line with the law of conspiracy in England has been introduced and by the appearance of that section it is possible to try persons at one and the same time for conspiracy under S. 120-B together with numerous other charges not necessarily of the same kind. A number of authorities were cited to us by the learned Deputy Legal Remembrancer in regard to his view of the law dealing not only with misjoinder of charges but also with the common case of misjoinder of parties. The whole position is a curious one, because I for one find it a little difficult to distinguish in principle between the decision in *Subrahmania's case* (1) and these other more recent decisions even though it may be accepted that S. 120-B has extended the law of conspiracy beyond the narrow confines of the law of conspiracy depending upon abetment alone. It seems to be that at some time or another, (it may be quite soon), that the Judicial Committee will be asked to give an authoritative ruling upon any possible change in the law which has been introduced by the appearance of S. 120-B and it may well be that the governing factor in laying down the procedure as to what

1. *Subrahmania Ayyar v. Emperor*, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P O).

is permissible in framing charges against accused persons will depend upon some necessary finding as to whether the particular conspiracy in the particular case amounted to a single transaction or several transactions. I have perhaps taken too much time in dealing with this point. I have only done so in deference to the argument addressed to the Court.

We are of the opinion that on the actualities of this case there has been no infringement of the provisions laid down in S. 234, Criminal P. C. No doubt the question whether an offence has been committed under S. 420 does not depend upon the accused's success in swindling of the amount of times that he has managed to obtain property by cheating but depends in each individual case, on the successful inducement of the person cheated. In this particular case, we are of the opinion that if the charges, carelessly drawn up as they are, are regarded in their proper perspective, there are only three charges which come within the legitimate purview of the section. For all these reasons, we dismiss these appeals so far as the convictions are concerned. We dismiss also the appeals, so far as the sentences are concerned, with the exception of the sentence upon the appellant, Radha Kissen Brahmin. He has alleged in this petition of appeal that he is only 18 years of age. The Crown are unable to help us at the moment as to testing that allegation. If it is true, we shall reduce his sentence. He must now surrender to his bail along with the others and we further direct that he be examined by the Police Surgeon who will report to this Court as to his exact age; and on receipt of his report, if Radha Kissen is found to be under 20, we shall certainly reduce his sentence.

Henderson, J. — I agree that Mr. Bhattacharya was unable to lay the necessary foundation for his argument on the point of law. I am bound to say that had he been successful in doing so, then it was an argument which would have deserved our very serious consideration. In the present circumstances, I do not desire to express any opinion on the point raised.

R.W./R.K.

Appeals dismissed.

*** * A. I. R. 1936 Calcutta 680**

CUNLIFFE AND HENDERSON, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Akhil Bandu Guha and others—Respondents.

Govt. Appeal No. 1 of 1936, Decided on 24th June 1936.

(a) **Company — No banking business — Deposit account similar to Government Savings Bank account — Overdraft not allowed on deposit accounts but allowed on current accounts only—Company giving loan to depositor but showing as overdraft conceals true statements of facts.**

A common form of deposit account is a Government account in Savings Bank. It is difficult to visualise any deposit customer of a Savings Bank going to the Manager of the Savings Bank and obtaining an overdraft. Neither would anyone be strictly allowed an overdraft based on a deposit account in an ordinary Bank. Overdrafts are the usual accompaniments of current accounts. Therefore a Company giving loan to one of its depositors and showing it to be an overdraft to him conceals the true statement of facts. [P 683 C 1]

*** (b) Companies Act (1913), S. 282—Interpretation—"Wilfully" does not mean with criminal intent—Spontaneous action of person who is free agent is wilful action—Term to be interpreted according to facts of each case.**

The expression 'wilfully' in S. 282, Companies Act, does not embody the idea of a criminal mentality, but the expression 'wilfully' used in the Companies Act in this country means nothing more nor less than the spontaneous action of a person who is a free agent. It is of course, a term that must be interpreted according to the facts of each case. It has been described as not being a term of art, but a legal expression to be fitted to the circumstances being considered by the Court. [P 683 C 2]

*** (c) Company—Balance sheet—Should not be mere inventory—It should be pictorial representation of trading position understandable to people in commercial line.**

A balance sheet need not be, in fact it must not be, a mere inventory. It is supposed to be a pictorial representation of the trading position of the Company, easily appreciated not by ignorant people but by persons who are reasonably able to understand commercial expressions and commercial conditions: *Gluskslein v. Barnes*, (1900) A C 240; *Peck v. Gurney*, (1874) 6 H L 377; *Rex v. Kysant*, (1932) 1 K B 442 and *Rex v. Bishirgian*, (1936) 154 L T 499, Ref.

[P 683 C 2; P 684 C 1]

*** * (d) Company—Balance sheet—Loan and deposit accounts—Difference between—Consolidation, amounts to suppression of truth.**

A loan and a deposit are items differing completely in principle from the balance sheet point of view. Strictly speaking they ought to appear on different sides, for one is an asset and the other is a liability. Consolidating the two and presenting them as one item to the readers is a striking case of non-disclosure, amounting to a suppression of the truth. [P 684 C 2]

*** * (e) Company—Position of directors—Directors stand in fiduciary capacities with**

respect to capital under their control—Investing public should have confidence in managers—Directors are not allowed to publish false balance sheets to cover their improper conduct.

It is of paramount importance that the investing public in India, now that modern methods are being adopted in business should have the utmost confidence in those persons who are managing Indian concerns. Directors of Joint Stock Companies stand in a fiduciary capacity with regard to capital under their control. They are in the position of trustees and are bound to deal with the capital under their control as a trust and cannot be allowed with impunity to publish false balance sheets to conceal their own improper conduct.

[P 684 C 2; P 686 C 2]

(f) **Company—Balance sheet not disclosing true state of affairs—Opinion of auditor that it is properly drawn is of no value.**

The opinion of an accountant or an auditor that a balance sheet which does not disclose the true state of affairs of a company has been properly drawn is of no value whatsoever for no opinion expressed by him can turn a false balance sheet into a true one.

[P 685 C 1, 2]

*S. M. Bose and Bireswar Chatterjee—*for Appellant.

*Barwell, Nirmal Kumar Sen, N. K. Basu, D. N. Bhattacharjee and Hemendra Nath Basu—*for Respondents.

Cunliffe, J.—This is an appeal by the Crown against an acquittal passed by the Sessions Judge at Dacca. The learned Judge himself was dealing with an appeal from convictions and sentences passed upon three respondents here by a Local Magistrate for offences under the Companies Act. The facts which led up to this prosecution are, I think, not in great dispute. It is the construction to be put on those facts which formed conflict between the prosecution and the defence in the trial Court and which has been the subject of an elaborate argument both in the lower Court and before us at the hearing of the appeal. Now, the facts are shortly these: The three respondents Akhil Bandu Guha, Surjya Kumar Bose and Rajani Mohan Basak, were Managing Directors of a concern known as the Dhakeswari Cotton Mills Ltd. They were appointed to this responsible position out of a large Board of Directors amounting sometimes to as many as 17. The Company appears to have been a flourishing one paying dividends and was, as far as one can see, run and intended to be run upon up-to-date modern lines both in its equipment and in its management. It may be seen from the contents of a small booklet that was handed to me which contained both a review of the year's

working ending December 1933, the balance sheet, profit and loss account, and the revenue account, that the Directors were full of confidence as to their commercial position and also with regard to certain subsidiary aims which took the form, as authorised by the memorandum and articles of association, of training young Bengalee businessmen in up-to-date business methods. There was another Company formed sometime after the Dhakeswari Cotton Mills Ltd. which was known as the Eastern Bengal Jute and Cotton Mills Ltd. This Company was at the material time in a formative stage only. It was engaged in the same branch more or less, of industry as the Dhakeswari Cotton Mills and it had the advantage of having as its Managing Directors the three respondents here who had already considerable experience in the trade.

The trouble, however first came to light with regard to the Dhakeswari Cotton Mills Ltd., and its Directors when the balance sheet for the year ending December 1933, was produced in draft. An objection was taken at a Directors' meeting by one of the Directors, who was not a Managing Director, to two items which appeared in the balance sheet. The first was shown on the capital and liability side of the sheet and was entitled "Deposits by others" Rs. 2,52,496. Then exception was taken also to an item which appeared on the property and assets side of the balance entitled "Advances to contractors and others" Rs. 69,334.

It is not disputed, to turn first to the deposit item, that this figure represented or purported to represent the net balance of a deposit account which had been opened by the firm for the purpose of receiving cash from depositors which was divided. I think I am right in saying, into two deposit accounts; one on a $4\frac{1}{2}$ per cent basis and the other at a higher rate of interest at 6 per cent. The indulgence in cash deposit taking which the Company had undertaken was perfectly valid. It was authorised generally by Art. M of the Memorandum of Association. But it is again not in dispute that this figure of roughly Rs. 2½ lakhs was the net balance of this account, because the actual deposits amounted to nearly Rs. 3 lakhs, but for the purpose of arriving at Rs. 2½ lakhs figure, a deduction had been made from the total deposits by subtracting the

loan of over Rs. 40,000 and its interest which had been made by the Managing Directors to the Eastern Bengal Jute and Cotton Mills Ltd. The Eastern Bengal Mills had at one time been depositors with the Dhakeswari Cotton Mills but at the time the loan was made, they were no longer depositors. It may also be noted that earlier than the date of this balance sheet the loans extended to the Eastern Jute Mills had amounted to well over Rs. 60,000. So much for that figure.

Turning to the other figure that I mentioned, "Advances to Contractors and others," it is said that this figure contained a much smaller item of cash advanced to the Managing Directors themselves by way of prepayment of annual commission on the Company's profits and travelling expenses, and it was objected, as far as the accounting expression "Contractors and others" was concerned, "and others" did not indicate clearly that a loan had been made to officers of the Company. In fact it was argued that such payments did not constitute loan items at all. When the objections were raised at the Directors' meeting there was a good deal of fuss and it is said that at the meeting which subsequently took place when the balance sheet was confirmed, the meeting was packed and the objectors were howled down. Then came this prosecution on the part of a nominal shareholder who, it is suggested, was set up to complain by the recalcitrant Director who had started the first objection and had not signed the balance sheet. The respondents were prosecuted under S. 282, Companies Act of 1913. That section is in the following terms:

Whoever in any return, report, certificate, balance sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Closely connected with the penalty section of the Act, are the earlier sections which deal specifically with the form of balance sheet to be adopted. S. 132 for example is in these terms:

The balance sheet shall contain a summary of the property and assets and of the capital and liabilities of the Company giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at. The balance sheet shall be in the form marked F in

the Third Schedule or as near thereto as circumstances admit.

Section 134 deals in part with a penalty to be sought in a still earlier section, that of S. 32, if a default is made in the required form of the balance sheet, and the penalty for infringement there is a fine. Turning to the schedule mentioned in S. 132, Form F, one finds a specimen balance sheet in a very full form and as far as this case is concerned, I think the only requirement which needs notice is that, apparently, the Statute insists upon the loans made by the Company being itemised with some precision on the capital and liability side of the sheet. Loans and mortgages are dealt with, also general loans prescribed as loans otherwise secured; and it is necessary according to the form to state the nature of the security. Finally we find the items of unsecured loans.

It is not necessary for me I think to enter into all the elaborate arguments which were discussed in the two very long judgments of the Court below. I think it will suffice if I endeavour to deal with the arguments which were addressed to us in this Court. It was contended on the part of the Crown that this manner of accounting concentrating upon the item 'by other deposits' amounted to a breach of S. 282. It was said that this was a false statement because it amounted to a non-disclosure of a material particular. The Crown argued that the figure ought not to have been the net amount at all, but ought to have been in the neighbourhood of Rs. 2,90,000 which would have shown the true deposit account and that the Rs. 40,000 loan ought to have been shown as a separate item altogether. It is necessary to deal with this point more particularly because I had omitted to say that the learned Magistrate, for reasons which commended themselves to him, convicted the respondents for a false statement in relation to the 'by other deposit items', but he acquitted them of the charge based upon the alleged mis-statement wrapped up in the item "Contractors and others." The way in which the defence met this argument on the part of the Crown was this: they said that the Company was in reality carrying on a subsidiary banking business and that they were entitled to do this under the two Arts. L and M in the memorandum and that this loan of

Rs. 40,000 made to the Eastern Bengal Mills was nothing more or less than a banker's overdraft granted to a banking customer and therefore it was quite in order to enter as the banking deposit account the actual net figure of the account, when showing it in the balance sheet. There was a further argument to illustrate this contention based on the well known difference in banking law between banker's loan and banker's overdraft; and it was strenuously argued that here there was nothing more or less than an overdraft, because the Eastern Bengal Mills was an old client of the banking side of the Company's activities. I shall deal with that point at once.

It seems to me however that in reality this Company was not carrying on a banking business at all. Its object in receiving deposits in cash from its customers was merely to assist its working capital. These were of course deposit accounts and were treated as deposit accounts, but in my experience I have never heard yet of an overdraft based on a deposit account. A common form of deposit account is a Government account in a Savings Bank. It is difficult to visualise any deposit customer of a Savings Bank going to the Manager of the Savings Bank and obtaining an overdraft. Neither do I imagine that anyone would be strictly allowed an overdraft based on a deposit account in an ordinary Bank. Overdrafts are the usual accompaniments of current accounts. Therefore I am not prepared to accept that this figure of Rs. 2,53,200 odd, the net balance of the deposit account, with the isolated loan subtracted, was a proper way of entering the Company's activities in this regard in the balance sheet to be issued to the shareholders. It is not disputed that this was an isolated loan. There was no evidence that any of the other depositors had loans extended to them; and one cannot free one's mind from the thought having regard to the aspect of suggested concealment about the manner of accounting, that the Rs. 40,000 loan was made to a Company of which three respondent persons who made the loan were also the Managing Directors.

Another point which was strenuously canvassed before us, and in the Courts below, was that supposing the method adopted of entering this combined financial transaction was a wrong one, could

it possibly come within the mischief of S. 282, having regard to the section's exact wording? It must be recollected that the word "wilfully" is employed in the section and the section also contains the words, as was apparent when when I read it, "a statement false in any material particular." This argument based on the word 'wilfully' very greatly impressed the Judge of the lower appellate Court.

I have no hesitation in saying that it was largely due to his construction of the expression 'wilfully' on the facts which were disclosed to him when considering the judgment of the Magistrate's Court that he reversed the conviction. The learned Judge apparently took the line that the expression 'wilfully' embodies the idea of a criminal mentality and he came to the conclusion that there was no criminal mentality on the part of the three accused persons here. There I differ from him. In my opinion also the expression 'wilfully' used in the Companies Acts, both in this country and in the United Kingdom, means nothing more nor less than the spontaneous action of a person who is a free agent. The word 'wilfully' has been dealt with in certain well-known decisions to which I need not refer exactly but such seems to be the considered opinion with regard to its exact significance. It is, of course, a term that must be interpreted according to the facts of each case. It has been described as not being a term of art, but a legal expression to be fitted to the circumstances being considered by the Court.

Now the really important question in this case falls at last to be considered, and it is this: Was the entry of the figure to which I have referred over and over again appended to the expression "deposits by others" in the circumstances of the case, a statement false in any material particular? In my opinion, it was. The requirements of a balance sheet have often in law been discussed both in the Courts of this country and in England and it had been said that a balance sheet need not be, in fact it must not be, a mere inventory. It is supposed to be, to use an expression employed in one judgment, a pictorial representation of the trading position of the company, easily appreciated not by ignorant people but by persons who are reasonably able to understand commercial ex-

pressions and commercial conditions. There is a well known observation of that great Judge, Lord Macnaughten, in (1900) A C 240 (1) at p. 250. The learned Law Lord there said :

It is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And every body knows that sometimes half a truth is no better than a downright falsehood.

Then, again, in the old case, 6 H L 377 (2), it was said in the House of Lords with regard to a prospectus that

the foundation in relation to a projected company was therefore necessarily laid in concealment; and to render the scheme attractive to the public, the promoters were not only compelled to hide the truth but to give such a colour to the statements put forth in the prospectus as to render them (though perhaps literally true) yet, in the sense in which they must have known the statements would be understood by the public, really false.

I apprehend that all these cases which sometimes deal with balance sheets and sometimes with prospectuses are governed by the same principles of law with regard to the making of false statements, and it is the effect upon the ordinary investor reading the statements in an ordinarily careful manner in which an investor would do which has to be considered, when one is making up one's mind as to whether the breach of S. 282 in this case of the Indian Companies Act has been committed. Those were the principles which were adopted by the Court of Appeal in England in two recent cases which are very familiar to those of us who study the law in relation to joint stock companies. The first is the case of *Rex v. Kysant* (3), the second being the case of *Rex v. Bishirgian* (4) better known as the *Pepper case*. These were both instances in which the convictions that followed the trial depended upon the false prospectuses, although in the *Royal Mail Case* (3) Lord Kysant was also charged with concealment of material particulars in balance sheets. In both cases also the jury were directed to consider what would be the effect on the minds of the members of the investing public.

Now, applying these principles to this case, I have no hesitation in saying that

1. *Gluskstein v. Barnes*, (1900) A C 240=83 L T 393=7 Manson 321=16 T L R 321.

2. *Peek v. Gurney*, (1874) 6 H L 377=22 W R 29=43 L J Ch 19.

3. (1932) 1 K B 442=101 L J K B 97.

4. (1936) 154 L T 499.

ordinary investors reading the item 'by other deposits' would imagine that it represented a total figure of accumulated deposits and not an incorporated net figure making an outgoing loan. It is quite obvious that a loan and a deposit are items differing completely in principle from the balance sheet point of view. Strictly speaking, they ought to appear on different sides, for one is an asset and the other is a liability. Consolidating the two and presenting them as one item to the readers, to my mind, is a striking case of non-disclosure, amounting to a suppression of the truth. I further regret very much to say that there was every inducement for the people who drew up this balance sheet to make it up, in this irregular fashion. It was certainly an improper thing for the directors of the Dhakeswari Cotton Mills to advance money to the East Bengal Jute and Cotton Mills which was an embryonic concern and which might possibly turn out afterwards to be a competitor. These directors knew, or at any rate ought to have known, before the final minutes, which included the balance sheet, were confirmed that grave objections were being raised among their own colleagues to this type of action being adopted. They knew or at any rate ought to have known that the shareholders of this very big concern, scattered all over India, could not possibly on receiving by post a balance sheet of this nature appreciate these particular activities of the company.

In my opinion, the three respondents here were rightly convicted by the Magistrate. It is of paramount importance that the investing public in India, now that modern methods are being adopted in business a fact which should be gratifying to all men of good will should have the utmost confidence in those persons who are managing Indian concerns. Directors of Joint Stock Companies stand in a fiduciary capacity with regard to capital under their control. They are in the position of trustees and I regret to say, that these three gentlemen do not seem to have appreciated their position and that they wilfully misled the shareholders by making up the balance sheet in the way they did. The convictions as passed by the Magistrate on the respondents are restored. As to the sentences, we take a graver view than the learned Magistrate did. We consider that the

finer imposed by the Magistrate ought to remain; but the sentences of imprisonment are enhanced in each case to one of three months' simple imprisonment.

Henderson, J.—I have had no difficulty in reaching the conclusion that the balance sheet was false. It was grossly misleading. It suggested that the amount due from the company to depositors was Rs. 2,50,000 odd, whereas in reality it was over Rs. 2,90,000. Then, in the second place, it deliberately suppressed the fact that an advance of Rs. 40,000 was made to the Eastern Bengal Jute and Cotton Mills. No explanation or juggling with figures can suggest that that balance sheet was true. The next question which requires consideration is whether this false balance sheet was prepared wilfully by the respondents and whether they knew that it was false. Their defence was that they had drawn it up in good faith, because they thought that, as drawn up, it was in conformity with law and with Form No. F. I may note that it is clear that the respondents were not over scrupulous or punctillious with regard to money matters from the transactions which formed the subject matter of the third charge. Two of the respondents with the connivance of the third drew advances for themselves on account of their commission and travelling allowances and then showed it under the heading 'advances to contractors and others.' This was clearly an unscrupulous thing to do. But in support of their plea of good faith, they examined two expert witnesses, viz., a chartered accountant, named Reed, and the auditor of their own company, and both these witnesses gave evidence to the effect that, in their opinion, the balance sheet was properly drawn up.

Of course, no opinion expressed by an auditor or accountant can turn a false balance sheet into a true one and the only importance of this lies in the effect that it may have had upon the intention of the respondents. So far as Mr. Reed is concerned, it has none at all because he was only shown the accounts a few days before he gave evidence and was merely called to depose that there was nothing wrong in the balance sheet. He was severely shaken in cross-examination and I do not believe him when he says that in his opinion the balance sheet was carefully drawn up. I am further of

opinion that the learned Magistrate formed a proper estimate of the auditor. He was related to one of the respondents and was clearly under an obligation to them. That he was not carrying out his duties to the share-holders is abundantly clear from the fact that he did not press and call their attention to his objection that the advances made by the respondents to the Eastern Bengal Jute Mills were improperly made. I cannot place any reliance on the opinion that he has given. But be that as it may, the plain fact of the matter is that the opinion of an accountant or an auditor that a balance sheet, which does not disclose the true state of affairs of a company has been properly drawn is of no value whatsoever.

Then, again, the respondent relied upon the fact that the same method had been employed in drawing up previous balance sheets. As my learned brother has pointed out there never was any advance to any depositor, except to the Eastern Bengal Mills. So all this amounts to is that on previous occasions the respondents did the same improper thing for exactly the same reason. This clearly is no evidence of good faith. The explanation given for the contention that the balance sheet was properly drawn up is that this advance was in reality a banker's overdraft and not a loan. My learned brother has given full reasons for rejecting that contention and I have no desire to elaborate it. In my opinion it makes not the slightest difference whether this advance was an overdraft or a loan. Supposing it were true that a banker was bound to disclose the existence of loans but was entitled to suppress the existence of overdrafts, there might have been something to be said. But there cannot be any doubt that a banker in drawing up a balance sheet must disclose both. In my opinion, the respondents have entirely failed to show that the balance sheet was properly drawn up. They knew obviously that it was false, and it was further apparent from their own conduct that it was done wilfully. P. W. 8 is the Director who refused to sign this balance sheet.

He had heard rumours of this improper advance to the Eastern Bengal Mills and was anxious to investigate the matter. He was not allowed to enter the office or to inspect the accounts without the permission of the Managing Directors. The

Directors' meeting to pass the balance sheet was called on 8th April. This witness received the draft balance sheet the previous evening at 9 p. m. and had not time to examine it properly. In previous years he was given four or five days for this work. Accordingly, as soon as the meeting began, he asked that it might be postponed for three days so that he might have time to examine the balance sheet properly. This was disallowed, and he was left in ignorance of the true position. Such conduct is clearly not the conduct of honest men who think that they have drawn up their balance sheet properly and have nothing to conceal. Then, again, if we found on examination that the irregularities were of no importance to anybody and were of no benefit to the respondents, we might be able to hold that the action of the respondents was not wilful; but exactly the opposite is the case. There were two irregularities both of which were of benefit to the respondents and both of which were necessary to the respondents in order to enable them to cover up their tracks. From this it is transparent that they wilfully drew up a false balance sheet for their own benefit.

I think the respondents were ill-advised, when they became the Managing Directors of a rival Company. At any rate, they received a warning from the objection of a co-director, P. W. 8, when he objected to their taking up the management of the new mill as well. They promised him that the new mill would deal with jute and not with cotton; but that promise was soon broken. The result was that when the new mill required money, the respondents were placed in a position in which their duty to one mill conflicted with their duty to the other. Not to mince matters they took money belonging to the Dhakeswari Mill in an improper and irregular way and used it for the rival mill. They knew that their action was improper and irregular, because even their timid auditor had warned them of the fact before. Having done this, they were determined to conceal their improper conduct from their own shareholders and from such members of the public as might be interested in the position of the company. Accordingly, they drew up the balance sheet in this false way and, so far as the balance sheet alone goes, they were completely successful in hoodwinking their shareholders. Thus, there can be no

question that they knew the balance sheet to be false, and that they acted wilfully in every possible sense of the term, in order to conceal their own improper conduct. On the question of sentence, Mr. Basu contended that although it is necessary to inflict imprisonment, it should be nominal in the case of a technical offence of this description. I can find nothing technical in this offence. The only thing that can be said in favour of the respondents is that they did not put the money which they had taken from the company into their own pockets. But, of course, if they had done that, they would have been charged with another offence. I entirely agree with my learned brother that this is a serious offence, because persons in the position of these gentlemen are entrusted with the money of the public and are bound to deal with it as trustees and cannot be allowed with impunity to publish false balance sheets in order to conceal their own improper conduct.

B.D./R.K.

*Sentence enhanced.***A. I. R. 1936 Calcutta 686**

CUNLIFFE AND HENDERSON, JJ.

Shib Chandra Roy — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 557 of 1936, Decided on 4th August 1936.

Criminal P. C. (1898), Ss. 403 (1), 235 (1) — Person, prosecuted under S. 283, Penal Code for obstructing river by extending tank-banks, acquitted on appeal—Subsequent prosecution under Embankment Act for meddling with embankment — Subsequent offence held not distinct offence and principle of *autrefois acquit* applied.

A person was prosecuted under S. 283, Penal Code, for creating obstruction in the bed of a river by extending a tank, and making banks. He was acquitted on appeal. Subsequently he was prosecuted under S. 76-B, Bengal Embankment Act, for meddling with embankment :

Held : that the subsequent offence did not constitute a distinct offence within the meaning of S. 235 (1), Criminal P. C., from one in the former case and, therefore, the principle of *autrefois acquit* operated and the second prosecution was barred. [P 687 C 2]

*Probodha Chandra Chatterjee — for Petitioner.**Khundkar — for the Crown.*

Cunliffe, J.—We granted this rule on a point of law based upon the principle of *autrefois acquit* laid down in S. 403, Criminal P. C. The petitioner was ori-

ginally tried for an offence under S. 283, Penal Code, and sentenced to pay a fine with a term of imprisonment in default of the fine. S. 283 is widely drawn, Section dealing with criminal acts causing danger to property, obstruction or injury to persons in a public highway or in a public line of navigation. After that conviction, the petitioner went up on appeal. On appeal, he was acquitted somewhat technically perhaps on the ground that the place which he had obstructed was not a navigable river as during considerable portions of the year, it consisted of a dry bed and the learned appellate Court Judge relied on a definition of 'navigable river' laid down in the Government Estates Manual. Whether the learned Judge was right in specifically relying upon a definition which I should regard as being rather more executive than judicial I am not prepared to say; but at any rate the petitioner was acquitted. That acquittal took place on 5th December 1934. Subsequently, the authorities returned to the attack, because there is an order sheet on the record referring to a fresh prosecution under the Embankment Act, this time for an offence under S. 76-B of that statute. S. 76-B, Bengal Embankment Act, deals with the offence of interfering with embankments. Apparently after that, Mr. Ahmed, the Local Sessions Judge at Nadia was approached by way of motion and his record of what occurred in its material particulars runs as follows: "Arguments heard. For judgment 21st May 1936." Then, a short judgment came to be delivered. The learned Judge said this:

I went through the records. The only question for determination in the case is whether S. 403 (1) applies to this case. It is contended that as the applicant was once fined and acquitted on appeal under S. 283, Penal Code, he cannot again be tried upon the same facts under a different enactment. But in this case I think the prosecution of the applicant under S. 76, Cl. (b), Embankment Act, is a distinct offence and it is governed by S. 235 (1), Criminal P. O., and as such, S. 403 (1) has no application. The motion is hereby rejected.

That means that a preliminary point of law, which raised a plea in bar to the second prosecution, was rejected as the new offence under the Embankment Act, in the opinion of the learned Judge, was quite distinct from the old offence under S. 283 and the learned Judge pre-supposed that the new prosecution was going to be

upon exactly the same facts as the petitioner was tried in the earlier case. I need not refer in terms to S. 403 in its entirety. By sub-s. (2) it refers back to the provisions of S. 235, sub-s. (1) on the basis and on the basis alone that a distinct offence has been committed. S. 235 (1) runs as follows:

If in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

The question is whether the offence of meddling with an embankment is a genuinely distinct offence from the kind of offence with which the petitioner was charged under the widely drawn S. 283. It is no good looking at the bare terms of S. 283. One must, I think, in equity look at the exact charge as embraced by S. 283 and the charge against the petitioner, as I understand it, was of creating an obstruction in the bed of the river by extending a tank and making banks which would constitute an obstruction under the section. In my opinion, it cannot be said that meddling with an embankment is a distinct offence as compared with this first offence with which the petitioner was charged, and then acquitted which was, as I have indicated, concerned with making a tank together with extending some kind of protection to it in the way of an embankment. For these reasons, I think that the principle of *autrefois acquit* operates in favour of the petitioner here. The prosecution in 1934 had reached a finality before this new prosecution under the Embankment Act was launched. We had a case the other day when we ordered a man to be retried by a Magistrate under another section of the Code after he had been convicted under a separate section, and when the learned Magistrate proceeded to carry out our order, learned counsel rose and said 'My client has been acquitted of the offence; I would plead *autrefois acquit*.' And when he came to us, we pointed out to him that he could not plead *autrefois acquit*, because there was no finality there; but here there was. The rule, therefore, will be made absolute.

Henderson, J.—I agree. In showing cause, the learned Deputy Legal Remembrancer tried to persuade us that the present prosecution is really for a different offence. The argument he made is this: the previous prosecution was for obstruc-

tion of the river by the erection of banks in connection with the extension of the petitioner's tank. The present prosecution is not really for that at all, but for something done in the course of smashing down the embankment of the river itself. I can find nothing whatever in the record to support any such argument. There is nothing to show us that the petitioner smashed down anything in connexion with the extension and excavation of the tank. The present prosecution is based upon a letter written by the Collector and the impression that letter has made on my mind is that the present prosecution was intended to be precisely the same thing on a misapprehension of the law. Certainly that is the course which the proceedings took in the Court of the learned Sessions Judge. It by no means follows that anything which the petitioner is supposed to have done to what is called the bank of a river would be an offence under S. 76-B, Embankment Act, at all. I have, therefore, reached the conclusion that there is no foundation for the argument made on behalf of the Crown and I agree that this rule must be made absolute and the proceedings quashed.

D.S./R.K. *Rule made absolute.*

A. I. R. 1936 Calcutta 688

GUHA, BARTLEY AND R. C. MITTER, JJ.

Collector of Dacca—Appellant.

v.

Gholam Kuddus Choudhury and others—Respondents.

Letters Patent Appeal Nos. 1 to 5 of 1935, Decided on 31st March 1936, from Mukerji and M. C. Ghose, JJ., D/- 14th March 1935.

(a) Appeal — Right of — Must be given by express enactment.

A right of appeal from any decision of any tribunal must be given by express enactment; such a right can not be implied: *Sand Bank Charity Trustees v. North Staffordshire Ry. Co.*, (1877) 3 Q B D 1, *Rel. on.* [P 690 C 1]

(b) Letters Patent (Calcutta), Cl. 15—"Judgment", meaning of—"Judgment" in land acquisition case is judgment under Cl. 15.

The "judgment" in Cl. 15, Letters Patent, means a decision which affects the merits of the question between the parties, by determining some right or liability; judgment in a land acquisition case is a judgment as mentioned in Cl. 15, Letters Patent, and is appealable: 8 *Beng L R* 433; 9 *Cal* 482 (P C) and 6 *Cal* 594, *Rel. on.* [P 690 C 1,2]

(c) Land Acquisition—Basis of valuation — There is more than ordinary room for guess-

work—Exact exposition of reasons for conclusions arrived at should not be demanded.

In all valuation, judicial or otherwise, there must be room for inference and inclinations of opinion which are difficult to reduce to exact reasoning or to explain to others i. e. something more than guesswork. It would be unfair to require an exact exposition of reasons for the conclusions arrived at: 26 *Bom* 1 (P C), *Rel. on.* [P 691 C 1]

(d) Land Acquisition Act (1894), S. 18—Owner of land objecting to amount awarded but not to apportionment between tenants—Afterwards he would be entitled only to proportionate and not full increased amount resulting from his objection less compensation accepted by them—Government and not owner is entitled to benefit arising from tenants having accepted compensation at lower value.

Where in proceedings under Land Acquisition Act, the owner of the land has objected under S. 18 to the amount awarded, but has not objected to the apportionment between them, the owner is not entitled to an increased amount resulting from his objection less the compensation accepted by the tenants, but only to such proportion of the increased amount as accords with the apportionment awarded; the Government and not the owner is entitled to the benefit arising from the tenants having accepted compensation upon a lower value: 1932 *P C* 102 and 1929 *All* 525, *Rel. on.* [P 692 C 1]

(e) Land Acquisition Act (1894), S. 30—Interests of landlord and tenant with right of occupancy—No general rule exists as to apportionment.

In the matter of determining the value of the two different interests, the landlords and the tenants, the position that the tenants on the lands acquired, had right of occupancy in the same has to be taken into consideration. There is no doubt that there is, and can be no rule of general application, applicable to apportionment between a landlord and a tenant with a permanent right of occupancy; and what is sometimes called a rough and ready method of settling the matter of apportionment has to be adopted. Landlords held entitled to 2/5 of value of entire interest in land acquired. [P 692 C 2]

Sarat Chandra Basak and Bijan Kumar Mukherjee—for Appellant.

Atul Chandra Gupta, Nurul Huq, Hamidul Huq Choudhury (in 3 and 4), Shamsuddin (in 1 and 5), Rajendra Chandra Guha and Mahendra Kumar Ghose (in 2)—for Respondents.

Judgment.—These five appeals are under S. 15, Letters Patent, and have arisen out of proceedings under the Land Acquisition Act. In pursuance of a declaration, dated 17th December 1928, lands were acquired for a project named "Landing Grounds for Aeroplanes at Dacca, in the village of Dhanmandal, Zillah Dacca." The village is just outside the Municipal limits, and the lands

acquired were near the other lands in the village purchased by private owners for residential purposes. The lands acquired had tenants on them, having rights of occupancy; their landlords had lakheraj right in the same. The Collector valued the tenants' interest in the lands acquired at Rs. 275 per bigha and the lakheraj right of the proprietors at twenty-five times the annual rent, and five years' purchase in addition for the loss of selami of the net annual profit for rent paid by the tenants to the proprietors; the total valuation of all interests in the lands acquired was about Rs. 450 per bigha. The tenants accepted the Collector's award; there were, however, references under S. 18, Land Acquisition Act, to the Special Land Acquisition Judge, on applications made by the proprietors claiming increment of the valuation of their interest in the lands acquired. The proprietors claimed that the lands acquired should have been valued by the Collector at Rs. 5,000 a bigha.

The learned Special Land Acquisition Judge, on consideration of the materials placed before the Court, increased the valuation of the lands acquired: that value of the lands was estimated by the Judge at Rs. 1,150 per bigha. The increase in the valuation was based on three transactions subsequent to the notification under which the lands in question were acquired. The two Mirash Pottas, Exs. 1 and 2 in the case, according to which the value of the lands covered by the documents worked out at Rs. 1,350; a deduction was made from that valuation, for the reason that the lands acquired were at a greater distance from the town of Dacca, and therefore slightly less favourably situated. The third transaction relied upon by the Judge was an offer of which, as it appears from the Judge's judgment itself, the exact terms were not in evidence and in regard to which negotiations had not been completed. The evidence relating to this transaction was oral, coming from a witness examined on the side of the Government; from the particulars given by the witness in his deposition before the Court, the learned Judge came to the conclusion that the total value of the land, in regard to the granting of a permanent lease negotiations had not been completed, was Rs. 1,150 per bigha. This plot of land

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comprised an area of five bighas adjoining the lands acquired. It may be noticed also, while referring to the judgment of the Special Land Acquisition Judge, that according to the Judge, the landlords claimants before the Court were entitled to get the full value of the land less the value of the tenant's interest as valued by the Collector. The landlords were to get Rs. 875 per bigha as their share of the value of the lands acquired.

The Collector of Dacca preferred appeals to this Court directed against the decision of the Special Land Acquisition Judge to which reference has been made above. The appeals (Appeals from Original Decrees Nos. 242 to 247 of 1930) directed against that decision, were heard by two learned Judges of this Court; one of the six appeals (No. 247) was dismissed by the learned Judges, while in the other five (Nos. 242 to 246), there was difference of opinion as between the Judges, and those appeals were also dismissed in view of the provision contained in S. 98, Civil P. C. The Collector of Dacca preferred these appeals under S. 15, Letters Patent, in those five cases in which the opinion of the Senior Judge of the Division Bench prevailed.

It is necessary at this stage to give our decision on the question of competency of these appeals, raised by way of preliminary objection. It was urged on behalf of the respondents in these appeals that no appeal was permissible under the Letters Patent, inasmuch as the decision of the High Court in a land acquisition case was not a judgment within S. 15 of the Letters Patent, so as to enable a party to file a further appeal to the High Court under that provision of the law. In support of this position, reliance was placed on the decision of the Madras High Court given in the year 1918, in 41 Mad 943 (1), based principally on the judgment of their Lordships of the Judicial Committee of the Privy Council, delivered in the year 1912, in 39 I A 197 (2) and on the observations of Lord Macnaughten in a case decided by the Judicial Committee

1. Manavikraman Tirumalpad v. Collector of Nilgiris, 1919 Mad 626=49 I O 27=41 Mad 943=35 M L J 110 (F B).
2. Rangoon Botatoung Co. v. Collector of Rangoon, (1912) 40 Cal 21=39 I A 197=6 L B R 150=16 I O 188 (P O).

in the year 1913, 17 C W N 421 (3). The provisions in the Land Acquisition Act contained in S. 26 of the Act, were however amended in the year 1921, by the Amending Act 19 of 1921. Every award under the Land Acquisition Act was to be deemed to be a decree, and the statement of the grounds of every such award, a judgment within the meaning of S. 2, Cl. (2) and S. 2, Cl. (9) respectively of the Code of Civil Procedure, 1908, (S. 2, Amending Act); consequential changes were also introduced in S. 54, Land Acquisition Act, providing for appeal to His Majesty in Council, subject to the provisions contained in S. 110, Civil P. C., (S. 3, Amending Act).

The reason for the amendments referred to above, was to remove the anomaly created by the decision of the Judicial Committee in 39 I A 197 (2), and to meet the observations made in that case by their Lordships based on Lord Bramwell's dictum in (1877) 3 Q B D 1 (4), that an appeal did not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment; such a right could not be implied. By the Amending Act of 1921 the awards of Courts made in land acquisition cases were placed in the same category as decrees, and awards are now, after the passing of the Amending Act, decrees and orders of Civil Courts; and the statements of the grounds of such awards are judgments within the meaning of the Code of Civil Procedure. The question for consideration now is whether a judgment in a land acquisition case is a judgment as mentioned in Cl. 15 of the Letters Patent and the question in our judgment must be answered in the words used by Couch, C. J. in 8 Beng L R 433 (5) :

The judgment in Cl. 15 means a decision which affects the merits of the question between the parties, by determining some right or liability.

The definition of "judgment" in 8 Beng L R 433 (5), must be taken to have received the approval of their Lordships of the Judicial Committee of the

Privy Council by their decision in 10 I A 4 (6), which affirmed the decision of this Court in 6 Cal 594 (7), in which the definition of the word "judgment" contained in 8 Beng L R 433 (5) was adopted. A judgment in a land acquisition case is now under the Code of Civil Procedure, and appealable as such, and we do not see any reason to give a limited meaning of the word as used in the Letters Patent. The view taken by the Lahore High Court in 3 Lah 420 (8), was that the Land Acquisition Amendment Act (19 of 1921) did not in any way affect the right of appeal from the judgment of one Judge to a Division Bench under the Letters Patent; the scope of the amendment was to extend the right of appeal, and not to curtail any existing right. As it was pointed out by the learned Judges in the above case, S. 111, Civil P. C., prohibits an appeal to His Majesty in Council from the judgment of a single Judge of a High Court established by the Letters Patent, and the reason of the prohibition was that an appeal from such a judgment is provided for in the Letters Patent; that an aggrieved party should not be permitted to appeal to His Majesty in Council, but that he should not in the first instance appeal under the Letters Patent, to the other Judges of the High Court. As indicated above, the word "judgment" as used in S. 15 of the Letters Patent, must, in our judgment, be held to include all judgments affecting the merits of the question between parties before the Court, by determining some right or liability; and by the express provision contained in the Amending Act of 1921, a judgment includes a judgment in a land acquisition case. The appeals preferred by the Collector of Dacca in the case before us are competent.

On the merits of the appeals it must be stated at the outset that one of the learned Judges of this Court was of opinion that the decision of the Special Land Acquisition Judge valuing the lands acquired in the cases before us, at Rupees 1,150 per bigha, should be accepted. In the opinion of the other Judge, it would be amply generous to the landlords claim-

3. The Special Officer Salsette Building Sites v. Dosabhai, (1913) 20 I C 763=17 C W N 421 (P O).

4. Sand Bank Charity Trustees v. North Staffordshire Ry. Co., (1877) 3 Q B D 1.
Justices of the Peace for Calcutta v. The Oriental Gas Co., (1872) 8 Beng L R 433=17 W R 364.

6. Hurrish Chunder v. Kali Sundari, (1884) 9 Cal 482=10 I A 4 (P C).

7. Kally Sundari v. Hurrish Chunder, (1881) 6 Cal 594=7 C L R 543.

8. Har Dial Shaha v. Secy. of State, 1923 Lah 275=69 I C 428=3 Lah 420.

ants for compensation, if the market value of the lands was fixed at Rs. 960 per bigha. Regard being had to the position indicated above, the appellant before us cannot be allowed to challenge the valuation of the lands acquired at the rate of Rs. 960 per bigha. It must be conceded, as it has been conceded by the learned Senior Government Pleader that there was agreement as between the learned Judges of the Division Bench to this extent, that the Collector's valuation of the lands must be increased from Rs. 450 to Rs. 960 per bigha. The question arising for consideration in these appeals is whether on the materials on the record, any further increase in the valuation of lands as mentioned above, could be allowed. In our judgment, no such increase would be justifiable. In the first place there is no reason why the market value as indicated in the documents, Exs. A and B in the case of lands lying immediately to the north of the acquired lands, should be kept out of consideration and preference given to the value of lands deducible from the two other transactions evidenced by Exs. 1 and 2, and from an offer of a permanent lease of which the exact terms were not in evidence and relating to which there is no evidence other than the statement by a witness examined in Court, a transaction which admittedly was not complete even after more than a year after the date of the publication of the declaration for acquisition of lands. The transaction evidenced by Exs. 1 and 2 relates to a time more than a month after the publication of declaration under the Land Acquisition Act for the acquisition of lands in the case before us.

The law requires that the market value of lands acquired is to be determined as it was at the time of the publication of the notification under S. 4, Land Acquisition Act [S. 23 (1), Land Acquisition Act]; and in the case before us, there was no special reason for relying on transactions after the publication of the declaration for acquisition of lands, and giving them preference over Exs. A and B on which the Collector's valuation was based. It is however unnecessary to pursue the matter any further, as both the learned Judges constituting the Division Bench must be presumed to have relied upon the basis of valuation afforded by transactions to which reference has been made above, and the increase in valuation

to the extent of Rs. 960 per bigha must be accepted by us, based presumably upon these transactions and the oral evidence in the cases before us. In accepting the figure Rs. 960 as we are bound to do, we desire to express our opinion, in the words used by Lord Hobhouse in 28 I A 121 (9), that both the learned Judges of this Court appear to have admitted into their minds those very considerations which the law directs to exclude, namely speculation on the value likely to be conferred on the lands taken for a particular project, by the completion of the project itself.

The position however must be recognized, as was pointed out by their Lordships of the Judicial Committee of the Privy Council in the case mentioned above, that in all valuation, judicial or otherwise, there must be room for inference and inclinations of opinion which being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others; there is more than ordinary room for guess work; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at. On the materials before us, we fix the market value of the lands acquired in the cases before us, at the rate of Rs. 960 per bigha, as mentioned in the judgment of one of the learned Judges of this Court, as, in our opinion, no increase on that figure could be held to be justifiable. The valuation of Rs. 960 per bigha, as mentioned above, represents the value of the proprietor's interest in the lands acquired on the one hand, and that of the tenants on the lands on the other. The value of the lands being determined as a whole, the question of the apportionment of the compensation awarded had to be taken into consideration with reference to the interests of different degrees as amongst the claimants. The Collector's basis of calculation of the two different interests in the cases before us shows that the valuation of the tenants' share of the compensation money based on average price paid on lands in the immediate neighbourhood as represented by the transactions evidenced by Exs. A and B was Rs. 275 per bigha, out of the total valuation of about Rs. 450 per bigha as a whole, representing the value of the

9. Secy. of State for Foreign Affairs v. Charlesworth, Pilling and Co., (1901) 26 Bom 1=28 I A 121 (P O).

two different interests in the lands. The Special Land Acquisition Judge increased the valuation as a whole, from about Rs. 450 to Rs. 1,150 per bigha; and as the tenant has not applied for any reference under S. 18, Land Acquisition Act, against the valuation of the Collector, the landlords were held by the Judge to be entitled to get the full value of the land, less the value of the tenants' interest, namely Rs. 275 per bigha, i. e. Rs. 875 per bigha, as their share of the compensation money for the lands acquired.

One of the learned Judges of this Court affirmed the decision of the learned Special Land Acquisition Judge mentioned above, while the other learned Judge of the Division Bench expressed the opinion that the view taken by the Judge in the Court below was not sound. In our judgment, the question arising for consideration on this part of the case must be decided in accordance with the rule laid down by their Lordships of the Judicial Committee of the Privy Council in 59 I A 155 (10), that where in proceedings under the Land Acquisition Act, the owner of the land has objected under S. 18 to the amount awarded, but has not objected to the apportionment between them, the owner is not entitled to an increased amount resulting from his objection less the compensation accepted by the tenants, but only to such proportion of the increased amount as accords with the apportionment awarded; the Government and not the owner is entitled to the benefit arising from the tenants having accepted compensation upon a lower value. The above rule is in consonance with what was held by the Judicial Committee in 51 All 765 (11). In the case before us, there was, in the words of Lord Russell of Killowen in 59 I A 155 (10) no foundation for the landlords' claim to be entitled to extra amount which the tenants might have received if they had not accepted the lower valuation and the landlords were therefore only entitled to their share of the compensation money, so much of the value of the lands acquired, as represents their interest in the same.

In the matter of determining the value of the two different interests, the landlords and the tenants, the position that the tenants on the lands acquired had right of occupancy in the same has to be taken into consideration.

There is no doubt that there is, and can be no rule of general application, applicable to apportionment between a landlord and a tenant with a permanent right of occupancy; and what is sometimes called a rough and ready method of settling the matter of apportionment has to be adopted. In view of all the circumstances that have to be taken into consideration in the matter of rights conferred with rights of occupancy, it is not, in our judgment, unreasonable to hold in the cases before us that the landlords claimants for compensation who applied for a reference under S. 18, Land Acquisition Act, for increased valuation, were entitled to get two-fifths of the value of the entire interest in the lands acquired, which is fixed at Rs. 960 per bigha. In the result, the appeals are allowed in the manner indicated above. The Collector's valuation of the lands acquired in the cases before us is increased to Rs. 960 per bigha, representing the valuation of the landlords' and tenants' interests in the same. The landlords claimants are held entitled to get two-fifths of the increased valuation of Rs. 960, the statutory compensation 15 per cent allowed by law being added to the same.

The appellant is entitled to get his costs in these appeals, and in the appeals heard by the Division Bench of this Court, as also in the reference cases before the Special Land Acquisition Judge, in proportion to his success.

R.W./R.K. *Appeals allowed.*

A. I. R. 1936 Calcutta 692

LORT-WILLIAMS AND CONLIFFE, JJ.

Rebati Mohan Bose—Petitioner.

v.

Chottal Chandra Sen—Opposite Party.

Criminal Revn. No. 613 of 1935, Decided on 13th November 1935.

Criminal P. C. (1898), Ss. 133, 137 and 142 — Magistrate, in spite of making order under S. 142, is entitled to proceed with case and make final order under S. 137.

An order under S. 142 is intended to meet an immediate danger or injury and its object is to prevent that injury pending the determination of the case under S. 133 or S. 137. A Magistrate passing an order under S. 142 is not only not

10. *Prag Narain v. Collector of Agra*, 1932 P O 102=136 I O 449=59 I A 155=54 All 286 (P C).

11. *Rohan Lal v. Collector of Etah*, 1929 All 525=117 I O 612=51 All 765=1929 A L J 522.

precluded from making a final order under S. 137, but Ss. 133, 137 and 142 taken together clearly mean that the Magistrate, in spite of making an order under S. 142, is entitled to proceed with the case and make a final order under S. 137. [P 693 C 1, 2]

S. C. Taluqdar and Jatis Chandra Guha—for Petitioner.

Lort. Williams, J.—In this case, a rule was issued calling upon the District Magistrate and the opposite party to show cause why a certain order should not be set aside. It appears that an order was made under S. 133, Criminal P. C., directing the petitioner to remove certain obstruction in a Khal which was claimed to be a public Khal belonging to the Municipality. The petitioner proceeded under S. 135 and appeared in accordance with the order to show cause why the obstruction should not be removed. Subsequently and before hearing either the evidence or arguments, the Magistrate made an order under S. 142 and directed the petitioner immediately to remove the obstruction. Subsequently, he proceeded with the hearing and made a final order under S. 137 against the petitioner.

The petitioner's present contention and the contention which he made before the learned Sessions Judge at Chittagong, is that owing to the fact that the Magistrate made an order under S. 142 which was complied with, he was precluded from continuing with the case and from making a final order under S. 137. This contention is based upon the argument that an order under S. 137 can only be made, where there is an existing obstruction or nuisance and cannot be made in respect of some future nuisance. That contention, no doubt, is correct. But that is not what the Magistrate has done in this case. His order under S. 137 was not made in respect of some future nuisance. It was made in respect of the nuisance which existed when the proceedings under S. 133 commenced. S. 142 provides merely for issue of injunctions pending inquiry and the Magistrate made an order under this section to obviate or prevent imminent danger or injury pending the determination of the matter. It is clear that the section intends the order to meet an immediate danger or injury and its object is to prevent that injury pending the determination of the case under S. 133 or S. 137. In my opinion therefore the Magistrate not only is not precluded from making a final order

under S. 137, but Ss. 133, 137 and 142 taken together clearly mean that the Magistrate in spite of making an order under S. 142 is intended to proceed with the case and make a final order under S. 137. For these reasons the rule is discharged.

Cunliffe, J.—I agree.

R.M./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 693

CUNLIFFE AND HENDERSON, JJ.

Amitava Ghose—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 371 of 1936, Decided on 29th July 1936.

Criminal Trial—Conspiracy case—Charge should not be introduced before proper appraisement of preliminary prosecution evidence has been adopted by prosecuting authorities.

It is waste of public time that charges of conspiracy, which always mean a long trial, however convenient the prosecution may think it to be to the success of its case, should be introduced when no sort of proper appraisement of the preliminary prosecution evidence has apparently been adopted by the prosecuting authorities before the case comes to its actual trial. [P 694 C 2]

In a case the accused was originally prosecuted for cheating and criminal breach of trust but subsequently the prosecution authorities to make themselves safe and to let in certain evidence, added the charge of conspiracy to the charges of cheating and criminal breach of trust. In addition to these charges 14 other charges were alleged. The trial Judge tried all these charges and without considering whether there was any real evidence in support of conspiracy convicted the accused of cheating and criminal breach of trust together with conspiracy:

Held: that the trial Judge ought to have insisted on the prosecuting authorities to produce evidence in support of the charge of conspiracy. The result, apart from multiplicity of charges, was that the accused was convicted of conspiracy without consideration of evidence and hence the case should be retried. [P 694 C 2]

D. N. Bhattacharjee and Santosh Kumar Basu—for Appellant.

Khundkar and Anil Chandra Roy—for the Crown.

Cunliffe, J.—The appellant Amitava Ghose, an undischarged insolvent, was tried before Mr. H. K. De, 4th Presidency Magistrate of Calcutta, on 14 charges comprising both cheating and criminal breach of trust as a banker, together with allegations of conspiracy in relation to these two types of charges with two named persons, one, Kalimuddin and

the other Banerjee, with certain other unnamed conspirators. He was convicted and sentenced to four years' rigorous imprisonment in all, such sentence comprising separate convictions under both criminal breach of trust with conspiracy and cheating with conspiracy, the sentences to run concurrently. Now, the sole ground on which this appeal has been argued before us is a technical one. The learned Advocate for the appellant has confined himself to a criticism of the manner in which this man was tried in law. The complaint is that there was no evidence before the Court whatever to support the charges of conspiracy to which I have already referred. It appears that originally the appellant was not charged with conspiracy. He was prosecuted for criminal breach of trust as a banker only and it was not until the case apparently got into the hands of a pleader and as we are told, the Court Inspector, that these charges of conspiracy were superadded. There seems to be a kind of mania in the Province for introducing charges of conspiracy into criminal cases. It is, I suppose, based upon an idea at the back of the minds of those conducting the prosecution that by introducing the conspiracy element into a charge of crime, you thereby let in, to use a colloquialism, certain evidence which otherwise it might be difficult to bring before the Court.

This is a very peculiar case, because there is only one accused person and there is very little evidence that there was any intention to bring any other accused persons before the Court with any resolution. We have been told that one of the named conspirators was at one time the subject of a charge, but he was never charged, and he was not placed before the Magistrate in the capacity of an accused standing his trial. Why, indeed, in addition to the conspiracy charge, there were so many as 14 different charges alleged, it is also difficult to see, with no evidence worth the name of conspiracy—certainly no evidence which would interconnect these various offences of cheating and misappropriation. I suppose the prosecution also thought that they would be on the safe side by introducing these numerous charges. As a matter of fact, if we had been unable to accept the argument that the conspiracy charge was not supported by the evidence before the Court, we should have been faced with

another argument based upon a misapplication or infringement of S. 234, Criminal P. C. That is the section which sets out an exception to the ordinary rule laid down in S. 233 which deals with separate charges and provides that in some cases not more than three charges might be lumped together in one prosecution. As I have already said, there are 14 here. I am surprised that the learned Magistrate should not have appreciated firstly that there was no real evidence of conspiracy, and secondly that there was an illegal multiplicity of charges against the accused in the trial Court. He has convicted the appellant upon the conspiracy basis, and when we find that that was done without any evidence, it is our bounden duty to set aside the convictions and sentences.

In this particular case we shall order a new trial. But I should like to say that it is a sickening waste of public time that charges of conspiracy which always mean a long trial, however convenient the prosecution may think it is to the success of their case, should be introduced when no sort of proper appraisal of the preliminary prosecution evidence has apparently been adopted by the prosecuting authorities before the case comes to its actual trial. There is no blame attached here to the police authorities, as I have endeavoured to show; but there does lie a blame somewhere that we should have to set aside this case which ought by now to have been disposed of. It is, without expressing an opinion about it, a very serious case indeed from the prosecution's point of view of swindling, and we are now forced to start all over again. The order of the Court is that the convictions and sentences are set aside and there will be a new trial before the Additional Chief Presidency Magistrate.

Henderson, J.—I agree. It should be obvious to anybody that the police officers who sent up this case were alive to the realities of it. In my opinion, it is deplorable that the learned Magistrate did not put a stop to the transparent manoeuvre made by the gentleman in charge of the actual prosecution with the object of evading the provisions of the law with regard to a joint trial. It should have struck him as strange that when it was never suggested that anybody but the appellant was responsible for these offences, he should possibly have been charged

with conspiracy. If he thought that the officers in charge of the prosecution before him had received subsequent information which would justify him in making an entirely new case, he should have, at any rate, insisted upon their producing evidence in support of it. He says not a word in his judgment to show in what way the appellant conspired with Kalimuddin, Banerjea and other unknown persons. The simple explanation of this is that there was no evidence that he conspired with any of them. The witnesses who referred to Kalimuddin are P. W. 24, P. W. 25, P. W. 26 and P. W. 30. There is nothing in any of their depositions to suggest that he had anything to do with the swindling of the appellant. The case with regard to Banerjea is even more ridiculous. This is to be found in the deposition of P. W. 14. All the evidence amounts to, if true, is this: that the witness had been caught by an advertisement issued by Banerjea and that the appellant successfully took him away from Banerjea and persuaded him to make the money over to him. It should have been transparent to the learned Magistrate that there is nothing here to support the imaginary charge of conspiracy.

One unfortunate result was that the learned Magistrate's mind was entirely diverted from his real duty which was to decide whether certain specific charges had been established. He was so busy with this imaginary conspiracy that he does not say a single word in his judgment which would enlighten us as to the way in which he thinks that the specific charges were established. I entirely agree with my learned brother as to what the result of the manoeuvre is. But the whole trial has been rendered abortive and the only course open to us, however harassing it may be to both parties and the witnesses, is to order a re-trial and we sincerely trust that we shall not have any other cases of this sort.

D.S./R.K.

*Retrial ordered.***A. I. R. 1936 Calcutta 695**

EDGLEY, J.

Sudhansu Sekhor Banerjee—Defendant
—Appellant.

v.

Rai Kiron Chandra Roy Bahadur and
others—Respondents.Appeals Nos. 167, 168, 169 and 170 of
1935, Decided on 9th June 1936.(a) Bengal Cess Act (9 of 1880), Preamble
—Cess must be paid whether property is rent
free or not.According to the general scheme of the Cess
Act, subject to certain statutory exceptions, cess
must be paid on all immovable property situate
within any district whether rent is paid in res-
pect of such immovable property or such pro-
perty is rent free. [P 696 C 1](b) Bengal Cess Act (9 of 1880), Ss. 16 and 14
—Act is taxing Act to be strictly construed
—Form of return—Annual value of land
must be included in return.The annual value of the land is one of the
most important details required to be furnished
in the returns under S. 16 read with S. 14 in
the prescribed form as it is upon the basis of
these returns that the valuation roll is prepared
by the Collector under S. 34. The Cess Act is a
taxing statute and should therefore be strictly
construed. [P 697 C 2](c) Bengal Cess Act (9 of 1880), S. 66—
Rent free lands omitted from landlord's
return—Valuation under S. 21—Notice under
S. 66 must be given—Procedure in Ch. 4
should be followed before proceeding under
Ch. 2.The general scheme of the Cess Act demands
that as regards rent free lands, the special con-
ditions prescribed by Ch. 4 should be observed
before the procedure laid down in Ch. 2 can be
brought into operation and, in this view, the
issue of a notice under S. 66 is a condition pre-
cedent to the valuation under S. 21 of rent free
lands which had been omitted from the land-
lord's cess returns. [P 698 C 1](d) Bengal Cess Act (9 of 1880), Ss. 16, 14
—Liability of holders of rent free land to pay
cess—There must be inclusion of those lands
in landlord's return.The inclusion of the rent free land in the
landlord's return under Ss. 14 and 16 of the Act
is a condition precedent to any liability which
is imposed upon the holder of rent free land to
pay cess in respect thereof. [P 698 C 1]Prakash Chandra Pakrasi and Susil
Ranjan Ghose—for Appellant.Hemendra Chandra Sen and Surendra
Nath Basu (Sr.)—for Respondents.

Judgment.—These appeals arise with reference to certain suits brought by the plaintiffs for the recovery of cess from the defendant. Both the Courts below held that the defendant was liable in respect of the major part of the cess which had been claimed. The facts of the case appear to be briefly as follows: The lands in respect of which cess has been claimed by the plaintiffs are admittedly nishkar or rent free lands. Notices were issued in due course under Ss. 14 and 16, Cess Act (Bengal Act 9 of 1880). After the issue of the notices under S. 16 of the Act, the landlords did not submit returns in the form prescribed in Sch. A to the Act, but,

instead of doing so, sent some petitions to the Collector, in which they referred to the entries contained in the record of rights and suggested that the valuation for the purposes of the Cess Act should be made in accordance with those entries. The Collector thereupon proceeded to make a summary valuation of the rent free land under Ss. 21 and 28, Cess Act. Subsequently the valuation roll was duly published and notices were duly issued under Ss. 52 and 54 of the Act. It is admitted that the landlords have actually paid to the Collector the cess for which they are liable and they now seek to recover from the holders of the rent free lands that portion of the cess which according to their allegation, is payable to them under S. 56 of the Act. The main point which has been urged by the learned Advocate for the appellant in this case is that the landlords are not entitled to recover any cess from the holders of rent free lands, because the nishkardars' liability to pay cess to them depends upon the observance by the landlords of the procedure prescribed in Ch. 4, Cess Act, and, as this procedure has not been observed, they are under no liability whatsoever in respect of the cess which has been claimed.

According to the general scheme of the Cess Act, subject to certain statutory exceptions, cess must be paid on all immovable property situate within any district, whether rent is paid in respect of such immovable property or such property is rent free. Ch. 2, Cess Act, lays down the procedure to be observed generally in connection with the valuation of lands for the purposes of the Cess Act, and, under S. 16 of the Act read with S. 14, certain returns have to be submitted to the Collector by the holders of estates or tenures the gross annual rental of which exceeds one hundred rupees in the form prescribed in Sch. A to the Act. The Act further lays down that, if no return is lodged in accordance with the requirements of S. 16, the Collector may proceed to make a summary valuation under S. 21. Further, under S. 28 the Collector has summary powers of valuation in connection with small estates, but it appears that, in the present case, this section has no application as the gross rental of the estate with which we are concerned exceeds Rs. 100. S. 34 of the Act provides that:

Whenever any valuation or revaluation is made under this Part, the Collector shall cause to be prepared from the returns furnished to him and from the valuation made by him in accordance with this Act a valuation roll of each estate.

And there follow certain provisions with regard to the publication of the valuation roll. Ch. 3 contains certain provisions with regard to the mode of the amount of cess which has been assessed under the valuation roll. In the cases out of which these appeals arise the valuation of the lands in suit purports to have been made under Ss. 21 and 28 of the Act although, as pointed out above, S. 28 is not applicable in view of the circumstances of the cases out of which these appeals arise. It is, however, contended by the learned Advocate for the appellant that even if it be admitted that any valuation was made by the Collector under S. 21 of the Act such valuation alone cannot be held to impose any liability on the defendant as regards the payment of cess because, when it is a question of valuing and assessing rent-free land, the procedure laid down under Ch. 4 of the Act must be followed, and the procedure prescribed by that Chapter is exhaustive as regards the valuation and assessment of rent free land.

Chapter 4 is headed: "Valuation and Assessment of Lands held rent free and Payment and Recovery of Cess in respect thereof." It is then provided under Ss. 50 and 51, that in submitting their returns in the form prescribed in Sch. A, holders of estates or tenures must include all rent free lands contained within the boundaries of their estates or tenures in the returns relating to those estates or tenures as the case may be. It is then laid down that the holder of an estate or tenure

shall be bound to pay road cess and public works cess on the annual value of such lands at one half of the rates fixed under this Act for the levy of such cesses respectively in the district generally for the year.

It would therefore appear to have been the intention of the legislature that ordinarily cess due from rent free lands should be collected through the agency of the holders of estates or tenures within which such lands are situate and, provided such land had been included in their returns, they would then be entitled to realize cess from the owners of the rent free lands concerned under Ss. 56 and 58 of the Act. It was however necessary to provide that rent free lands which

had been omitted from the landlords' returns should not escape liability to pay cess. It is therefore laid down in S. 66, Ch. 4, that:

Notwithstanding anything in this Chapter contained, the Collector may at any time cause a notice as mentioned in S. 16 to be served on the holder of any rent free land which he shall consider not to have been entered in the return of any estate or tenure in which such land ought to have been included under the provisions of S. 51.

This section goes on to state:

And on service of such notice, the provisions of this Chapter shall no longer apply to such lands; but the same consequences shall ensue and the same liabilities shall attach to the holder of such land as would have ensued and would have attached if such lands had constituted a revenue free estate.

In this connexion therefore it is to be noted that, after service of a notice under S. 66, one of the consequences would be that, if no cess return were lodged by the nishkardar, the Collector would be empowered to value rent free lands summarily in accordance with procedure laid down in S. 21 of the Act, and further, a valuation roll of such lands would be prepared and published in the manner provided by S. 34 and the following sections of the Act. In S. 70 provision is made for the liabilities of holders of rent free lands after the issue of notices under S. 66 and it is further provided in S. 71 that:

No owner or holder of rent free land on whom a notice has been served by the Collector under S. 66 or in respect of whose land an order has been made by the Collector under S. 68, shall be liable to have the land to which such notice or order refers included in any return of an estate of tenure, or to pay any amount as road cess or public works cess otherwise than to the Collector or to some person appointed by him in that behalf.

It follows from what I have already stated that, if Ch. 4 of the Act cannot be exactly described as containing a Code of exhaustive procedure relating to the valuation and assessment of rent free lands for the purposes of the Cess Act, it nevertheless prescribes certain essential conditions which must be observed as regards such lands before the general procedure prescribed in Chs. 2 and 3 can be brought into operation with reference thereto. In particular the provisions of Ch. 4 indicate that the valuation roll which is published by the Collector under S. 52 can only be prepared under S. 34 as regards rent free lands which such lands have been included in the landlords' cess returns, that, unless they have been so included the owner or holder of rent free

land is not bound to pay cess to the holder of the estate or tenure: see S. 56 and, if the Collector wishes to realize cess from rent free lands omitted from the returns and value such lands under the provisions of Ch. 2, he should issue a notice under S. 66.

It is however argued by the learned advocate for the respondents that the petitions Exs. 23-A to 23-E should be regarded as valid returns under S. 14 read with S. 16, Cess Act. I am not prepared however to hold that these petitions can possibly be regarded as return as required by the law. They merely refer to certain particulars contained in the record of rights and suggest that the assessment should be made on the basis of these particulars. Admittedly they are not in the form required by Sch. A to the Act and, in any event, they furnish no particulars relating to the annual value of the land. This is one of the most important details required to be furnished in the returns in the prescribed form as it is upon the basis of these returns that the valuation roll is prepared by the Collector under S. 34. The Cess Act is a taxing statute and should therefore be strictly construed and, this being the case, I must hold that in no event, can the petitions Exs. 23-A to 23-E be regarded as returns under S. 16 read with S. 14 of the Act. It is said that the Collector treated these petitions as returns for the purposes of the Act. In that case it is curious that he should have proceeded to ascertain the annual value of the nishkar lands partly, at any rate, under S. 21 of the Act which can only be brought into operation, if no return has been made. It is however clear that, in view of the mandatory requirements of the Act as to the form of the returns and the particulars that they should contain, the Collector had no jurisdiction to treat these petitions as valid cess returns under Ss. 14 and 16 of the Act.

It is then urged on behalf of the respondents that the Collector was competent to ascertain the annual value of the rent free lands under S. 21 even without issuing a notice under S. 66 of the Act. This part of the argument of the learned advocate assumes that no return was actually made, and it is therefore somewhat inconsistent with his contention to the effect that the petitions Exs. 23-A to 23-E should be deemed to be valid re-

turns. I have already indicated that in my view the general scheme of the Act demands that as regards rent free lands, the special conditions prescribed by Ch. 4 should be observed before the procedure laid down in Ch. 2 can be brought into operation and, in this view of the case, the issue of a notice under S. 66 would be a condition precedent to the valuation under S. 21 of rent free lands which had been omitted from the landlord's cess returns. If however it be assumed that the Collector was competent to make the valuation under S. 21 without issuing a notice under S. 66 such valuation would not enable the landlords to realize cess from the defendants in view of my finding that the rent free lands had not been included in their cess return. If such valuation were intended as a preliminary step to enable the landlord to collect cess in respect of rent free lands it would be merely a work of supererogation on the part of the Collector. It would not give him jurisdiction to issue the notice required by S. 52 nor would it render the nishkardar liable to pay cess to the landlord under S. 56 as these sections expressly require that the rent free lands should have been included in the landlord's cess returns. It would appear therefore that the inclusion of the rent free land in the landlord's return under Ss. 14 and 16 of the Act is a condition precedent to any liability which is imposed upon the holder of rent free land to pay cess in respect thereof.

In the case out of which these appeals arise I have already said that the petitions Exs. 23-A to 23-E cannot be regarded as returns which comply with the requirements of the Cess Act. This being the case, as the landlords must be deemed to have failed to include the nishkar lands in suit in their returns in the form in Sch. A as required by S. 51 of the Act, the defendant does not appear to be under any liability to pay cess to the landlords. In this view of the case these appeals must be allowed with costs throughout. The judgments and decrees of the lower appellate Courts are set aside and the plaintiffs' suit will stand dismissed. Permission to file an appeal under S. 15, Letters Patent, is granted.

B.D./R.K. *G. N. Appellate allowed.*

Advocate High Court

Jammu & Kashmir

A. I. R. 1936 Calcutta 698

MUKERJI, AG. C. J. AND
S. K. GHOSE, J.

Jonab Ali Khan and another—Defendants 2 and 3—Appellants.

v.

Satis Chandra Ray — Plaintiff and others—Respondents

Appeal No. 201 of 1932, Decided on 26th November 1935, from original decree of Sub-Judge, Bankura, D/- 9th May 1932.

(a) Mortgage—Mortgagor dead at date of final decree and no substitution of heirs—Final decree is nullity.

Where the final decree on the mortgage is passed at a date when the mortgagor was dead without any substitution made of his heir in his place, the final decree is a nullity. [P 699 C 2]

(b) Minor—Court guardian unable to get instructions to defend suit—Not contesting suit is not wrongful.

If after taking steps, the Court guardian is unable to get any instructions to defend the suit it is not at all wrong on his part not to contest it. [P 700 C 1]

(c) Mortgage—Separate and distinct suits on successive mortgages to same person of same property —Whether maintainable.

It is highly debatable whether separate and distinct suits for successive mortgages to same person on the same properties can be held to be not maintainable: 1921 Cal 321, Ref. [But see S. 67-A, T. P. Act.] [P 700 C 1]

Hiralal Chakravarty, Shyama Das Bhattacharji and Rabindra Nath Bhattacharjee—for Appellants.

Bijan Kumar Mukherji and Santosh Kumar Ghosal—for Respondents.

Judgment.—One Nadiar Chand Roy was the owner of six properties which are plots Nos. 1 to 6 of schedule to the plaint. He mortgaged plots Nos. 1 to 4 to one Upendra Dutt in 1904 and again in 1906, and in 1913 he made a gift of the said properties in favour of one Chintamani Roy. Upendra Dutt obtained a preliminary decree on the basis of the first mortgage against Chintamani and others; and thereafter on 15th November 1920 he also obtained a final decree against them; but in the meantime on 23rd September 1919 which was a date after the preliminary decree and before the final decree, Chintamani had died leaving his widow Nanibala and a minor son namely the plaintiff. On the second mortgage Upendra Dutt instituted a suit after Chintamani's death against the plaintiff and some other persons, impleading the plaintiff as a minor represented by his mother

as his guardian. The mother did not appear in the suit and on that one Munshi Obeidur Rahim, a pleader of the Court was appointed Court guardian for the said minor. In April 1920 a preliminary decree was passed in the said suit, and thereafter in November 1920 a final decree was also passed therein. In pursuance of this final decree the mortgaged properties were put up to sale. Upendra purchased the said properties for Rs. 1,600 and having got his decree on the second mortgage satisfied attached the surplus sale-proceeds and credited the same in part satisfaction of his decree on the first mortgage. On 2nd March 1925 Upendra sold the properties to Jonab Ali Khan who made the purchase for himself and his brother Rayen Khan for Rs. 2,200. The plaintiff as a minor represented by his maternal uncle Behari Roy as his next friend, then commenced this suit on 27th July 1928.

He applied for permission to sue in forma pauperis but the application was disallowed. Court-fees were then paid on the plaint and the suit thereafter proceeded in the ordinary way. Of the six items of properties which were included in the plaintiff's claim in this suit, two namely plots Nos. 5 and 6 need no longer be considered because the Judge has held that the plaintiff had no cause of action as regards them and this conclusion has not been challenged before us. As regards the other four items, namely plots Nos. 1 to 4, put quite shortly the plaintiff claimed to recover possession of the properties on a declaration of his title thereto. The decrees and the sale by which he purported to have lost his title to the properties were attached under the following broad heads: (1) That the final decree on the first mortgage was a nullity as it had been passed with Chintamani as a party when he was dead; (2) that the decrees on the second mortgage were nullities inasmuch as the Court guardian was appointed in direct contravention of O. 32, R. 3 (4) of the Code no notice having been served on the minor or on his mother with whom as his guardian he had been impleaded in the suit, or on his maternal uncle Behari Lal Roy through whom as his next friend the present suit has been instituted and who was really his natural guardian and with whom he was living at that time; (3) that the Court guardian did not communicate with the minor's mother or maternal

uncle and neglected his duties as such by not entering any defence when as a matter of fact several substantial defences were open; (4) that the proceedings held in pursuance of the decree which culminated in the sale were vitiated by fraud, illegalities and material irregularities. The contesting defendant was defendant 2 who averred that there was no fraud, that every thing was legally done and all the proceedings were regularly taken and that the minor's maternal uncle with whom it is alleged that the minor was living at the relevant period, had full knowledge, at the time, of all that was happening about the suits and the other proceedings.

The Subordinate Judge having decreed the suit, defendants 2 and 3 have preferred this appeal. It would be convenient to deal with the case under the four items of objection noted above on which the plaintiff rested his claim.

1. It is conceded on behalf of the appellant that the final decree on first mortgage was passed at a date when Chintamani was dead and without any substitution made of his heir in his place. That decree therefore was a nullity.

2. In the plaint in the suit on the second mortgage Chintamani, as the original defendant 1 was described as resident of Bhaluka. On his death on 23rd September 1919, his name was struck out and the following endorsement was made in the place: "Defendant 1 having died his heir son No. 1 Satis Chandra Roy, minor through his guardian his mother, Nani Mayrani, is made a party." (After examining the evidence his lordship proceeded.) The plaintiff's contention was that O. 32, R. 3 (4), Civil P. C., has been contravened and that contention had two branches: 1st that Nanibala was not the natural guardian but Behari Roy was; and 2nd that there was no service at Bhaluka as was alleged. That contention in our opinion, has failed in both its branches. The learned Judge has recorded as his conclusion that Upendra Dutt, in order to avoid the difficulties which would be raised if the suit was defended, intentionally gave a wrong address of the minor and caused a false return to be submitted by the peon. We are unable to hold that any such conclusion is justified.

3. As regards neglect on the part of the Court guardian to obtain instructions, the materials, such as there are on the record

and such as we have already referred to lead us to a very different conclusion from what the learned Judge has arrived at. We think the Court guardian's evidence, supported as it is by the contemporaneous statements made by him as contained in the two petitions to which we have already referred, must be accepted as true. The report no doubt is missing, but if either of the two parties are at all responsible therefor, no suspicion certainly can fall on the defendants; for it is obvious that the report must have been in consonance with what was stated in the petitions. If after taking the steps which the Court guardian alleged he took he was unable to get any instructions to defend the suit, it was not at all wrong on his part not to contest it. The substantial defences that are said to have been open to the minor to take are three: 1st that nothing was due to the mortgagee upon any of the two mortgages; 2nd that the stipulation to pay interest on the second mortgage was penal; and 3rd that separate and distinct suits for successive mortgages on the same properties were not maintainable. As regards the first of these defences, even now there is nothing reliable on which such a defence can be said to be true.

On the second point it may be pointed out that the rates of interest was 16½ per cent per annum compound with yearly rest. As regards the third ground, it would be sufficient to say that it is highly debatable whether in any Court subordinate to the Calcutta High Court such a suit could be held to be not maintainable in view of the decision in 33 C L J 232 (1) to which the learned Judge has himself referred in his judgment. Moreover, we have perused the judgment in the suit on the second mortgage which apparently the learned Judge has not read. It appears defendant 2 in the suit, who was a puisne incumbrancer, contested the mortgagee's claim on all possible grounds and that at his instance various issues were framed: question of execution and attestation of the mortgage bond; question of consideration; question of interest; question of maintainability of the suit, etc. And it appears also that after evidence of several witnesses was recorded on behalf of the mortgagee all the issues were specifically and elaborately considered.

1. Nilu v. Asirbad Mandal, 1921 Cal 321=60
I O 809=25 C W N 129=33 C L J 232.

4. There is no substance in this ground and the plaintiff's claim has not been pressed before us on its basis. In our opinion, therefore, the view which the learned Judge has taken of the second mortgage decree and the sale cannot be supported. The result is that this appeal should be allowed, and the decree of the Court below should be modified. The plaintiff should get a declaration that the decree in the suit on the first mortgage is void, and will be entitled to recover from defendant 1 the surplus sale proceeds, namely Rs. 90-15-9 (which was appropriated by the mortgagee against that decree) with interest at the rate of 6 per cent per annum from the date of the sale namely 15th July 1921, until realisation. Defendant 2 who was the contesting defendant in the Court below will be entitled to his costs in that Court from the plaintiff; and in this Court the appellants (i. e. defendants 2 and 3) will get their costs from the plaintiff, but the plaintiff will get his costs of the appeal from defendant 1, hearing fee being assessed at 5 gold mohurs.

A.L./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 700

JACK, J.

Uddab Nath—Defendant 1 and others
—Appellants.

v.

Gokul Chandra Deb Nath and others
—Respondents.

Appeal No. 436 of 1932, Decided on 21st November 1935, from appellate decree of Sub-Judge, Second Court, Sylhet, D/- 15th July 1931.

Registration Act (1908), S. 17—Butwara Chitta—Mere list of shares—Registration not necessary for admissibility.

A Butwara Chitta is a mere list of the shares which each of the parties has in the property concerned and which is signed by the parties but it is not in itself a deed of partition but is merely a note upon which the parties have to proceed at the partition. As such it does not require registration for being admissible in evidence. [P 701 C 1, 2]

Priya Nath Dutta—for Appellants.

Paresh Lal Shome—for Respondents.

Judgment.—This appeal has arisen out of a suit for declaration of the plaintiffs' 3 annas and 3 pies maliki right in the land described in the plaint, and for recovery of joint khas possession in the trial Court the plaintiffs' title to 1½ pies share in the holding was declared. In the

lower appellate Court, in addition to the $1\frac{1}{2}$ pies share awarded by the trial Court the plaintiffs were declared to be entitled to another 1 anna 2 pies share in the property in suit, as being the share originally held by Moiram Chand Banu, the predecessor of the plaintiffs. This appeal is with regard to 1 anna 2 pies share. The plaintiffs are claiming by purchase from defendants 14 and 15. These defendants purchased the share which they held in a revenue paying estate. The whole question is whether their predecessor had the share which they purported to have sold to the plaintiffs. This again depends upon the question whether Moiram Banu had inherited this share of 1 anna 2 pies. The defendants claim that there was a partition and that Moiram gave up her claim to a share in the property in suit and that she got in exchange some other specified land and that, thereafter she has no share in the land of this estate. The trial Court decided in favour of the defendants that there had been a partition and that Moiram gave up her share in the land in suit in exchange of other specified lands. The learned Judge in the Court of appeal below, on the other hand, held that the partition paper or Saham list or Butwara Chitta was signed by the father of defendants 5 and 6, defendant 8, father of defendant 7, mother of defendants 9 and 10, defendants 9 and 10 and defendant 12, and that that being an unregistered deed of family partition is inadmissible in evidence under Ss. 17 and 19, Registration Act, and that the document could not be used in evidence against the plaintiffs.

For the appellants it has been urged that the Court of appeal below ought to have held that Ex. B was a Butwara Chitta and that it having been duly proved was admissible in evidence to show that there was a partition; and it was further urged that the Court of appeal below ought to have held that the fact of partition could be proved even by oral evidence although Ex. B was inadmissible for want of registration. In fact, on considering the document Ex. B it appears that the learned Judge could not himself decide whether he should describe it as a partition paper or Saham list or Butwara Chitta. It appears to be a list for giving shares to various parties after the partition of the suit lands. It

does not appear to be a regular deed of partition. As I have said, it was simply a list for giving shares. It does not mention under what circumstances Moiram had been excluded from the list and that again shows that it was not a regular deed of partition. I am therefore inclined to think that this list did not require registration. But apart from that the other contention of the appellant must prevail. There was ample evidence which was relied on by the trial Court but was not considered by the Court of appeal below which shows that in fact there was a partition between the heirs of Watir, the original holder of the estate. P. W. 2, brother of Watir, is an old man of 77. He says that there was a partition between the said heirs. He also admits that the husband of Moiram Banu was present at the time of the partition. D. W. 2 states that he asked at the time why Moiram's name was left out and that her husband said that she had got some specified lands in her share. There was another circumstance going to show that the whole of the original property held by the heirs of Watir was purchased by defendant 1 by two kobalas—8 anna share by each kobala making up the 16 anna share of the whole property. There is no reason whatever to disbelieve P. W. 2 who states that there was in fact a partition between the heirs of Watir or D. W. 2 who stated that when he asked the husband of Moiram Banu why her name was left out from the list which was a memorandum of shares to be given to the parties at the partition, her husband said that she had got some specified lands in her share. This portion of the evidence was not discussed at all in the lower appellate Court. The only portion of the evidence that was considered in the lower appellate Court appears to be Ex. C which was filed by the defendants in order to show that in lieu of the shares in this property defendants 14 and 15 got the whole of another piece of land. The learned Judge finds that this evidence was not sufficient to destroy the title of the plaintiffs' vendors; he says that there was no other documentary evidence in the case. But he has failed to consider the oral evidence referred to by the trial Court. I have been referred to the case in 37 C W N 112 (1), in which

1. Kshetro Mohan Pal v. Tufani Talukdar, 1933 Cal 474=144 I O 868=37 C W N 112.

it was decided that where on a partition of certain bonds having been effected a list of bonds allotted to each of the parties was prepared and the list was signed by the parties that the list was not an instrument of partition which required registration. Similarly, in the present case, the list of the shares which each of the parties had in the property concerned, and which was signed by the parties, is not in itself a deed of partition but merely a note on which the parties had to proceed at the partition. That there was unquestionably a partition seems also clear from the finding of the trial Court that the plaintiffs had purchased $1\frac{1}{2}$ pies share in the property from defendants 14 and 15, that the plaintiffs could not remember the price they paid and that only Rs. 10 was paid in cash and the rest of the consideration of Rs. 50 was contained in a bond for Rs. 40 executed by them.

On these grounds I think that the decree of the lower appellate Court should be set aside and that the decree of the trial Court should be restored and that the plaintiffs' claim to 1 anna 6 pies share in the property in suit cannot be allowed. As regards the $1\frac{1}{2}$ pies share which Abdul Bari, husband of Moiram Banu, had inherited from Golam Hossein's widow and which was again inherited by the plaintiff's vendors from Abdul Bari, the plaintiffs claimed only $\frac{7}{8}$ pie share but the trial Court gave them a decree for $1\frac{1}{2}$ pies share. But as there was no cross-appeal by the defendants against the decree of the trial Court, the plaintiff should be given a decree for the whole of $1\frac{1}{2}$ pies share. The result is that this appeal is allowed and the decree of the trial Court is restored with costs in this appeal and proportionate costs in the Courts below.

B.D./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 702**

NASIM ALI, J.

Jagat Kishore Acharya Choudhury—
Plaintiff—Petitioner.

v.

Badan Mandal and others—Defendants
—Opposite Parties.

Civil Rule No. 650 of 1936, Decided on 28th July 1936, from order of 2nd Court, Munsif, Mymensingh, D/- 6th May 1936.

Bengal Tenancy Act (1885), S. 148 (b)—
Natural guardian of minor is person entitled

to custody of minor under minor's personal law in absence of testamentary or appointed guardian.

The mere fact that an infant is in the care of a person does not make that person the natural guardian of the person of the infant. S. 148 (b) contemplates guardians who are entitled to the custody of the infant under the personal law by which the infant is governed, in the absence of a testamentary guardian or a guardian appointed. An elder brother was entitled to the custody of the minor under the Muslim law. He did not appear and object to be appointed guardian of the minor when served with a notice under S. 148 (b):

Held: that he must be deemed to be duly appointed guardian of the minor for the suit: *Remington v. Holby*, (1880) 14 Ch 630, *Rel. on.*

[P 703 C 1]

Jatindra Nath Sanyal and Tarapada Mukherjee—for Petitioner.

A. Quasem—for Deputy Registrar.

Order.—This rule is directed against an order of the Second Sadar Munsif, Mymensingh, dated 6th May 1936, in rent Suit No. 34 of 1936 now pending before him. The petitioner is the plaintiff in that suit. He applied to the learned Munsif under S. 148 (b), Ben. Ten. Act, to serve on defendant 1 the elder brother of minor defendant 6, a notice informing him that he will be treated as the guardian of the minor defendant in respect of the suit. That prayer was allowed and the notice was served. He, however, did not appear and object to his being treated as guardian for the suit within the time prescribed by that section. On 21st April 1936, the learned Munsif directed the petitioner to deposit requisite fees for the appointment of a Court guardian. The petitioner thereafter prayed for reconsideration of that order on the ground that defendant 1 who was the natural guardian of defendant 6 did not object to his being appointed guardian and consequently must be deemed to be the duly appointed guardian of the minor defendant under the provisions of S. 148 (b), Ben. Ten. Act. The learned Munsif however rejected his prayer on 6th May 1936, on the ground that defendant 1 was not the "natural guardian of the minor" within the meaning of S. 148 (b) of the Act. The petitioner thereupon obtained this rule.

The expression "natural guardian" has not been defined in the Bengal Tenancy Act or in the Civil Procedure Code. The word "guardian" standing alone generally means guardian of the person. "Guar.

dian of an infant means guardian of the person" per Jessel M. R. in 14 Ch D 630 (1) at p. 632. A "natural guardian" therefore is a natural guardian of the person of the infant. A person is a natural guardian when he is neither the testamentary guardian nor a guardian appointed. The mere fact that an infant is in the care of a person does not make that person the natural guardian of the person of the infant. The section contemplates guardians who are entitled to the custody of the infant under the personal law by which the infant is governed, in the absence of a testamentary guardian or a guardian appointed. It is not disputed that defendant 1 is now entitled to the custody of defendant 6 under the Muslim law. He did not appear and object to be appointed guardian of defendant 6 for the suit. He must therefore be deemed to be the duly appointed guardian of defendant 6 for the purposes of the rent suit. The learned Munsif was therefore wrong in directing the petitioner to deposit fees for the appointment of a Court guardian.

The result therefore is that this rule is made absolute. The orders of the Munsif directing the petitioner to deposit fees for the appointment of a Court guardian are set aside. Defendant 1 must be deemed to be the duly appointed guardian of defendant 6 for the purposes of the suit. There will be no order for costs in the rule.

D.S./R.K. *Rule made absolute.*

1. Remington v. Holby, (1880) 14 Ch D 630.

A. I. R. 1936 Calcutta 703

MCNAIR, J.

Sagoremull Khaitan—Applicant.

v.

Gajadhar Mansinghka and others—Opposite Parties.

O. O. C. J. Suit No. 309 of 1933, Decided on 18th November 1935.

Execution Sale—Condition of sale requiring purchaser to assume certain facts owing to inability of vendor to obtain necessary title deeds or documents—Condition is neither misleading nor does it amount to misstatement.

A condition of sale requiring the purchaser to assume certain facts, specifically added owing to the inability of the vendor to obtain particular title deeds or documents, is not misleading if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. Con-

sequently, where the conditions of sale settled under R. 15 are in the form set out in rules and orders so far as condition 14, and a condition 15 is specifically added to the effect that the purchaser shall accept the recitals in the abstract of title, owing to the inability of the decree-holder to obtain the necessary title deeds and documents, and the formalities of Rr. 15 and 20, Ch. 27, of the Calcutta High Court Original Side Rules, are complied with, and the purchaser signs the bidding paper and purchases the property, he cannot subsequently be allowed to impeach the sale on the ground of want of defect in title: *In re Evans and Bettell's Contract*, (1910) 2 Ch 438, *Disting.*; *In re Sandbach and Edmondson's Contract*, (1891) 1 Ch 99 and *Blairberg v. Keeves*, (1906) 2 Ch 175, *Ref.* [P 705 C 2]

Sarat C. Bose and H. N. Sanyal—for Applicant.

Sudhis C. Ray and J. N. Majumdar—for Opposite Parties.

Order.—This is an application on the part of the purchaser of premises No 1, Jugmohan Mullick Street, for an order that the sale held by the Registrar on 26th July 1935 be set aside and the money paid by the applicant refunded. There is an alternative prayer that a reference be directed to the Registrar to enquire and report on the title of the premises. On behalf of the respondent to this motion Mr. Mazumdar has stated that he is agreeable to an enquiry as to title, but the applicant preferred to proceed with his application to set aside the sale. The sale was held pursuant to a final mortgage decree, and the petitioner was declared the highest bidder and purchaser for a sum of Rs. 34,500. The petitioner paid the sum of Rs. 8,625 to the Registrar being twenty-five per cent of the purchase money. The petitioner contends that the vendor was unable to give him a good title, and he seeks to have the sale set aside. It appears that the property was purchased in 1887 by one Hanuman Das, a Hindu governed by the Mitakshara School of law. By his will, dated 20th October 1901, Hanuman Das directed that his charities at Nawalgarh and Barua should for ever be continued and the expenses thereof met out of the income of his estate and should form a charge on his estate. The expenses at Barua were stated to be Rs. 750 yearly. The expenses at Nawalgarh were Rs. 400 yearly.

On 18th February 1916 the executors of Hanuman's will conveyed the estate including the property No. 1, Jugmohan Mullick, Street to Gajadhar, the defendant in this suit, subject to the charge of

Rs. 750 yearly for the carrying out of the religious trust to which I have referred. On 7th September 1917 Gajadhar purported to release the property from the charge, and created a charge for the payment of that sum of Rs. 750 on certain other properties at Siliguri. On 13th March 1931 Gajadhar mortgaged No. 1, Jugmohan Mullick Street, in favour of the plaintiff who instituted this suit on his mortgage on 9th February 1933. There was the usual final decree and the sale by the Registrar took place on 25th July 1935. In support of the application Mr. Bose for the petitioner complains that neither the will nor the probate, which, he says, are two of the most material documents, was abstracted. It is true that this was not done, but in the affidavit on behalf of the plaintiff Seary Lal explains that neither the will nor the probate was in the plaintiff's possession, and that they were unable to procure them from the defendants. A copy of the will has now been produced and it is on the record of this application. The material part to which I have referred has been set out in the petition. The second line of argument on behalf of the petitioner is that the action of Gajadhar purporting to release the property from the charge in favour of the charity was illegal and improper.

It is further contended that even if the shifting of that charge from the properties on which a charge was placed by the testator was in order, the further charge of Rs. 400 on Nawalgarh remained, and this was an incumbrance which should have been mentioned in the notification of sale. Reference is made to Ch. 27, R. 9 of the Rules and Orders of this Court, Original Side, which states:

Where the property or any portion of it is to be sold subject to an incumbrance the nature and the amount of such incumbrance shall, as far as practicable, be also stated.

No incumbrance has been mentioned, and it is argued therefore that the property must have been sold free from incumbrances, and inasmuch as an incumbrance is now disclosed no good title can be given by the vendor. Reference has also been made to S. 55, T. P. Act, which in effect states that the seller is bound to disclose any defect in title and that it is his duty to discharge incumbrances unless the property is sold subject to incumbrances. Reliance has been

placed on the case (1910) 2 Ch 438 (1). In that case it was held that not even the Court had jurisdiction to set apart a fund to answer annuities and legacies and distribute the rest of the property released from the charge, and notwithstanding the setting apart of the fund it was held that a purchaser of part of the distributed property may validly object to the title in the absence of any release from the annuities and legacies, and an order under S. 5, Conveyancing and Law of Property Act. On behalf of the vendor reference has been made to the abstract and to the sale, more particularly, the abstract of the indenture of release made by Gajadhar Agarwalla on 17th September 1917, where the whole history of the property and of the dealings with it have been set out. In that document there is a recital of the will of Hanuman Das which states that in giving certain legacies he directed that the charities at Nawalgarh and Barua should for ever be continued and the expenses thereof should be met out of the income of his estate and should form a charge on his estate and that the expenses at Nawalgarh should be Rs. 400 per annum and at Barua Rs. 750 per annum. There is a recital that the will was duly proved and that after obtaining probate the executors administered the estate.

Clearly those recitals give the substance of the will so far as it is material to this application and mention the probate. There is therefore no substance in the contention that the will and probate have not been abstracted. Under Ch. 27, R. 15 of the Original Side Rules, it is provided, that on the notification and conditions being settled a fair copy thereof and of the abstract should be filed in the Accounts Department of the Registrar's Office, and it is stated that in accordance with the rule a copy of this document was filed in the Registrar's Office. Under R. 20 of the same chapter the notifications and conditions of sale are to be read out and the name of each bidder is to be entered in the Registrar's note-book and each bid offered by him entered opposite his name. In the affidavit of Pearilal it is stated that the purchaser and his attorney inspected the abstract of title. In the affidavit in reply it is stated that the abstract of title was not inspected.

1. In re, Evans and Bettell's Contract, (1910) 2 Ch 438=103 L T 181=79 L J Ch 669=54 S J 680.

At any rate, it was there for inspection and any failure to inspect it was the fault of the purchaser. The conditions of sale are in the form set out in the Rules and Orders as far as condition 14. Condition 15 is added and is as follows :

The plaintiff has not in his possession any title deeds or documents other than those disclosed in the abstract of title and the purchaser shall not be entitled to make any objection or requisition in respect of such title deeds or documents and shall accept the recitals in the documents mentioned in the abstract of title as correct.

It is stated that this condition was specifically added owing to the inability of the vendor to obtain the will and the probate which he states were not in his possession. The purchase was subject to the conditions of sale including condition 15 to which I have just referred, which states that the purchaser shall accept the recitals; and the purchaser has signed the bidding paper on the understanding that the purchase is subject to the conditions of sale. In my opinion the recital which I have already referred to in the document of 17th September 1917 gives the purport of the will and probate and the other recitals which set out the history of the property state the facts from which the purchaser is able to form his own conclusion as to whether a good title can be obtained or not.

There is a recital of a conveyance by the executor to Gajadhar and that Gajadhar was advised that the executors could not in any way modify the effect of the terms in the will nor select any specific property for the operation of the charges created by the will. There are further recitals that Gajadhar had since 18th February 1916 been maintaining the trust of Barua out of the income of the general estate and not out of the rents and profits of No. 1 Jagmohan Mullick Lane which were said to have been charged with the payment of the Rs. 750 per month. There is a further recital of the release by Gajadhar of the premises from the charge and the transfer of that charge on to the properties at Siliguri which were paying an annual rent of Rs. 7-0-3. In fact, as I have already stated, the whole history of the property is set out and it is for the purchaser to decide whether on the facts which are contained in that abstract he can or cannot obtain a good title. I have been referred to the case

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in (1891) 1 Ch 99 (2), the head-note of which is as follows :

A condition of sale requiring the purchaser to assume certain facts is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover.

In his judgment Lord Halsbury says :

If there were an actual misstatement or such an imperfect statement of the facts as in the result makes what is stated untrue, the condition would be so tainted by falsehood that it could not be insisted on as against the purchaser misled by such taint or falsehood. But now that the facts are all known the condition appears to have been aptly and properly framed to prevent the purchaser insisting on proof of what was then and is now believed to be the fact but which the vendor is not in a position to establish by legal proof.

In my opinion the facts here are very similar. The vendor has set out in the abstract of title the facts so far as he is able to state them, but owing to his inability to get possession of the will and probate he has inserted Cl. 15 of the conditions of sale to prevent the purchaser insisting on proof of what was believed to be a fact but which the vendor is not in a position to establish by legal proof. I can find no misstatement or such imperfect statement of facts as in the result makes what is stated untrue. The same principle is laid down in (1906) 2 Ch 175 (3). The property there was described as freehold, and in one of the conditions of sale it was stated that the property was formerly held on a lease for 500 years at an yearly rent of one shilling but the property had been assigned many years previously free from the said rent, and the purchaser should assume that the rent had been released and was no longer charged on the property. By a deed poll in 1902 the property was expressed to be enlarged into a fee simple and the condition stated that it should be assumed that the deed poll operated as an effectual enlargement. It was there held that the vendor might reasonably believe the property was freehold and was therefore justified in so describing it in the particulars, and then, by the conditions, requiring the purchaser to assume the facts establishing the freehold title, which the vendor knew he

2. In re Sandbach & Edmondson's Contract, (1891) 1 Ch 99=60 L J Ch 60=63 L T 797=39 W R 193.

3. Blaiberg v. Keeves, (1906) 2 Ch 175=75 L J Ch 464=95 L T 412=54 W R 451.

would have a difficulty in proving. There again it is doubtful whether legally the property was in fact freehold as it was described; but it was being sold as such and the vendor in the conditions of sale put the purchaser on notice by stating the facts. Warrington, J. at p. 183 says as follows:

All that the vendor has done is to describe the property as being held upon a particular tenure, which he believed, and reasonably believed, on sufficient grounds, might be the true tenure on which it was held. Then, knowing that he might have a difficulty in proving the fact of freehold tenure, in the proper part of the document, i. e., the conditions, which shew how he is going to establish his title, he throws upon the purchaser the burden of assuming the facts the proof of which might have been difficult.

The principles involved in these cases seem to me to be a complete answer to the contention of the petitioner that the property with which we are now concerned was sold free from incumbrance. The facts were all set out and it was the duty of the purchaser to assume the burden of finding out from those facts whether or not he could obtain a good title. In my opinion no good reasons have been advanced as to why the sale should be set aside and the application is dismissed with costs.

V.B./R.K. *Application dismissed.*

*** A. I. R. 1936 Calcutta 706**

M. C. GHOSE, J.

Majaharali and another—Petitioners.

v.

Mafijaddi Sardar and another—Decree-holder and others—Judgment debtors—Opposite Parties.

Civil Rule No. 390 of 1936, Decided on 28th July 1936, from order of Special Sub-Judge, Barisal (Bakargunj), D/- 8th January 1936.

* (a) Limitation Act (1908), S. 18—Execution sale fraudulently conducted by decree-holder—Application to set aside sale beyond time—S. 18 cannot apply when property is purchased bona fide by third party.

Where in execution sale which was conducted fraudulently by the decree-holder, the property was purchased bona fide by a third party and an application to set aside the sale was made by the mortgagee of the property beyond 30 days:

Held: that S. 18 did not apply as the section applied only against a person claiming through another otherwise than in good faith and for valuable consideration: 44 C L J 565, *Rel. on.*

[P 707 C 1]

(b) Civil P. C. (1908), S. 115—Error of law is not sufficient ground for interference.

In a case under S. 115 even an error of law is not a sufficient ground for interference by the High Court: 11 Cal 6, *Rel. on.* [P 707 C 1]

Jitendra Nath Guha—for Petitioner.

Radhika Ranjan Guha—for Opposite Parties.

Order.—In this case the petitioners were mortgagees of certain tenure. Opposite party No. 1, the landlord, instituted a rent suit, got a decree and in execution of that decree put up the tenure to sale. It was sold at auction and purchased by another person, opposite party No. 2, wife of opposite No. 3, and not the decree-holder. After about six months the petitioners applied to set aside the sale on the grounds that sale processes had been fraudulently suppressed by the decree-holder and that by such sale the petitioners had suffered substantial loss. The trial Court set aside the sale. In appeal the findings were reversed and the petition was dismissed.

It is urged in this Court that the learned Munsif, carefully considered all the evidence on the issue of the service of the sale proclamation. He noticed that the witnesses named in the peon's report were not examined but other persons were brought in to prove the service of the sale proclamation and that a person was brought in who stated that he had beaten the drum whereas his name was not in the peon's report. The Court of appeal considered that the defect might have been due to the mistakes of the peon. The appellate Court did not believe that the processes had been suppressed. On the matter of the valuation the Munsif found that the value of the property would be Rs. 1,200 as it appeared that this particular property had been sold in 1928 for Rs. 1,300. The Court of appeal below considered that since 1928 there had been fall in prices of staple food-crops; there was correspondingly fall in prices of land and the prices in 1935 could not be as in the year 1928. But that as in his opinion there was no suppression of notices, the question of valuation was not important. On this point the Court of appeal below upon consideration of the evidence has come to its finding and in an application under S. 115, Civil P. C., his findings cannot be attacked on the ground of error in appreciating the evidence. The last point taken is that the Court of appeal below recorded a finding that even if there was a finding

of fraud on the part of the decree-holder the petitioner would not succeed against the auction purchaser who was a third party and against whom there was no allegation of fraud. On this point the case in 44 C L J 565 (1) is quoted. Upon perusal of the judgment and upon consideration of S. 18, Lim Act, it cannot be said that the Court of appeal below was wrong. S. 18 of the Act runs as follows:

Where any person having a right to institute a suit or make an application, has, by means of fraud, been kept from the knowledge of such right of or the title on which it is founded, the time limited for instituting a suit or making an application (a) against the person guilty of the fraud or accessory thereto, or (b) against any person claiming through him otherwise than in good faith and for a valuable consideration shall be computed from the time when the fraud first became known to the person injuriously affected thereby ...

On a plain reading of the section the extended time can only be claimed against a person guilty of the fraud and against a person accessory thereto and against a person who claims through the person who committed the fraud. From this it would appear that it cannot be claimed against an innocent third party against whom ordinary limitation would apply. In a case under S 115, Civil P. C., even an error of law is not a sufficient ground for interference by the High Court. See the case in 11 Cal 6 (2). The Rule is discharged with costs, hearing fee being assessed at one gold mohur.

D.S./R.K. Rule discharged.

1. Kedar Hura v. Asutosh Roy, (1927) 44 C L J 565=99 I O 946.
2. Amir Hassan Khan v. Sheo Baksh Singh, (1885) 11 Cal 6=11 I A 237 (P C).

A. I. R 1936 Calcutta 707

R. C. MITTER, J.

Nirmal Chandra Sanyal and another
—Plaintiffs—Appellants.

v.

Municipal Commissioners, Pabna —
Defendants—Respondents.

Appeal No 969 of 1935, Decided on 17th July 1936, from appellate decree of Dist. Judge, Pabna, D/- 5th March 1935.

(a) Calcutta Hackney Carriage Act (1 of 1919), S 60—Authority to appoint hackney carriage stand is absolute — Statute not merely permits but directs person or body authorized to do so — Persons would be exempt from liability of causing nuisance to neighbours provided they have statutory authority — Pabna Municipality held had no such authority.

Under S. 60 the authority to appoint stands for hackney carriages is absolute. The statute does not merely permit the appointment of such reserved places for hackney carriages but directs the person or body authorized to do so. Persons having such authority to appoint places to be used as public stand for hackney carriages would not be liable even if the said public stand is a source of nuisance to the neighbours. Since 1919 and *a fortiori* in July 1933, the Commissioners of the Pabna Municipality had no statutory authority to appoint or reserve any place as a hackney carriage stand and hence there was no statutory indemnity from actions for nuisance. (The principles of exemption of liability for acts done under statutory authority summarised): *Geddis v. Proprietors of Bann Reservoir*, (1878) 3 A C 430; *Vaughan v. Taff Vale Ry Co.*, (1860) 5 H & N 679; *Managers of Metropolitan District Asylum v. Hill*, (1881) 6 A C 193 and *Canadian Pacific Ry. Co. v Parke*, (1899) A C 585 *Rel. on.* [P 709 C 2; P 710 C 1]

(b) Tort—Continuing nuisance—Injunction is usual remedy unless injury is trivial.

Injunction is the usual and proper remedy in the case of continuing nuisance. It ought to be granted in some form unless the injury complained of is trivial. [P 710 C 2]

The construction of hackney carriage stand with no suitable contrivance for drainage caused discomfort to the plaintiff in that it was the cause of his house being vacated by tenant and not being re-occupied :

Held: that the injury was not trivial and that injunction was proper relief. [P 710 C 2]

(c) Bengal Municipal Act (3 of 1884), S. 5 (35)—Applicability — Erection of defective hackney carriage stand with no suitable contrivance for drainage—Suit for injunction for removal of same is not governed by S. 5 (35).

Section 5 (35), Bengal Municipal Act, applies when the act complained of is purported to be done under the Municipal Act or any rule or bye-law made thereunder. But the erection of a defective hackney carriage stand with no suitable contrivance for drainage does not come within this section, for the Bengal Municipal Act has no provision for the erection of such stands, nor are there any statutory rules or bye-laws made under the said Act. Hence a suit for mandatory injunction for removal of same is not governed by S. 5 (35). [P 711 C 1]

Jatindra Nath Sanyal and Bijali Bhusan Sanyal—for Appellants.

Surajit Chandra Lahiry and Amaresh Chandra Roy—for Respondents.

Judgment.—This appeal has been preferred by the plaintiff against the judgment and decree of the learned District Judge of Pabna who has partly reversed the judgment and decree of the Second Court of the Munsif of that place. The defendants, the Commissioners of the Municipality of Pabna, have referred cross-objections and as the cross-objections go to the root of the matter, I have heard the respondent's advocate first in

support of his cross-objections. In 1918 the Commissioners of the Pabna Municipality had reserved a part of the Strand Road, in front of the plaintiffs' land, as a hackney carriage stand. At that time the Calcutta Hackney Carriage Act of 1891 (2 of 1891, B. C.) was in force. The said Act had been extended to the Municipal limits of the town of Pabna by Notification No. 1008 T. M., dated 4th November 1913. The said notification is in the following terms:

In exercise of the power conferred by S. (1), Cl. (3), Calcutta Hackney Carriage Act 2 of 1891, the Governor in Council is pleased to extend the provisions of the said Act to the Pabna Municipality in the District of Pabna.

2. The Governor in Council is also pleased, in exercise of the power conferred by S. 61, subsection (1) of the same Act, to appoint the Commissioners of the Pabna Municipality and their Chairman, respectively, to perform the duties imposed and to exercise the powers conferred by the Act on the Corporation of Calcutta and the Chairman of the Corporation, respectively.

By the Calcutta Hackney Carriage Act 1 of 1919 (B. C.) Act 2 of 1891 (B. C.) was repealed and no notification by the Local Government has been issued under S. 2, Cl. (a) of Act 1 of 1919 extending the said Act of 1919 to the town of Pabna. In July 1933 the Commissioners of the Pabna Municipality paved the portion of the Strand Road reserved in the year 1918 as a hackney carriage stand. The said place is still being used as a hackney carriage stand.

The plaintiff filed his suit on 11th December 1933 against the Commissioners of the Pabna Municipality for a mandatory injunction for removal of the said hackney carriage stand, for a permanent injunction restraining them from allowing the said place to be used as a hackney carriage stand, for a permanent injunction for restraining them from obstructing the passage to his land from the Strand Road and for damages. The basis of these reliefs is the statement made in para. 4 of the plaint. The substance of that paragraph is that the hackney carriage stand is kept in a dirty condition; there is no flushing arrangement and the bad smell has caused and is causing great discomfort with the result that some of the plaintiffs' tenants occupying huts on his land had already left and the carriages standing in a long row caused obstruction to the ingress and egress to and from his land to the Strand Road.

The first Court dismissed the suit, and an appeal was taken by the plaintiff to the learned District Judge. The learned District Judge, apparently with the consent of both parties, inspected the locality and thereafter heard arguments and decreed the suit in part. He held that no case for an injunction has been made out by the plaintiff, but that he was entitled to damages which he assessed at Rs. 50. I will have to examine this part of his judgment in some detail hereafter. The plaintiff has preferred this appeal in which he maintains that an injunction ought to be granted. The defendants have preferred cross-objections in which they maintain that the decree for damages ought to be discharged and the plaintiff's suit dismissed in its entirety.

The learned advocate for the defendants-respondents raises in his cross-objection a point which goes to the root of the matter and if it be a sound one, the plaintiff's suit will have to be dismissed, even if the hackney carriage stand constitutes a nuisance. He contends that if the Commissioners have the statutory power to appoint a place as a hackney carriage stand, and if in the exercise of that power they do something which is necessary for the exercise of the same, no action can lie against them even if their said acts constitute nuisance. The proposition so stated and in such a broad form is in my judgment now the law. The principles of exemption of liability coming within this head, in my judgment, can be summarised in the following manner: (i) Whenever an act otherwise unlawful and actionable is expressly authorised by the legislature, no action would lie against the person who has the statutory authority to do the act, provided it is done without negligence. The statutory authority is to be regarded as statutory indemnity: (1878) 3 A C 430 (1) per Lord Blackburn at p. 455. (ii) The statutory authority and the consequent statutory indemnity extends not only to the act itself, but to all its necessary consequences. When the legislature has authorised an act, it must be deemed also to have authorised by necessary implication all inevitable results of that act. As has been put in some of the cases, the test of the necessity of a consequence is the

1. *Geddis v. Proprietors of Bann Reservoir*, (1878) 3 A C 430.

impossibility of avoiding it by the exercise of due care and skill. No consequence which can be so avoided is within the scope of the statutory indemnity. It is on this principle that in 5 H & N 679 (2) no damages were awarded against the Railway Company for fire caused by a spark escaping from one of their locomotive engines, it being proved that the engine had been constructed with due care and skill and escapes of sparks were inevitable. It is not necessary to multiply cases, many of which can be found in the reports which illustrate this principle. (iii) The aforesaid two principles of exemption from liability are only applicable when the statutory authority is absolute and conditional. Whether the authority is absolute or conditional has often to be implied from the general provisions of the statute. A good working test is that where the authority to do an act is imperative, that is, where the statute imperatively directs the acts to be done, and not permissive, i. e. merely allows to be done, it is to be considered as absolute; if it is merely permissive, the authority is *prima facie* conditional and does not absolve the authorised person doing the act from liability, if nuisance results from the act: (1881) 6 A C 193 (3) and (1899) A C 535 (4).

It is on this principle that Metropolitan District Asylum, a statutory Corporation having statutory authority to build a smallpox hospital, was restrained from building it at Hampstead in London, as the erection of such a hospital there would be a source of danger to the neighbourhood: (1881) 6 A C 193 (3). On the same principle the case (1893) 2 Ch 588 (5) was decided. There the Tramway Company was authorised by an Act of Parliament to use horse traction for their tramcars. That power by necessary implication authorised building stables for the horses to be used for drawing the tramcars. But the company was restrained from maintaining a large stable

which by reason of the noise and smell was a nuisance to the adjoining residents. Having regard to the provisions of S. 60, Hackney Carriage Act of 1919 (1 of 1919), which corresponds to S. 45, Act 2 of 1891, however, I hold that the authority to appoint stands for hackney carriages is absolute. The statute does not merely permit the appointment of such reserved places for hackney carriages but directs the person or body authorised to do so. If therefore the Commissioners of the Pabna Municipality had, in July 1933, the statutory authority to appoint places to be used as public stand for hackney carriages they would not be liable even if the said public stand erected on a part of the Strand Road is a source of nuisance to the neighbours.

This leads me to the question as to whether they had the statutory authority. This depends upon the question whether the Calcutta Hackney Carriage Act either of 1891 or 1919 was in force at Pabna in July 1933. There cannot be any question that the Act of 1891 was not in force because that Act being wholly repealed by Act 1 of 1919 is no longer on the statute book. The question is whether Act 1 of 1919 was in force then. It is admitted that no notification has been issued by the Local Government under S. 2, Cl. (a) of this Act, extending its operation to the town of Pabna. The only notification that has been issued is the notification No. 1008 T. M. dated 4th November 1913, which I have quoted above. That notification extended to the town of Pabna the Act then in force, namely the Hackney Carriage Act of 1891. The word 'said' used in para. 1 of the notification implies that it was a notification issued under S. 1, Cl. (3) of the Act of 1891. S. 25, Bengal General Clauses Act (1 of 1899 B. C.) is of no assistance to the Municipal Commissioners of Pabna. The only effect of that section is to make the notification No. 1008 T. M., dated 4th November 1913, as if issued under Act 1 of 1919. By the application of S. 25, General Clauses Act, the said notification would read in the following manner:

"In the exercise of the powers conferred by S. 2, Cl. (a), Calcutta Hackney Carriage Act 1 of 1919, the Governor in Council is to be pleased to extend the provisions of Act 2 of 1891 to the Pabna Municipality in the District of Pabna." But this means to the Commissioners

2. *Vaughan v. Taff Vale Ry. Co.*, (1860) 5 H & N 679=29 L J Ex 247=6 Jur (N S) 899=2 L T 394=8 W R 549.

3. *Managers of the Metropolitan District Asylum v. Hill*, (1881) 6 A C 193=50 L J Q B 353=44 L T 653=29 W R 617=45 J P 664.

4. *Canadian Pacific Ry. Co. v. Parke*, (1899) A C 535=68 L J P C 89=81 L T 127=48 W R 118=15 T L R 427.

5. *Napier v. London Tramways Co.*, (1893) 2 Ch 588.

nothing as Act 2 of 1891 is not in existence since 1919. The view I am taking is supported by the decision in 36 C W N 11 (6). I hold that since 1919 and *a fortiori* in July 1933, the Commissioners of the Pabna Municipality had no statutory authority to appoint or reserve any place as a hackney carriage stand, and hence there is no statutory indemnity from actions for nuisance. I do not consider that S. 3, Cl. (2), Hackney Carriage Act of 1919, which preserves intact "the validity of anything done or suffered or any right, title obligation or liability which may have accrued under" the Hackney Carriage Act of 1891, protects the Commissioners from this action, if their act done in July 1933 amounted to nuisance. The liability sought to be enforced in the suit is a liability which arose in July 1933 when the Hackney Carriage Act of 1891 was no longer in force.

The question now to be considered is whether the plaintiff has succeeded in proving that the construction of the pucca hackney stand in front of his property has caused and is causing nuisance. In the plaint he stated that by reason of the bad smell, his tenants have left. He also complained of obstruction to free access to his land from the public road caused by the hackney carriages standing in a row. The learned District Judge who inspected the locality has found that there is no extra accumulation of filth on the stand itself. The smell emitting from the stand itself is not more noxious or disagreeable than the smell emitting from the streets of Pabna generally. If this was the only finding no action for nuisance would lie, for a person living in that town must put up with its usual and ordinary discomforts. But he finds something more. He finds that there is no proper drain or channel to drain off the urine of the horses with the result that offensive matter drains into and accumulates in a long strip of land in between the pucca stand and the plaintiff's land. This finding in my judgment supports the plaintiff's action. I do not attach much importance to the respondents' contention that this fact is not specifically mentioned in the plaint. The

plaintiff complained of nuisance and gave some instances of discomfort he and his tenants were feeling, and I do think it would be giving a too strict interpretation to the plaintiff's pleading if I am to accept the respondents' contention. I do hold that the plaintiff is entitled to relief on the basis of this finding.

The learned District Judge refused the prayer for injunction but awarded the plaintiff Rs. 50 as damages. He was, it seems to me, by reading his judgment influenced to some extent in refusing the prayer for injunction by the promise made before him that the Municipality will in a short time provide proper drains. This promise was made in March 1935, but has not yet been redeemed. Injunction is the usual and proper remedy in the case of continuing nuisance. It ought to be granted in some form unless the injury complained of is trivial. I do not consider that the discomfort caused to the plaintiff is trivial. One of his tenants has left the land. The plaintiff has no doubt failed to prove that the pucca hackney carriage stand was the cause of his departure. But the fact is established that no tenant has come in his place since then and the hut that he occupied is now owing to long and continued vacancy in a dilapidated state. I hold that injunction is the proper relief. Having taken all the circumstances into consideration I think that Commissioners of the Municipality should not be directed to remove the stand elsewhere, but that they should be directed to take proper care in the matter of keeping the stand and the adjoining places reasonably clean and for that purpose they are directed to clean and to keep in a reasonably clean state the strip of land in between the hackney carriage stand and the plaintiff's land by providing a suitable pucca drain. They are accordingly directed to construct a suitable pucca drain on that piece of land within six months from this date. If they fail to do so the plaintiff will have such a drain constructed and recover the costs thereof from the Commissioners of the Municipality. As I am giving the plaintiff an injunction in this limited form, I discharge decree for damages.

A point was taken that the suit not being instituted within the time limited by S. 5 (35), Bengal Municipal Act, is barred by time. I do not accept that

6. Chairman of the commissioners of the Howrah Municipality v. Haripada Roy Choudhury, 1932 Cal 315=138 I C 28=59 Cal 1007=36 C W N 11.

contention. The said section applies when the act complained of is purported to be done under the Municipal Act or any rule or bye law made thereunder. The act complained of, namely, the erection of a defective hackney carriage stand with no suitable contrivance for drainage does not come within this section, for the Bengal Municipal Act has no provision for the erection of such stands, nor are there any statutory rules or bye-laws made under the said Act. The appeal and the cross-objections are thus partially allowed. Each party to bear their costs of this Court.

R.W./R.K. *Appeal partly allowed.*

A. I. R. 1936 Calcutta 711

R. C. MITTER, J.

Abdul Kader Chaudhury — Plaintiff—Appellant.

v.

Upendra Lal Barua and others — Respondents.

Appeal No. 811 of 1935, Decided on 23rd July 1936, against decree of Sub-Judge, Second Court, Chittagong, D/- 13th December 1934.

Acquiescence—Mere silence is no acquiescence — Silence is acquiescence only when there is duty to speak and silence amounts to fraud — Trespasser spending money on property of another — True owner silent — To amount to fraud, he must know that property is his at that time and that trespasser is acting under mistaken belief that land is his (trespasser's) — Where he does not know any of these there is no acquiescence.

The doctrines of estoppel and acquiescence both require for their foundation a representation made by one party to another. Such representation in case of acquiescence is to be inferred from silence. But mere silence does not amount to acquiescence. In order that silence may amount to acquiescence there must be duty to speak and silence means fraud. For silence to amount to fraud, the chief elements are that the possessor of legal right must know of the existence of his own right which is inconsistent with the right claimed by the trespasser, and secondly he must know of the trespasser's mistaken belief of his rights.

[P 713 C 1]

If in a suit for possession of land the possessor of legal right does not know at the time when the trespasser is spending money upon his property that the land is his, and if he does not know in addition that the trespasser is acting under a mistaken belief that the property is his, there is nothing wrong if he remains silent. His silence is not fraudulent and hence it cannot amount to acquiescence. *A.C.L.J. 23 (P.C.)* and *Willmetts v. Barber*, 15 C.D. 202 Rel. on.

[P 713 C 2]

Advocate High Court

Jammu & Kashmir

Narendra Kumar Das and Durgesh Prosad Das—for Appellant.

Amritalal Mukherjee and Rohinibinod Rakshit—for Respondents.

Judgment—The subject matter of the suit is a strip of land being the Western portion of the Southern Bank of a certain tank. The Eastern portion of the Southern Bank admittedly is the property of the Aryya Mitra Institution, a school of which the defendants are the members of the committee. The suit lands are described in schedule Ka of the plaint. The plaintiff's case is that the Western portion and the Eastern portion of the Southern as well as the other banks of the tank were at some time ejmali properties of the plaintiff's and the defendants' predecessors in title. There was a partition and the Western portion of the Southern Bank was allotted exclusively to the share of the plaintiff's predecessor. The plaintiff has instituted this suit on the ground that the property described in Sch. Ka falls within his exclusive property but he was dispossessed from it in the year 1928 when there was an encroachment made and some huts of the school were built upon a portion of it. He claims therefore recovery of possession on declaration of his exclusive title. The defendants denied the title of the plaintiff and in one paragraph of their written statement they said that the plaintiff's suit was barred by estoppel, acquiescence and waiver.

They did not plead facts which would support the said plea of estoppel, acquiescence and waiver. In another paragraph of the written statement they stated that at the time when those huts were raised on behalf of the school authorities, the plaintiff's son was the secretary of the school and those huts were raised with the knowledge of the plaintiff's son and of the plaintiff. They did not say in the written statement that either the plaintiff or the plaintiff's son on behalf of his father gave his consent to the school authorities to raise those buildings nor did they plead an alternative case that even if the land belonged to the plaintiff the school authorities were given a license to build upon it. Both the Courts below have found that the land in suit belonged to the plaintiff and he was dispossessed in the year 1928, well within the period of limitation. The Court of first instance made a decree in favour of the

plaintiff on those findings. The lower appellate Court, although maintaining those findings which I have noticed above, has dismissed the suit on the ground that the plaintiff must be taken to have given his consent to the school authorities enclosing the disputed land within his compound and raising structures on some portion thereof.

The lower appellate Court deals with this question in dealing with point No. 4 formulated by it, namely "To what relief is the plaintiff entitled." First of all it states that the plaintiff's son was the secretary at the time when the school authorities took possession of this plot of land and from that he says "there can be no manner of doubt" that he (the plaintiff's son) was fully aware of the fact that the school authorities were enclosing the said portion and were raising structures on it. That is a finding which I take to be a good finding based on evidence. It was open to the lower appellate Court to draw the inference from the fact that the plaintiff's son was the secretary, at the time that the plaintiff's son had knowledge of the fact that on this particular plot rooms of the school were being built and this particular plot was being enclosed within the school compound. Then the lower appellate Court says the plaintiff's son is a dutiful and obedient son and is in the same mess with his father. From that he concludes that the plaintiff's father must have known of these operations on the part of the school authorities well, although there is some element of speculation here, and I would take it for the purpose of my decision that this is a good finding also. Then the learned Judge says that 'I am inclined to think that the school was removed to the suit land with the knowledge and consent of the plaintiff.' He is a little inaccurate there in the statement of the facts because the school was not removed from its old site to its present site but there was only an extension over the suit land. However that may be, that is a misstatement which is immaterial for the purpose of this appeal. Then he says that,

inasmuch as the plaintiff by his own conduct must have led the school authorities to believe that he would not object to any hut being erected there and the remaining land being used for the purpose of the school he cannot now turn round to take khas possession of the land by the removal of the mud-walled hut or

huts thereon which are no doubt substantial structures.

On these three findings which I have enumerated above the learned Judge modified the decree of the Court of first instance and gave to the plaintiff possession of only the vacant portion of schedule Ka land. He did not give him khas possession of the portion of schedule Ka where the huts stand nor did he direct the removal of the said huts but only gave the plaintiff a decree for damages for use and occupation of the lands whereon the school huts stand. I have great difficulty in following the conclusion of the learned Judge on the aforesaid findings. As I have indicated above I consider some of these to be no findings at all but mere speculations. But assuming them to be good findings, there are serious objections to the decree which the learned Subordinate Judge has made in this case. In the first place, as I have pointed out, defendants did not plead an alternative case that the school authorities were there with the license of the plaintiff. They did not plead that the plaintiff had given consent to the extension of the school over this ground. All that they pleaded was that the plaintiff knew of these extensions and they said that the plaintiff's claim for possession was barred by estoppel and acquiescence and waiver. The point about waiver has not been developed before me and therefore in dealing with the above mentioned sentence in the written statement I leave aside the word "waiver." The finding therefore that the plaintiff gave consent to the school authorities to enclose his land is a finding on a new case made by the lower appellate Court for the defence and that finding therefore must be disregarded. What remains then is the finding that the plaintiff knew that the school authorities were enclosing the land which is now described as Sch. Ka of the plaintiff and which is now claimed as the plaintiff's land.

There is no suggestion that the plaintiff either himself or through his son made an active representation to the school authorities in the year 1928, that this land was the land belonging to the school. Therefore there is no foundation for the application of the doctrine of estoppel. The question is whether the doctrine of acquiescence can be invoked for the purpose of defeating the plaintiff's claim for khas

possession. Now, as I understand it, the doctrine of acquiescence is only another phase of estoppel. The foundation of the doctrine of estoppel and acquiescence is that the representations have been made to the other side—representations which were intended to be acted upon by the other side, and were in fact acted upon by the other side spending money or doing some act which he would not have otherwise done which involved expenditure or a change of position. In the case of estoppel the material representations are active in form while in the case of acquiescence the representations are to be inferred from silence. The doctrine of acquiescence has gone by different names—the doctrine of standing by—but all the elements must be there. If an owner finds another person trespassing upon his land and building upon his land, mere silence or inaction on his part at the time of the building operations is not sufficient to support a case of acquiescence. He need not prevent the act at the time when it was begun. He need not say to the other side to stop. Mere silence, mere inaction cannot be construed to be a representation. In order to support a case of acquiescence there must be something more than mere silence or inaction. Inaction or silence in circumstances which require a duty to speak is the foundation of the doctrine. When inaction or silence would amount to fraud or deception then and then only would the doctrine of standing by or acquiescence be applied. This is the position which is made quite clear in the judgment of Sir Asutosh Mookerji in 1 C L J 23 (1). The passage is at p. 27 and runs as follows :

It cannot be doubted that there may be cases in which there is deception by omission, but silence may be treated as deception only when there is a duty to speak ; in other words, as Bigelow points out, ' a duty to speak, which is the ground of liability, arises wherever and only where silence can be considered as having an active property, that of misleading.'

In 15 Ch D 96 (2) Fry, J. has defined the elements in a lucid manner. There he was considering the case whether the defendant was bound by the doctrine of acquiescence from asserting his legal rights. First of all he points out that

omission or inaction on the part of the defendant would support a case of acquiescence if his omission or inaction amounted to fraud. Then he makes this observation : 15 Ch D 96 (2). The passage is at pp. 105 and 106 :

What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it but, in my judgment, nothing short of this will do.

It is the third and the fourth element in the passage which is material for this case. If the possessor of the legal right does not know at the time when the trespasser is spending money upon his property that the land is his, and if he does not know in addition that the trespasser is acting under a mistaken belief that the property is his, there is nothing wrong if he remains silent. His conscience is not affected. There is nothing fraudulent in his conduct. Even if he knows that the property is his he might not disclose at that time to the trespasser that the property is his unless he also knows that the trespasser is spending money upon a mistaken view of his rights. In the present case there is no evidence whatsoever that in the year 1928 either the plaintiff or the plaintiff's son knew that the portion which was being enclosed by the school authorities was the property of the plaintiff and/or that they knew that the school authorities were under the mistaken belief that the property that was being enclosed was the property of the school. The onus is on the defendants who want to deprive the plaintiff of his legal rights by taking the

1. Joy Chandra Bandopadhyaya v. Srinath Chattopadhyaya, (1905) 32 Cal 357=1 C L J 23 (P C).

2. Willmott v. Barber, (1880) 15 Ch D 96 = 43 L T 95=28 W R 911=49 L J Ch 792.

said plea. They must prove all the elements, specially the 3rd and 4th which are important for the present case noticed in the Judgment of Fry, J. It may very well be that in the year 1928, when the plaintiff's son was the Secretary of the school, the plaintiff's son believed that the portion which was being enclosed then was a part of the property of the school. If that was so, there would be no foundation for the doctrine of acquiescence. In this view of the matter I do hold that the defendants have not made out a case of acquiescence. The lower appellate Court having found title to the whole of schedule Ka in the plaintiff and the suit having been instituted within six years of the dispossession of the plaintiff by the school authorities, the plaintiff must have a decree for possession in respect of the property in suit. The result is that I allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance. Having taken into consideration the history behind this litigation I think both parties should bear their respective costs of this Court and of the lower appellate Court.

D.S./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 714**

EDGLEY, J.

Radha Sundar Roy and another — Defendants—Appellants.

v.

Saktipada Roy — Plaintiff — Respondent.

Appeal No. 73 of 1935, Decided on 10th June 1936, from appellate decree of Sub-Judge, Murshidabad, D/- 23rd June 1934.

Specific Relief Act (1877), S. 39—Cancellation of instrument — Person transferring interest to another—Suit by such person is still maintainable—Test is apprehension of injury.

A person sued another for cancellation of an instrument which was alleged to be a forged document. The instrument purported to transfer lands of the plaintiff to the defendant. Before the suit the plaintiff had transferred his interests in the land to a third person. It was contended that the plaintiff's suit was not maintainable under such circumstances, because he had no interest left in the property:

Held: that a man who has parted with the property in respect of which a void or voidable instrument exists can sue to get the instrument cancelled, the test for the maintainability of the suit being reasonable apprehension of serious injury: 23 Bom 375, *Foll.*; 13 Mad 549, *Disapproved.* [P 715 C 3]

*Rajendra Chandra Guha and Mahendra Kumar Ghose—*for Appellants.

*Panchanan Ghose and Bhupendra Narayan Bera—*for Respondent.

Judgment.—In the suit out of which this appeal arises the plaintiff sued the defendants for the cancellation of an Ekrarnama which, according to his case, had been forged by the principal defendants. This document is said to have been executed on 3rd August 1931 and was presented for registration on 9th September 1931. The land covered by the Ekrarnama originally belonged to the maternal grandfather of the plaintiff and subsequently it devolved upon Nagendrabala Dasi, his maternal grandmother from whom he inherited it. On 29th August 1931 he sold this property to Rajendrabala. The contention of the defendants was to the effect that the Ekrarnama was a genuine one and that, in any event, the plaintiff's suit was not maintainable having regard to the provisions of S. 39, Specific Relief Act. Both the Courts below found that the Ekrarnama was a forged document and, this being the case, they decreed the plaintiff's suit. It has been faintly argued by the learned advocate for the appellants in this case that the findings of fact with regard to the genuineness of the Ekrarnama have been reached by the Courts below after insufficient consideration of the evidence. From a reference to the judgment of the learned Munsif and that of the learned Subordinate Judge it appears, however, that the evidence was very carefully discussed in all its bearings and I am of opinion that the findings of fact at which the Courts below have arrived with regard to the genuineness of the Ekrarnama cannot be challenged in second appeal. It is, however, urged that, in any event, the plaintiff's suit was not maintainable in view of the provisions of S. 39, Specific Relief Act. This section provides that:

Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable.

In the case out of which this appeal arises it is admitted that the plaintiff has parted with his interest in the property by reason of the kobala executed in favour of Rajendrabala on 29th August 1931 and it has been argued that, in these

circumstances and having regard to the decision of the Madras High Court in 13 Mad 549 (1) no suit would lie under S. 39, Specific Relief Act. The learned Judges, in the case cited above, stated that they were of opinion that the bare possibility of the plaintiff being sued in an action for damages would not entitle the plaintiff who had divested herself of all interest in the property to maintain the suit. This case was considered by the Bombay High Court in 23 Bom 375 (2). In the latter case a suit had been brought by the Swami of a mutt to avoid a Jimmapatra whereby he had made over the management of the mutt properties to a certain person. It was alleged that the conditions contained in the Jimmapatra had not been carried out and after this deed had been executed, the Swami transferred the property covered by the Jimmapatra to a third person. In the judgment of the Court in the case last cited above Farran, C. J. made the following observations:

It appears to us that, if the document is not cancelled . . . the purchaser may sue the original plaintiff for a return of his purchase money, if he cannot get possession of the lands by reason of the defendant holding them under the Jimmapatra, and that thus the original plaintiff may have had reasonable apprehension of permanent injury. He was also in danger of the defendant suing him in respect of the lands of which the defendant had not detained possession, for it does not appear that the defendant has detained possession of all the lands; and there is lastly the suggested risk that the added plaintiff may not act fully up to the terms of his purchase and that the original plaintiff may be in a position to resume the lands.

In the case out of which the present appeal arises it is alleged in the plaint that Rajendrabala is in possession of the property covered by the Ekrarnama, whereas in the written statement it is alleged that the defendants are in possession of this property. This being the case the possibilities of injury to the plaintiff are almost precisely similar to those to which reference has been made in Farran, C. J.'s judgment in 23 Bom 375 (2), the case cited above, and it would follow that as far as the plaintiff is concerned, there exists a reasonable apprehension of serious injury. In discussing the decision of the Madras High Court in 13 Mad

549 (1) the learned Chief Justice of the Bombay High Court further stated that:

We are not prepared to follow it if it was intended to lay it down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled,

and his Lordship went on to point out that:

The true test in a case of this sort is reasonable apprehension of serious injury.

I am entirely in agreement with the line of reasoning which has been adopted in the Bombay case cited above and, in these circumstances, I am of opinion that the decision of the lower appellate Court is correct. The judgment and decree of the learned Subordinate Judge will therefore be affirmed and this appeal is dismissed with costs. Leave to appeal under S. 15, Letters Patent is refused.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Calcutta 715

MUKERJI AND JACK, JJ.

Sadhiram Atoi—Plaintiff—Appellant.

v.

Kunja Behari Banerjee—Defendant—Respondent.

Appeal No. 113 of 1934, Decided on 10th July 1936, against decree of Special Sub-Judge, Assam Valley, D/- 14th August 1933.

(a) Assam Land and Revenue Regulation (1 of 1886), S. 82 (2) — "Or" means "and" — Both conditions must be fulfilled to maintain a suit to set aside sale.

The word "or" in the sub-section must be regarded, having been used in the sense of "and" and the sub-section means that unless both the conditions are specified the suit would not be maintainable. [P 717 C 2]

(b) Assam Land and Revenue Regulation (1 of 1886), Ss. 82 (2) and 80 — Suit to set aside sale is governed by S. 82 (2) and not by Art. 12 (c), Limitation Act.

When there is a special provision contained in the regulation itself as to limitation for instituting a suit to set aside a sale under it, it would not be right to travel beyond the regulation and to go to the Limitation Act for the purpose of finding out an article to be applied to a suit for setting aside the sale. Hence such a suit is governed by S. 82 (2) of the Regulation and not by Art. 12 (c), Limitation Act. [P 718 C 1]

(c) Assam Land and Revenue Regulation (1 of 1886), Ss. 91 (1) and 146 — Scope of S. 146 — All conditions in S. 91 (1) are not to be fulfilled before ordering sale of surety's property.

Section 146 of the Regulation merely lays down the procedure under which sale would take place, and though certain conditions are

1. Iyyappa v. Ramalakshamma, (1890) 18 Mad 549.

2. Kotrabassappaya v. Chenvirappaya, (1899) 23 Bom 375.

laid down in sub-s. (1), S. 91, which have to be fulfilled in order to bring to sale the estate of the defaulter other than the defaulting estate, it was not intended by S. 146 that these provisions would have to be complied with before the properties of the surety are put up to sale. The practice of proceeding against the moveables of the defaulter before proceeding against the surety is a procedure which is fair and reasonable. [P 719 C 1, 2]

(d) Assam Land and Revenue Regulation (1 of 1886), S. 82 (2) — Surety's properties sold for defaulter's arrears of revenue—Civil suit for declaration that sale is void ab initio is not barred though such plea is not taken in application before Commissioner.

A suit for declaration that the sale was void ab initio as being outside the powers of the revenue authorities to bring the property to sale because the surety was under no liability under his surety bond can be maintained in a civil Court even though it was not raised in application before the Commissioner. [P 720 C 1, 2]

Bijan Kumar Mukherjee, Sanat Kumar Chatterjee and Biswa Nath Naskar—for Appellant.

Prakash Chandra Majumdar and Manmatha Nath Roy (Jr.)—for Respondent.

Mukerji, J. — The plaintiff is the appellant in this appeal. The facts of the case, shortly stated, are the following: One Sarat Chandra Chowdhury was appointed Sarbarakar in respect of a mouza Bara Khetri in the month of September 1928. The plaintiff stood surety on behalf of the said Sarat Chandra Chowdhury in respect of the said appointment by executing a security bond whereby he hypothecated certain immoveable properties. The revenue payable for the said mouza was Rs 26,500 and the plaintiff's properties were taken as being valued at Rs. 28,000 which was the valuation which the plaintiff had put upon the properties.

Thereafter, there was a proposal to split up mouza Bara Khetri into two parts, one of which was to go by the name of Uttar Bara Khetri and the other Dakhin Bara Khetri. This proposal of the Commissioner was accepted by the Government on 9th November 1928. Thereafter sureties were called for an aggregate amount of Rs. 13,000 for an appointment which was to be made of the said Sarat Chandra Choudhury as Sarbarakar in respect of mouza Uttar Bara Khetri; and one Protap Narayan Dutta having offered himself as a surety he was accepted as such the property offered by him as security being taken as being valued at Rs. 4,600 and the plaintiff was accepted

as a surety in respect of the balance of Rs. 8,400. On 29th May 1929 the Sarbarakar defaulted in the payment of the instalment then due. Upon that his moveables were attached, the said moveables being valued at Rs. 3,000; but they were never sold. In the meantime, proclamation being issued for the sale of the hypothecated properties which were covered by the plaintiff's surety-bond, the said properties were sold at auction on 13th August 1929 and were purchased by the defendants at a price of Rs. 6,200. The plaintiff's case further was that he would have taken steps to prevent his hypothecated properties being put up to sale, but he was misled; because he came to know on inquiry that the Sarbarakar had made over the amount for which he was in default to the surety Protap Narayan Dutta, and also because he was under the impression that the moveable of the Sarbarakar which had been already attached would be first put up to sale and that only if such sale failed to fetch the requisite amount that the immoveable properties hypothecated were to be sold. Upon this statement of facts, the plaintiff instituted the suit for a declaration that the sale was improper, and not in accordance with law and that the defendant by his purchase had acquired no title to the properties. In some of the paragraphs of the plaint he complained of several irregularities and illegalities in connexion with the sale and also alleged that the price fetched at it was grossly inadequate. The defendant in his written statement denied that there was any irregularity in connexion with the sale and also pleaded that if there was any irregularity in the conduct of the sale it was the Government which was responsible, and inasmuch as the Government was highly interested in the result of the suit, the Government should be made a party thereto. So far as this last-mentioned plea was concerned, it was overruled by the Subordinate Judge. The learned Judge, on dealing with the merits of the case, held that the suit should be dismissed and he ordered accordingly. From this decree dismissing the suit, the plaintiff has preferred this appeal.

It would be convenient to deal in the first place with some of the illegalities or irregularities complained of on behalf of the plaintiff and to leave out for the

present for separate consideration here. after one question of irregularity or rather of jurisdiction as the plaintiff desires to make it out to be. Now, those irregularities were of the following description. It was said that there was no attachment in respect of the properties that were sold; and on this point the learned Subordinate Judge held that no attachment was necessary because the properties had already been hypothecated. It was also urged that no notice under O. 21, R. 66, Civil P. C., was issued and that there was no valuation of the properties mentioned in the sale proclamation. The learned Subordinate Judge found that these two irregularities had been made out and he also found that there had been no beating of drum in connexion with the proclamation. Our attention has also been drawn on behalf of the appellant to another irregularity of which he had made a grievance in his petition of appeal to the Commissioner, and also in his petition to the Local Government, namely, that in the sale proclamation the place where the properties were to be sold was not mentioned. We find that this complaint also is well founded. But the learned Subordinate Judge having found these facts in favour of the plaintiff went on to consider the value of the properties, and after a careful consideration of the materials that are on the record on that question he has come to the conclusion that the price fetched at the sale cannot be regarded as inadequate having regard to the fact that at auction sales anything approaching the market value of property is hardly realized. He has also come to the conclusion that at the sale that took place, a number of bidders were present and that there was nothing to show that any insufficiency in the price, even if there was any, was due to any of the irregularities or even to the cumulative effect of all. We are of opinion that in view of the finding last mentioned, which we find is amply borne out by the materials on the record, it is not possible to say that the plaintiff was entitled to succeed on the ground of any of these irregularities. Furthermore, the learned Subordinate Judge has found that the suit regarded as one of setting aside the sale, was barred under the provisions of S. 80, sub-s. (2) of the Assam Land and Revenue Regulation 1886. It may be mentioned

here that the sale took place on 13th August 1929; that thereafter an application was made by the plaintiff to the Commissioner, who by an order passed on 3rd January 1930 declined to set aside the sale; and that thereafter the plaintiff preferred a further appeal to His Excellency the Governor in Council and that appeal was also dismissed. S. 82, sub-s. (2) says:

A suit to annul such a sale shall not be entertained upon any ground, unless that ground has been specified in an application made to the Commissioner or Chief Commissioner under S. 79, or unless it is instituted within one year from the date of the sale becoming final under S. 80.

On behalf of the appellant it has been contended in the first place that the two conditions specified in this sub-section are disjoined by the word "or" and that in this respect the provision contained in this sub-section is materially different from the analogous provision contained in the revenue sale law. On the strength of the appearance of the word "or" in this sub-section, it has been argued that upon a true construction of it, it should be held that if one of these conditions is satisfied, an appeal would be competent. We are of opinion that this contention is not well founded. The two conditions are so different in their nature that it is impossible to maintain that if only one of the conditions is fulfilled an appeal would be competent. One of these conditions is that the ground to be taken in the appeal must be one which has been specified in the application made to the Commissioner or Chief Commissioner under S. 79 and the other is that the suit is to be instituted within one year from the date of the sale becoming final under S. 80. The word "or," as it appears in this sub-section, must, in our opinion, be regarded having been used in the sense of "and" and in our opinion, the sub-section means that unless both the conditions are specified, the suit would not be maintainable.

Nextly, it has been argued on behalf of the appellant that the suit was not barred by limitation because of an order which was passed by the Deputy Commissioner on 24th January 1930 in which it was stated that the sale was confirmed. It has been argued that inasmuch as the sale took place under the provisions of the Civil Procedure Code, the provisions of the Code as regards confirmation of the sale are applicable, and it was therefore

that the Deputy Commissioner on 24th January 1930 recorded the aforesaid order. Our attention has also been drawn to the sale certificate that was issued in this case and in it was said that the purchase took effect on 24th January 1930. Relying upon this date, that is, 24th January 1930, as the date of the confirmation of the sale, it has been argued that Art. 12, Cl. (c), Lim. Act, applies, and that therefore the plaintiff has got one year from the date when the sale is confirmed to institute a suit for the purpose of setting aside the sale. In our judgment this contention also is not well founded. The Regulation does not speak of any confirmation of the sale. It is quite true that the procedure that is prescribed for the sale is the procedure that is to be followed under the Civil Procedure Code. But that does not make all the provisions of that Code applicable, specially when it is not expressly stated in the Regulation that after a sale has become final it is necessary to have another order from the authority holding the sale for the purpose of getting the sale confirmed. Furthermore, on a question of limitation, with regard to which there is special provision contained in the Regulation itself, it would not, in our opinion, be right to travel beyond the Regulation and go to the Limitation Act for the purpose of finding out an article to be applied to a suit for setting aside the sale. S. 82, sub-s. (2) clearly lays down the time by which the suit will have to be instituted and reading that sub-section with the provisions of S. 80 it is perfectly clear that the sale became final in the present case when the appeal to the Commissioner was dismissed, namely, the 3rd January 1930. The suit, inasmuch as it was laid beyond a year from that date, was barred by limitation.

As already stated there was another complaint urged on behalf of the plaintiff as against the sale and the plaintiff relied upon it as giving rise to a question of jurisdiction. Now, that complaint is this. It was urged that under S. 146 of the Regulation which is a section appearing in Ch. 8 thereof headed "procedure," any person who has become liable for any amount as surety for a defaulter or Revenue Officer may be proceeded against in the manner prescribed in Ch. 5 as if he were a defaulter for such amount. It has been argued that having regard to the

provisions of this section, the procedure to be followed for the purpose of enforcing the security as against the plaintiff is the procedure contained in Ch. 5. The only section of Ch. 5 which may be taken to apply to a case where property other than the property in arrears is to be put up to sale is S. 91 of the Regulation. It may be stated here that there are certain papers on the record which show that different views used to be taken by different authorities on this question. For instance, there is an order of Mr. Bentick, Commissioner of Assam Valley Districts dated 3rd January 1930, in which he expressed the view that a sale of this kind is not governed by the provisions of Chap. 5 of the Regulation. On the other hand there are other documents specially an order of the Governor in Council dated 20th October 1931 in which it has been held that Chap. 5 is applicable and that the sale of the present description in circumstances such as there are in the present case is to be regulated by the provisions of S. 91 of the Regulation. It appears also that in the Assam Land and Revenue Manual a note has been inserted whereby it has been made clear that when a Mauzadar defaults and the estate pledged by his surety is sold in consequence under the Regulation, the sale, being of an estate for arrears other than its own, is governed by the provisions of S. 91. So, at the present moment there is hardly any dispute that the sale of the present nature has to be held under the provision of S. 91 of the Regulation. That being the position it has been argued on behalf of the appellant that the conditions laid down in sub-s (1), S. 91 have got to be complied with before the properties could be legally put up to sale. Now, sub-s. (1), S. 91 says:

If an arrear cannot be recovered by any of the foregoing processes, and the defaulter is in possession of any immoveable property other than the estate in respect of which the arrear has accrued, the Deputy Commissioner may proceed against any of that other property situated within his district according to the law for the time being in force for the attachment and sale of immoveable property under the decree of a civil Court.

The argument is that S. 146 of the Regulation by making S. 91, sub-s. (1) applicable to a sale of this kind requires that before the sale can take place, the conditions laid down in that sub-section have been fulfilled. One of the conditions

of that sub-section is that the arrears could not be recovered by any of the foregoing processes and on reference to the previous section, it would appear that two of the foregoing processes were contained in S. 69 and S. 70, S. 69 relating to attachment and sale of moveables of the defaulter and S. 70 providing for the sale of the defaulting estate. It is clear, however, that when the hypothecated property of a surety is put up to sale one of these foregoing provisions, namely, that contained in S. 70, cannot apply. But the argument is that the provisions, in so far as they are applicable, should be applied; and that, therefore, the moveables of the defaulter for seizure of which processes had already issued should have been put up to sale and the result of that sale should have awaited in order to see whether the arrears could be realized or not and it was only when it would be found after the sale of the moveables that the arrears could not be realized that it would be open to the authorities to put the plaintiff's properties to sale.

As a matter of construction of S. 146 of the Regulation, my own view is that that section merely lays down the procedure under which the sale would take place. It says, any person may be proceeded against in the manner prescribed in Chap. 5; and though certain conditions are laid down in sub-s. (1), S. 91 which have to be fulfilled in order to bring to sale the estate of the defaulter other than the defaulting estate, in my opinion, it was not intended by S. 146 that those provisions would have to be complied with before the properties of the surety are put up to sale. Indeed, the view that I take seems to receive support from the fact that with regard to a sale to be held in respect of properties belonging to a surety one of the provisions foregoing that contained in S. 91, namely, provisions contained in S. 70 of the Regulation, is admittedly inapplicable. At the same time I am of opinion that the procedure which has hitherto obtained in the province with regard to the sales of immovable properties belonging to the sureties, that is to say of proceeding against the moveables of the defaulter before proceeding against the surety and which as far as we are able to see from the papers before us was the procedure that was attempted to be resorted to in the first instance in the present case is a procedure

which is fair and reasonable. It appears from the order of the Governor-in Council dated 20th October 1931 to which reference has already been made that the Government took the view that the opening words of S. 91 show that before the defaulter's immovable property can be sold thereunder the other processes mentioned in Chap. 5 must be exhausted and that the same procedure should be adopted with regard to sales of properties hypothecated by sureties. Apparently, the Government have adopted what textbook writers and Judges have characterised as a humane construction and inasmuch as that construction is fair and reasonable it is open to the Courts to adopt it.

But, however that may be, what has happened in the present case is that although steps were taken first of all to have the moveables of the defaulter sold, those steps proved infructuous and while the moveable which had been attached remained in the custody of the other surety, Protap Narayan Dutta, the Revenue authorities, finding that the said Protap Narayan Dutta was not going to produce the moveables before the Court, proceeded to put up the plaintiff's properties to sale for the purpose of enforcing the surety bond which he had executed. It may be stated here that according to the terms of the surety bond it was not necessary that the remedies as against the defaulter should have been exhausted. The surety bond distinctly states that if the revenue due is not paid in due time the surety would remain liable for the amount mentioned in the schedule. As a matter of strict construction of S. 146, I am inclined to take the view that the course which was adopted in the present case was one which was open to Revenue authorities to take for the purpose of realizing the amount. There is, however, another objection and that is, in my opinion, a fatal objection to the plaintiff succeeding on this ground. The suit, even though it may be taken as a suit to set aside the sale on the aforesaid ground, was a suit which would come within the provisions of S. 82, sub-s. (2) of the Act. However much it may be said that the Revenue authorities would have no jurisdiction to proceed to realise the arrears from the properties of the surety, the plaintiff in order to get over this bar of limitation will have to show that the proceedings

that were taken were *ab initio* void. That cannot be said of the proceedings that were taken in the present case. All the different steps in the procedure have been laid down in the Regulation itself and if some of the steps have not been taken by the Revenue authorities which they should have taken, still it was a sale held under the provisions of the Regulation and the plaintiff in order to succeed will have to get that sale set aside. And once it is stated that it is a suit for the purpose of setting aside the sale held under the Regulation, the suit will have to comply with the provisions of sub-s. (2), S. 80. In that view of the matter the suit as laid must be held to be barred. This disposes of the objections on which the plaintiff took his stand for the purpose of getting the sale set aside on the grounds of irregularity or illegality. But there is one other part of the case which was put forward before the Court below and which has been disposed of by the learned Subordinate Judge in these words:

A new question of law had been introduced by the plaintiff's pleader during the later stage of the hearing of the suit, and which had been protested to by the defence. It is contended that the splitting up of the Barkhetri Mouza into two Mouzas made the security bond of plaintiff null and void and that his property was not legally liable to be sold for the default of Sarat Chandra, who actually became the Sarbarahakar of the newly created Barkhetri Mouza. I hold that plaintiff is barred not only by waiver but also by estoppel to take up such a plea now. He submitted to the changed order of things and continued as surety for Sarat Chandra (whatever might have been the area of his jurisdiction) to the extent of Rs. 8,400. Further, this ground was not especially urged in his appeal to the Commissioner under the provisions of S. 82 (2) of the Regulation and so the plaintiff is debarred from raising such a new plea in the civil Court.

It seems to us that the learned Judge has been in error in disposing of this matter in the way that he has done. It must be stated here that if the suit is based upon this ground it is not a suit for setting aside the sale but only for a declaration that the sale was void *ab initio*. A suit of this character would not be a suit for setting aside the sale nor a suit under the general law for a similar purpose. It would be a suit for a declaration that it was outside the powers of the Revenue authorities to bring the properties to sale because the plaintiff was under no liability under his surety bond. The learned Subordinate Judge was also in error in supposing that it was necessary

that the ground should have been taken in the application to the Commissioner. In the application to the Commissioner the facts relevant to this question were stated and in the appeal which the plaintiff preferred to the Local Government the facts were similarly stated. But the ground itself not being a ground either of mere irregularity and illegality, and for the purposes of an application of that nature irregularity and illegality stand on one and same footing, this question can very well be agitated in a civil Court even though it was not raised in that application. It is difficult to make out what the learned Subordinate Judge means by saying that there was waiver or estoppel on the part of the plaintiff. There are no materials whatsoever upon which such a conclusion could be come to.

The facts upon which this ground is based are set out in para. 2 of the plaint. It does not appear that any issue with regard to this matter was framed because as a matter of fact the statement contained in this paragraph was not attempted to be refuted in the written statement of the defendant. It appears also that the plaintiff went into evidence with regard to this matter and examined certain witnesses from the revenue department and made out a *prima facie* case to the effect that he never entered into a fresh surety bond and did not continue to act as a surety after the mouza had been split up. The original offer he had made was with regard to a very different contract, as has been stated above and that offer could not hold good, unless there was consent on the part of the offeror in respect of an appointment of the Sarbarakar, which in its essence was a different appointment. The mouza for which the appointment was made was only a part of the other mouza and the amounts of revenue and of the surety were also different. But it appears that although the facts were set out in the plaint, no special point of this matter was made in the paragraph of the plaint where the irregularities and illegalities upon which the plaintiff was relying for relief in the plaint were set out. And it also appears that the defendant went into evidence first and it was after the defendant's evidence had been closed that the plaintiff called witnesses and attempted to get it established that he was not liable under the original surety

bond having regard to the altered circumstances. In these circumstances, we think we should accede to the prayer which the defendant has made, namely, that now the plaintiff is relying upon this case he should be given proper opportunity to rebut it. It appears that when evidence was being given on behalf of the plaintiff with regard to this matter, an application was put in on behalf of the defendant objecting to that course. The Subordinate Judge apparently did not take any notice of this objection then and although the judgment was not delivered till after three months had expired from the date on which evidence had closed, the question of affording the defendant an opportunity to adduce rebutting evidence was not thought of by the Court or the parties.

Having regard to the fact that although the case had been made in the plaint, there was no distinct prayer for relief on the basis of it, that there was no issue framed and that the defendant has given evidence before any evidence on this question was led by the plaintiff we think it right that the case should be sent back to the Court below in order that this part of it may be re-tried. The questions which we have dealt with already in this judgment will not be allowed to be re-opened.

The result is that the appeal will succeed and no question which has already been dealt with in this judgment being allowed to be re-opened, the case will be tried only on the question of the plaintiff's liability on the basis of the surety bond. It is only this matter which the Court below will investigate further and having done so the said Court will dispose of the case in accordance with law. Costs of this appeal will abide the result.

Jack, J.—I agree.

A.L./R.K.

Case remanded.

A. I. R. 1936 Calcutta 721

D. N. MITTER AND S. K. GHOSE, JJ.

Khatejan Bibi—Plaintiff—Appellant.
v.

Haji Mahomed Yusuf and others—Respondents.

Appeal No. 1091 of 1933, Decided on 6th July 1936, from decree of Addl. Dist. Judge, 2nd Court, 24-Parganas, D/- 26th January 1933.

1936 C/91 & 92

(a) *Pardanashin Lady*—Execution of deed by illiterate young *pardanashin* lady in favour of relation—Rule that persons relying on document should satisfy Court as to her understanding the same should apply with greater force.

Where at the time of execution of an *Ammukhtarnama* by a *Pardanashin* lady in favour of her relative, the *pardanashin* lady was illiterate and young and her relative was of immoral character:

Held: that the rule that in the case of deeds and powers executed by *pardanashin* ladies, those who rely on them should satisfy the Court that they had been explained to and understood by those who execute them, should apply with greater force: 7 Cal 245 and 29 Cal 749, *Rel. on.* [P 722 C 2]

(b) *Pardanashin Lady*—Deed executed by *pardanashin* lady—Question as to binding nature—Facts existing on date of execution and not on date of suit should be considered.

In a suit brought many years after the execution of an *Ammukhtarnama* by a *pardanashin* lady, the question at issue was whether the deed was binding on her. The Judge issued a commission for enquiring whether she was illiterate and came to the conclusion that she was not illiterate on the date of the report of the commission:

Held: the matter had to be considered with reference to the material date, i. e., the date of execution of the *Ammukhtarnama* and not the date of her deposing before the commission. [P 723 C 1]

Harendra Kumar Sarbadhikary and Subodh Chandra Dutt—for Appellant.

Bijan Kumar Mukherjee, Kanaidhan Dutt and Jogneswar Mazumdar—for Respondents.

Ramendra Mohan Majumdar — for Deputy Registrar.

D. N. Mitter, J.—This is an appeal by the plaintiff from the decision of the Additional District Judge of 24-Parganas dated 26th January 1933 reversing the decision of the Subordinate Judge of the same district dated 27th March 1931 by which he decreed plaintiff's suit for declaration of title and recovery of possession of the properties mentioned in the schedule to the plaint. The case stated in the plaint is that the land in suit belonged to one Pecheruddi Mistri who died leaving him surviving him his son Belatali, his daughter Khatijan Bibi, (plaintiff) and his wife Abujan Bibi. Belatali died leaving behind him two wives, Nakjan and Kossiman, his sister Khatijan (the plaintiff) and his mother Abujan. Abujan is dead and plaintiff claims 6 annas 13 gandas 1 kara share of the property which she inherited from Pecheruddi and his heirs. It is further stated in the plaint that plain-

tiff's brother got an Ammukhtarnama executed by her and her mother and Nekjan Bibi, alleging that the execution of the Ammukhtarnama was necessary for the purposes of the management of their property, but the contents of the said Ammukhtarnama were never read over or explained to her, and that she never authorised Belatali to sell or mortgage any land of hers by this Ammukhtarnama and that she is an illiterate pardanashin, woman and that her husband and brother were both men of dissolute habits and that on the strength of this Ammukhtarnama Belatali executed a mortgage by way of conditional sale in the year 1324 B. S. in respect of 53 bighas odd (of which 35 bighas odd are the lands in suit and the remaining 17 bighas odd belonged to Nekjan Bibi) in favour of Haji Abdulla for Rs. 1,000 whereas the value of the property would be about three thousand rupees. As regards the 17½ bighas land Nekjan brought a suit against Abdulla to set aside the kobala and was successful. The plaintiff further alleged that the document of 1324 B. S. really constituted a mortgage and has prayed for redemption of the same if the Court holds that the document binds her. Haji Abdulla is now dead and defendants 1 to 8 are his heirs and legal representatives. To this suit to avoid the document or in the alternative to redeem, plaintiff joined the prayer for declaration of title and recovery of possession. The defence of the defendant is that there was no fraud or undue influence and that the deed in question was an out and out sale and not a mortgage by way of conditional sale. On these pleadings several issues were joined and they are set forth at p. 2 of the paper-book. Substantially three questions arose for determination before the Subordinate Judge: (1) Was the Ammukhtarnama executed by plaintiff and her mother after fully understanding the purport of the same? (2) If not was the conveyance in favour of Abdulla binding on the plaintiff? and (3) Was there any agreement between Belatali and the defendant's predecessor Haji Abdulla that defendant will reconvey the property in suit on the repayment of Rs. 1,000?

The Subordinate Judge found (1) that there is no evidence that the Ammukhtarnama (of which only a certified copy was produced in Court) was read over and explained to plaintiff and her mother;

(2) that the power of attorney was executed under undue influence; (3) that the sale on the strength of this power of attorney or Ammukhtarnama was not binding on the plaintiff or her mother and that the plaintiff was entitled to a declaration of title to the share claimed less the share which she inherited from her brother Belatali after his death; and (4) that the deed in question was an out and out sale and not a mortgage by way of conditional sale. The Subordinate Judge accordingly declared plaintiff's title to 5/12ths share in the property in suit and directed that she do get possession of the same.

Against this decree an appeal was taken to the Additional District Judge of 24. Parganas. The learned District Judge states rightly enough that the question to be decided is whether Abujan and Khatijan did understand the nature of the transaction when they executed their Ammukhtarnama but does not come to a definite finding on the question. The Subordinate Judge whose finding the learned District Judge was reversing, came to the distinct finding that there was no evidence that the Ammukhtarnama was read or explained either to plaintiff or her mother. The learned District Judge finds that "it may well be true, as was alleged, that at the time the Ammukhtarnama was executed plaintiff was a young and inexperienced girl" and one would have expected that the lower appellate Court should have held that the rule laid down by their Lordships of the Judicial Committee of the Privy Council in a number of cases that in the case of deeds and powers executed by Pardanashin ladies it is requisite that those who rely on them should satisfy the Court that they have been explained to and understood by those who execute them, should apply with greater force having regard to the illiteracy, youth and inexperience of plaintiff and her mother and their liability to be influenced or imposed on by near relations like her brother or son who are alleged to be men of weak character and immoral habits: See 8 I A 39=7 Cal 245 (1) and 29 I A 127=29 Cal 749 (2).

1. Sudhist Lal v. Sheobarat Koer, (1881) 7 Cal 245=8 I A 39 (P C).

2. Shambati Koeri v. Jago Bibi, (1902) 29 Cal 749=29 I A 127 (P C).

These strict rules regarding the burden of proof of persons dealing with Pardana-shin ladies have been laid down as Lord Sumner pointed out in a recent case "for the protection of the defenceless in India, and it is a matter of obligation upon their Lordships to be strict and unwavering about it:" 52 I A 342 (3). In arriving at the conclusion that the Ammukhtarnama is valid what are the considerations that have weighed with the lower appellate Court? They are: that the suit is brought eleven years after the execution of the kobala, in 1324, during which period it was not disputed by either Abujan or Khatijan. This reasoning of the learned Judge assumes that the plaintiff or her mother knew of the kobala as from the date of its execution. The learned Judge does not refer to such evidence or discuss the same. The next consideration of the learned Judge is "but a perusal of her examination and cross-examination taken on commission shows that she is far from being a helpless or uneducated woman now." The fallacy in this reasoning is that the matter has to be considered with reference to the material date, viz., the date of execution of the Ammukhtarnama which is many many years prior to the date she was deposing on commission when she may be more experienced in the world's affairs and less entitled to the protection given to illiterate Pardana-shin women. The learned Judge in appeal proceeds to observe:

The fact that so long a time did elapse before the suit was instituted raises considerable doubts in my mind as to the good faith in which it is now brought, and the law is not to be twisted to protect actions which are not brought in good faith.

This reasoning seems to me to be again vitiated by the assumption that the plaintiff knew of the execution of the deed of sale from the year 1324 B. S.: Then the learned Judge proceeds to find that the fact that she had knowledge regarding a mortgage executed by her husband along with Belatali in 1913 and her acquiescence during subsequent years now estops her from calling it into question. The learned Judge does not find that this mortgage was with reference to the property now in suit; on the other hand the finding of the Subordinate Judge is that there was a forced acquiescence on the

part of Khatijan Bibi in regard to the sale on the basis of mortgage executed by her husband and Belatali: see page 4 lines 20-30 of the Subordinate Judge's judgment in the paper book. We are of opinion that there has not been a definite finding of the lower appellate Court on the main issue as to whether the Ammukhtarnama was read over and explained to Khatijan or her mother after an analysis of the relevant evidence on the point. We accordingly set aside the judgment of the learned District Judge and direct him to rehear the appeal on two questions: (1) Whether the Ammukhtarnama was read over and explained to both plaintiff and her mother and whether they executed the document after fully understanding its purport and not being under undue influence; and (2) what is the extent of the share of the plaintiff in the disputed property? If the learned Judge finds that the burden of proving the affirmative of Question No. 1 has been discharged by the defendants he will dismiss plaintiff's suit and it will not be necessary to determine point No. 2. If the appellate Court answers Question No. 1 in the negative it will determine plaintiff's share and give her a decree for such share. Both Courts have concurrently found that the document which is sought to be avoided is an out and out sale and we do not disturb the finding which will not be re-opened again. Costs are to abide the result. We express the hope, however, that instead of prolonging this litigation parties will reach a settlement.

S. K. Ghose, J.—I agree.

D.S./R K.

Order accordingly.

A. I. R. 1936 Calcutta 723

R. C. MITTER, J.

Surendra Kumar Guha—Petitioner.
v.

Jamini Kumar Guha and others—
Opposite Parties.

Civil Rule No. 157 of 1936, Decided on 7th July 1936, from order of 2nd Court Munsif, Feni, D/- 28th November 1935.

Civil P. C. (1908), Ss. 63 and 73—Different Courts attaching same property of same judgment-debtor at instance of different decree-holders—Applications for execution to respective Courts—One Court realizing sale proceeds—Rateable distribution held is to be made by superior Court or in case Courts are of same grade by Court which first attached property.

3. Faridunessa v. Mukhtar Ahmad, 1925 P O 204=89 I C 649=52 I A 342=47 All 703=28 O O 338 (P O).

Section 63 contemplates the case where attachments of the same property have been made by different Courts at the instance of the different decree-holders of the common judgment-debtor and provides for the distribution among them of the proceeds of the attached property by one of such Courts only. The principle underlying it is the principle of convenience, the principle of avoiding multiplicity of proceedings, the principle of fair distribution, and not the principle of exclusion. The distribution is to be made by the superior Court, and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property. For this purpose, it is the duty of the Court of inferior grade or the Court of same grade which had attached last of all to send the sale proceeds to the superior Court, or if all the Courts be of the same grade to the Court which first attached the property, and the proceeds so received shall be deemed to have been received on behalf of all the Courts in which there have been attachments in execution of money decrees prior to the actual receipt of assets. The decree-holders in all such Courts will be entitled to rateable distribution under S. 73: *Case law referred.* [P 726 C 1, 2]

Nani Gopal Dass—for Petitioner.

Rajendra Chandra Guha and Amiya K. Sen—for Opposite Parties.

A. Quasem—for Deputy Registrar.

Order.—The petitioner instituted a suit for recovery of money against opposite parties Nos. 2 to 8 in the Second Court of the Munsif at Feni, being Money Suit No. 501 of 1934. Some immoveable property of the said opposite parties was attached before judgment on 19th March 1934, on his application. He obtained his decree on 4th September 1934, and on 4th February 1935, applied for execution of his decree in that Court (Money Execution Case No. 32 of 1935). The opposite party No. 1 also obtained a money decree against the said opposite parties Nos. 2 to 8 in a suit instituted by him in the first Court of the Munsif at Feni and on 19th November 1934, applied in that Court for execution (Money Execution Case No. 445 of 1934). The properties which had been attached before judgment by the petitioner were attached by the First Court of the Munsif at Feni on 20th December 1934. In the sale proclamation issued by that Court, 11th March 1935 was the date fixed for sale. On 8th March 1935, the petitioner made an application to the Second Court of the Munsif at Feni, in which Court his application for execution was pending. In that application he stated that the opposite party No. 1 was executing his decree for money against the same judgment-debtors in the first Court and that 11th March 1935 had been

fixed for sale. He prayed for rateable distribution. On that application the Second Court passed an order on the same date requiring petitioner "to show papers" that the judgment-debtors were the same." The next day the petitioner satisfied the Court that the judgment-debtors were the same and on that the Court (Second Court of the Munsif at Feni) passed order No. 5 dated 9th March 1935, in these terms:

Heard pleader. Prayer for rateable distribution of the assets to be fetched at the sale of the above Money Execution Case No. 445 of 1934 is allowed. Send a copy of this order to the local first Court for favour of passing necessary orders for rateable distribution. The claim of this case is Rs. 270-4-0.

On 18th March 1935, the Second Court passed the following order: "(Order No. 6) Put up on 27th April 1935 for rateable distribution with the Money Execution Case No. 445 of 1934 of the local First Court." The first mentioned order (No. 5) reached the First Court on 11th March 1935, but before its arrival that Court had allowed by its order No. 6, dated 11th March 1935, the decree-holder (opposite party No. 1) to bid at the sale, but on receipt of the said order, it passed on the same date order No. 7 which is in these terms:

Received the copy of O. 5 dated 9th March 1935, passed in Money Execution Case No. 32 of 1935 of the local Second Court. It appears that the decree-holder of the above execution case prayed for rateable distribution of the assets to be fetched at the sale of immoveables. The Nazir is accordingly directed to realise the purchase money in cash, so as to have the same rateably distributed between the decree-holders of both the cases.

Opposite party No. 1 did not proceed with the sale of lot No. 1. The sale of the other lots by the First Court could not be held on the 11th or 12th March, but it was held on 13th March 1935. Opposite Party No. 1 purchased one lot and the rest were purchased by a stranger, Sudhir Kumar Bhowmik. Earnest money of 25 per cent was deposited on that date, and the balance in April, within 30 days of the sale. An application to set aside the sale was made but was dismissed on 23rd September 1935. Thereafter the purchaser failed to deposit the landlord's transfer fee in respect of lot No. 5 with the result that the sales of lots Nos. 2 to 4, 6, 7 and 8 were confirmed and the first Court passed an order on 26th September 1935 stating that the petitioner would get by way of rateable distribution the

sum of Rs. 131-5-9. The said sum of money was placed to his credit and the second Court was informed by the first Court. Opposite Party No. 1 thereafter filed on 26th September 1935 in the second Court an objection to the claim for rateable distribution which had been made by the petitioner in the Court and had already been allowed. On 28th November 1935, the Second Court allowed this objection and recalled its order No. 5 dated 9th March 1935. It held that (a) it had no jurisdiction to order rateable distribution as the assets were held not by it, but by the First Court and (b) that the petitioner had no right to rateable distribution as he had not made an application for execution of his decree to the first Court which held the assets. It is against this order that the petitioner has moved this Court. He maintains that Order No. 5 dated 9th March 1935, is the correct order and prayed for its restoration.

The question involved depends upon the interpretation of Ss. 63 and 73, Civil P. C. There is a mass of case law on the subject and the High Courts have taken divergent views, and as I read the case law, there is sharp conflict of opinion in the decisions of the Madras and Bombay High Courts, but so far as this Court is concerned except for one or two decisions, a well-marked, definite and consistent course has been taken. Before reviewing the important decisions of the different High Courts, it is necessary that the precise scope of Ss. 63 and 73 should be examined. At the outset one fundamental identity and one fundamental distinction are apparent. The scope of both the sections is the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtors, certain conditions being fulfilled by the former. That is the common feature. But the fundamental distinction is that the fund available for distribution under S. 73 among those creditors is the entire fund realized or received by the executing Court. (I am not considering the proviso which may be left out of consideration for the present purpose.) The funds available for distribution under S. 63 are the proceeds of common property attached by the judgment-creditors. It is the fact of attachment and attachment of the identical properties by the several judgment-creditors that bring

into operation S. 63. To make the point clear, the following two illustrations are helpful: (1) *A*, who has a decree for payment of money against *J*, executes his decree in the Court of a particular Subordinate Judge and sells the judgment-debtor's properties, *X*, *Y* and *Z*. If other persons *B*, *C* and *D* who have decrees for payment of money against the same judgment-debtor apply for execution of their decrees in the Court of the said Subordinate Judge before the receipt of the proceeds of the sale of *X*, *Y* and *Z*, the whole of the proceeds of the sale will have to be rateably distributed amongst *A*, *B*, *C* and *D* under S. 73. *B*, *C*, and *D* need not have proceeded further beyond making their application for execution in that Court. *A*, who has a decree for payment of money against *J*, executes his decree in the Court of a particular Subordinate Judge and attaches and sells properties *X*, *Y* and *Z* the proceeds of which are received by that Court. *B*, *C* and *D*, who have decrees for payment of money against *J*, proceed to execute their respective decrees in other Courts, say the first, second and third Court of the Munsif of a particular place, and attach respectively *X*, *Y* and *Z*. These attachments are effected before the sale proceeds are received by the Subordinate Judge. They do not apply for execution of their decrees in the Court of the Subordinate Judge, nor are their executions transferred to that Court before the receipt of assets by that Court, but they bring the fact of the attachments to the notice of the Subordinate Judge. The entire proceeds of the sale of *X*, *Y* and *Z* cannot be distributed by the Subordinate Judge amongst *A*, *B*, *C* and *D* rateably under S. 63, but the proceeds of the sale of *X* has to be distributed rateably between *A* and *B*, those of *Y* between *A* and *C* and those of *Z* between *A* and *D*. This view which I am taking of the scope of S. 63 has been advanced by Abdur Rahim, J. in 35 Mad 588 (1). The relevant passage in the judgment is at p. 590 and runs as follows:

What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a general execution of his decree by the District Court or rateable distribution in all the assets of the judgment-debtor received by the District Court but only to share by virtue of his attachment

1. *Arimuthu Chetti v. Vyapuripandaram*, (1912) 35 Mad 588=8 I O 852=21 M L J 505.

in the proceeds of the attached property realized. To a relief, so limited, it appears to me to be not essential that the decree of the Munsif's Court shall have been previously transferred to the District Court, though this view runs counter to the observations in 6 Mad 357 (2) as to the need of transfer.

Section 63 contemplates the case where attachments of the same property have been made by different Courts at the instance of the different decree-holders of the common judgment-debtor and provides for the distribution among them of the proceeds of the attached property by one of Courts only. The principle underlying it is the principle of convenience, the principle of avoiding multiplicity of proceedings, the principle of fair distribution and not the principle of exclusion. The distribution is to be made by the superior Court, and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property. Any other view of S. 63 would make the position manifestly unjust. A person obtains a decree for money over Rs. 5,000 in the Court of the Subordinate Judge, applies for execution there and attaches a property. Another person obtains a decree for money against the same judgment-debtor for Rs. 500 in a Munsif's Court, applies for execution there and attaches the same property. The Munsif being unaware of the attachment effected by the Subordinate Judge, sells the property before the Subordinate Judge could put it up for sale. The sale by the Munsif would be a valid one. If S. 73 is to be regarded as the only section for rateable distribution, the person who obtained the decree for over Rs. 5,000 in the Subordinate Judge's Court would not be able to claim rateable distribution, if the terms of S. 73 be strictly construed and S. 63 be not looked into, because he would not, as has been pointed out in 46 Cal 64 (3) and 49 Bom 655 (4), be able to apply for execution of his decree in the Munsif Court, by reason of the limited pecuniary jurisdiction of the Munsif.

Cases of such sales by Courts of inferior grades, where the property was under attachment effected by a Court of superior grade or where the Courts are of the same grade by the Court which attached later in point of time, had come

before the Courts when the Code of 1882 was in force. A provision corresponding to sub-s. (2), S. 63 was not in S. 285 of the Code of 1882. So far as this High Court is concerned, it has consistently held that such sales are valid, but this Court has pointed out that in such cases it is the duty of the Court of inferior grade or the Court of same grade which had attached last of all, as the case may be, to send the sale proceeds to the Court of superior grade for distribution, or if all the Courts be of the same grade, to the Court which first attached the property. This was pointed out first by Pontifex, J., in 7 Cal 410 (5) at p. 413 and this principle has been almost consistently followed in this Court, which has held that the Court of superior grade or of the same grade which had first attached the property, as the case may be, is to distribute the sale proceeds amongst all the attaching decree-holders: 12 Cal 333 (6); 21 Cal 200 (7); 2 C W N 126 (8); 29 Cal 773 (9) and 46 Cal 64 (3). The Bombay and Madras High Courts, which in the matter of distribution of sale proceeds in such cases had taken different views, ultimately veered round to the same position: 55 Bom 473 (10); 35 Mad 588 (1); 26 M L J 406 (11); see also 55 All 622 (12), where most of the earlier cases are noticed. When such assets are not sent by the Court holding the sale to the Court which is given the right to distribute the same under the provisions of S. 63, there is a difference of opinion in the matter of procedure only.

This Court and the Bombay High Court have held that the District Judge is to be moved for asking the Court holding the sale to send the sale proceeds to the proper Court, but some of the other, High Courts have held that the Court of superior grade or the Court which first attached the property, as the case may be, can of its own motion make the requisition. So far as the case before me is

5. Obhoy Churn Kundu v. Golam Ali, (1891) 7 Cal 410=9 C L R 361.

6. Bykanta Nath Shaha v. Rajendra Narayan Roy, (1886) 12 Cal 333.

7. Clark v. Alexander, (1894) 21 Cal 200.

8. Har Bhagat v. Annadaram, (1898) 2 O W N 126.

9. Bhugwan Chandra v. Chandra Malla, (1902) 29 Cal 773=1 C L J 97=6 C W N 67.

10. Shidappa v. Guru Gumsangya, 1931 Bom 350=133 I C 817=33 B L R 537=55 Bom 473.

11. Narasimachariar v. Krishnamachariar, 1914 Mad 454=23 I C 909=26 M L J 406.

12. Sarju Ram v. Pratap Narain, 1933 All 563=146 I C 575=55 All 622=1933 A L J 921.

2. Muttalagiri v. Muttayyar, (1883) 6 Mad 357.

3. Nilkanta Rai v. Gosta Behary 1919 Cal 545=44 I C 249=46 Cal 64=27 C L J 145.

4. Deckappa v. Chanbasappa, 1925 Bom 420=89 I C 980=49 Bom 655=27 Bom L R 917.

concerned it makes no difference because I can direct, as was done in 46 Cal 64 (3), the sale proceeds to be sent by the first Court of the Munsif at Feni to the second Court of the Munsif of that place and direct the last mentioned Court to distribute the sale proceeds rateably among the petitioner and the opposite party No. 1. In my judgment the correct principle in such cases has been formulated by Wallis, J. in 26 M L J 406 (11) in the following passage:

What however where the attachments are in different Courts and the property is received or realised by the Court of the highest grade under S. 63? In such a case there is no receipt at all by the other Courts unless the receipt by the Court of highest grade can be deemed to be a receipt by the other creditors as well. (The word 'creditors' in the report is obviously a slip for the word 'Courts'). In my opinion this is the correct view and it is only for the purposes of convenience that the highest Court is made the collecting Court, and the Court to adjudicate on claims and objections and the property received or realised must be deemed to have been received or realised by or on behalf of all the Courts in which there have been attachments in execution of money decrees prior to the actual receipt of assets. If this be so, then the decree holders in the other Courts are entitled to rateable distribution under the very terms of S. 73.

It is in this view that it can be said, as has been said in 6 Rang 131 (13) and 61 Cal 240 (14), that S. 73 must be read in conjunction with S. 63. I accordingly make the rule absolute, set aside the order complained of and restore the order No. 5 of the Munsif, Second Court, Feni, dated 9th March 1935. The sale proceeds to be sent by the first Court of the Munsif at Feni to second Court of the Munsif of that place, in order that the last mentioned Court may make the rateable distribution among the petitioner and opposite party No. 1. The petitioner will have his costs of this Court and of the Court below from opposite party No. 1. Hearing fee 1 gold mohur.

D.S./R.K. *Rule made absolute.*

13. Kwai Tong Kee v. Lim Chaung Ghee, 1928 Rang 157=110 I C 744=6 Rang 131.

14. Gourgopal De Sarkar v. Kamal Kalika Datta, 1934 Cal 559=152 I C 69=61 Cal 240.

* A. I. R. 1936 Calcutta 727

D. N. MITTER AND PATTERSON, JJ.

Mati Lal Daga and others—Appellants.

v.

(Sri Sri) Iswar Radha Damodar Chandra Jew Thakur—Respondents.

Appeal No. 305 of 1932, Decided on 6th May 1936.

* (a) Lease—Liability of sub-lessee—Plaintiff granting lease of coal mines to lessee—Agreement to work mines on certain lines—Lessee sub leasing his leasehold rights—Sub-lessee having constructive notice of agreement with lessee—Sub-lessee working mines contrary to agreement—Suit by plaintiff against sub-lessee for damages—Defendant contending want of privity to agreement with original lessee—Want of privity in spite of constructive notice held good defence only in affirmative covenants—In case of restrictive covenants in agreement, constructive notice makes sub-lessee liable.

Plaintiff was a head-lessor who granted lease of his coal mines to another under an agreement that the mines would be worked on certain lines. The lessee transferred his leasehold rights to the defendant who worked the mines contrary to the agreement with the first lessee. The transfer to defendant did neither cover the entire period nor the entire property of the original lease granted by the head lessor the plaintiff. The defendant had constructive notice of the agreement between the head-lessor and the original lessee. In a suit between the plaintiff and defendant for damages due to working of mines against the agreement it was contended that the defendant was not liable and constructive notice would not affect the defendant, because the basis of the principle is not whether the sub-lessee had notice of the covenants or not but want of privity of contract or estate as between the lessor and sub-lessee:

Held: that that might be so with reference to affirmative covenants but not so with restrictive covenants where the question of notice became very material even if there was want of privity of contract or estate as between lessor and sub-lessee: *Hornoy v. Cardwell*, (1881) 8 Q B D 329; *Tulk v. Mawhay*, (1848) 2 Ph 774; *Haywood v. Brunswick Permanent Benefit Building Society*, (1881) 8 Q B D 403 and *Lord Strantheona Ltd. v. Dominion Coal Co. Ltd.*, (1926) A C 108, *Ref.* [P 733 C 1]

(b) Restrictive covenant—Essentials of—Vendor must retain some benefit in ascertainable land—Property need not be outside demised premises.

It is essential for a covenant to be restrictive that the covenantee must retain some interest in the land for the benefit of which the covenant is entered into. The property for the benefit of which restrictive covenant is entered into need not be independent of or outside the demised premises. In order that a covenant may be a restrictive covenant all that is necessary is that the covenant must be for the benefit of some ascertainable property retained by the vendor: *Formby R. v. Barker*, (1903) 2 Ch 539, *Rel. on.* [P 733 C 2; P 734 C 2]

(c) Lease—Reversion—Lease for long term—Lessor retains right of reversion—Conveyance in fee simple differs from perpetual lease.

Where a person grants a lease of his property for a very long term, for example of four hundred and ninety-nine years, the lessor still retains a right of reversion as against the lessee. There is always a distinction between a conveyance in

fee simple and a lease in perpetuity: 1934 *Bom* 184 (F B), *Dissent.*; 24 *Cal* 440 and 36 *Cal* 1003 (P C), *Rel. on.* [P 734 C 1]

(d) Transfer of Property Act (1882), S. 40—Restrictive covenant—Immoveable property—Property leased out—Lessee retaining right of reversion—Such right amounts to immoveable property—Negative stipulation for beneficial enjoyment of that right—Provisions of S. 40 are applicable.

The words 'immoveable property' are not defined in the Transfer of Property Act. One has to look for its definition to the General Clauses Act which again is not exhaustive. A benefit to arise out of land is interest in land and is therefore immoveable property. A person in whom there is reversion in property leased after the expiration of the term of 499 years is said to possess his own immoveable property and where for the more beneficial enjoyment of the reversion a negative stipulation is made, the principle of S. 40, T. P. Act, should be applied: 36 *Cal* 675; *Dyson v. Forster*, (1909) 4 C 98 and *Rogers v. Hosegood*, (1900) 2 Ch 388, *Rel. on.* [P 736 C 2]

(e) Mines Act (4 of 1923), S. 35—Presumption—Correctness of map.

As under S. 35, Mines Act, that Act prescribes a punishment for not preparing a plan, it is very unlikely that in such circumstances an incorrect plan would be submitted. [P 739 C 2]

(f) Mines and Minerals—Lease—Lessee working colliery after notice to quit—Suit for damages by lessor—Lessee is entitled to deduction for severing coal and bringing it to pit's mouth.

Where a person working a colliery under a legal title does so even after receipt of notice to quit, and the lessor sues for damages, he is entitled to the price of the coal removed but the lessee is entitled to deduction for severing the coal and bringing it to the pit's mouth: 1933 P C 29, *Rel. on.*; *Bulli Coal Mining Co. v. Osborne*, (1899) 4 C 351, *Disting.*

[P 740 C 2; P 741 C 1]

P. R. Das, S. C. Roy, G. K. Banerjee and Gopendra Krishna Banerjee—for Appellants.

Brojo Lal Chakravarti, Durga Charan Roy Choudhury, Panchanan Ghosal, Purusottam Chatterjee, Amiya Prosad Moitra and Amiruddin Ahmed (for Deputy Registrar)—for Respondents.

D. N. Mitter, J.—This is an appeal by defendants 5 to 9 against a preliminary judgment of the Subordinate Judge of Asansol dated 28th September 1932 by which he directed certain enquiry as to damages as also against the final decree passed by another Subordinate Judge on 5th October 1934, by which he directed the payment by the said defendants to the plaintiff of the sum of Rs. 1,80,747 for damages and for rents and royalties. The Hazra respondents describing themselves as Shobaites of a deity Sri Sri Radha

Damodar Chandra Jiu Thakur brought the suit in which this appeal arises: (1) to recover khas possession of a colliery known as Kajora Colliery, which belongs to the deity in Putni right, (2) to recover one lakh twenty thousand from the defendants on account of the commission and royalties in arrears and for damages, and (3) for other reliefs. The suit was directed against (1) defendant 1 Narendra Chaudhury, in whose name a lease of the underground rights was taken from the plaintiff for a period of 499 years by Sudhansu Bhusan (defendant 11), (2) Defendants 2 and 3 (the Sarkars), transferees from the real lessee defendant 11; (3) Defendant 4, the Official Assignee, the Sarkars having been adjudged insolvent; (4) the Dagas, defendants 5 to 9, who advanced money to the Sarkars on mortgage of their leasehold rights in the Colliery; and (5) Defendant 10, Vithal Das, purchaser at the sale by the Official Assignee who are to sell the mortgaged property and to pay off the mortgage; and (6) defendant 11, the real lessee under the plaintiff.

The plaintiff deity founds its claim on the pottah executed in favour of defendant 1 on 31st Chaitra 1327, B. S.=13th April 1921 and filed the Kabuliyat which is the counterpart of the said pottah along with the plaint. It is common ground that defendants 2 and 3 took a transfer of the leasehold interest under the lease of 13th April 1921 from defendants 1 and 11, the real lessee. The plaintiff next alleges that defendants 5 to 9 (now appellants) took an English mortgage of the property in suit from defendants 2 and 3 on the basis of two registered deeds executed on 26th February 1923 and 17th December 1926 and that defendants 5 to 9 have become liable for the money sought to be recovered in the suit. The plaintiffs' case is that there have been breaches of several covenants contained in the kabuliat. One of such breaches is mentioned in para. 7 of the plaint which is reproduced below :

7. That the defendants did not keep square pillars at least 12 cubits in dimensions at a distance of eight cubits as mentioned in para. 6 of the said pottah and kabuliat and are cutting coal by making much wider galleries. In consequence of this there is likelihood of great damage being done to the coal mine. Moreover, in spite of repeated requests, the officers of this plaintiff were not allowed to go underground into the pits for inspection of the work of the mine, as stated in the said paragraph. Under

the circumstances, the plaintiff had not been able to know the actual state of things in the mine.

The plaint further alleges that daily accounts of the coal raised from the mine have not been filed with the Shebait of the plaintiff in accordance with para. 16 of the pottah and kabuliati. The plaint further alleges that minimum and excess royalty have not been paid. The plaintiff after enumerating the breaches of covenant as aforesaid states that it has become entitled to get khas possession of the property in suit in accordance with the terms of pottah and kabuliati. The plaint alleges that a notice was sent by the deity plaintiff to the defendants on 14th September 1928 by registered post asking them to give up possession to the plaintiff, but the defendants have not given up khas possession, that the defendants are liable to be regarded as trespassers after the said notice and are bound to pay damages. In para. 10 of the plaint it is stated that as the defendants did not submit accounts regularly the plaintiff assessed the money claim at Rs. 84,000 approximately and the plaintiff was willing to pay deficit court-fees in case his claim is ultimately determined to be larger on final accounting. On this state of the pleading khas possession was asked for and there was a prayer for recovery of the damages and royalties, etc.

Defendants 5 to 9 (the Dagas) filed a written defence: see p. 122, Book A. They alleged that they did not violate any covenants contained in the lease in question; they deny that they have kept wider galleries; they allege that the statement in para. 7 of the plaint quoted above is false; they pleaded that the rule as to keeping of galleries of certain dimensions was not an inflexible rule and that the working of the mine was done with the full knowledge of plaintiffs and there was waiver and that the plaintiff's officers frequently used to come and inspect the mines, that the plaintiffs are estopped from claiming damages; that the claim for damages are excessive; that they are not trespassers and they did no injury to the colliery. On this state of the pleadings several issues were framed and decided, but it is not necessary to refer to them all as the question in controversy before us in appeal has been limited to certain issues. The material issues are: Issue 2 which is in these terms:

Whether the mortgages dated 26th February 1923 and 17th December 1926 were English mortgages as defined in the Transfer of Property Act. If so, are the mortgagees liable for the rents and royalties?

Issue 4 is to the following effect:

Are the defendants 5 to 9 liable to any portion of the claim. If so for what period and for how much?

Issue 5 raised the question of estoppel and waiver on the ground raised by the defence that the alleged breaches of the covenant were done with the knowledge and consent of the plaintiff. The Subordinate Judge who tried the suit in the first instance found: (1) that the mortgages in favour of the Dagas (defendants 5 to 9) are not English mortgages; (2) that there is no absolute assignment to the Dagas the mortgages being for 1 bigha less and the term being two days less; (3) the mortgage loan and security did not constitute an out and out transfer; (4) the Sarkars (mortgagors) remain tenants of the lessor (the plaintiff) all the time and they are liable for the rents although the Dagas were in possession; (5) the Dagas were really sub-lessees and he held that the Dagas were not liable for the rents and royalties as there was no privity of estate between the Dagas and the plaintiff; (6) that the Dagas are bound by breaches of covenants contained in the head lease of 13th April 1931; and (7) that the Dagas should be held liable for damages for two different periods on two different basis, i. e., they would be liable after notice for breach of contract for the sale of the coal and before notice for actual breaches only.

On this basis the first Subordinate Judge passed the preliminary judgment on 28th September 1932, directing an inquiry as to damages and referring the question to a Commissioner. The matter was referred to two Commissioners who submitted two reports. The matter of the passing of the final decree came before another Subordinate Judge who after considering the two reports of the Commissioners, as also a report passed before the preliminary decree, has granted a decree to the plaintiff for Rs. 1,80,747 by his judgment dated 5th October 1934. The present appeal was directed against the preliminary decree originally, but after the final decree was passed the memorandum of appeal was allowed to be amended so as to include the grounds of appeal against the final decree.

The first question of law which has been taken in the appeal is really an attack on the preliminary judgment which has made the Daga defendants (Nos. 5 to 9) liable for damages for breach of covenants contained in the head lease. It is argued that the Subordinate Judge below has committed an error in law in making the appellants liable for breach of covenants, for keeping proper pillars of coal for supporting the roof contained in the head lease Ex. 1 dated 13th April 1921 (Book B, p. 1) as they were no parties to the head lease and as they were not assignees of the head lease, but the mortgages in their favour being by way of sub-lease they were merely lessees under the Sarkars (defendants 2 and 3), the transferees from defendants 1 and 11, the head lessees. The argument of the appellant has been put in this way :

It is unarguable on the authorities that there being no privity between Dagas (sub-lessees) and the plaintiff the Dagas are liable for breach of covenants contained in the head lease, assuming that the breach was committed by the Dagas and that the view of the Subordinate Judge, that this rule does not apply as the Dagas had notice of the covenants contained in the head lease, is erroneous as the basis of the principle is not whether the sub-lessee had notice of the covenants, but that there is neither privity of contract nor estate as between the lessor and the sub-lessee, and the following authorities were cited in support of this contention: 1 Doug 183 (1) at p. 186 and 20 C L J 551 (2) at p. 554, Halsbury's Laws of England, Vol. 18, Art. 865.

In order to consider the soundness or otherwise of this contention it would be convenient at this stage to set forth the relevant parts of the lease containing the covenant for the breach of which this suit has been brought and then to narrate the circumstances under which defendants 5 to 9 were put in possession of the Colliery in question, and the subsequent events that followed up to the date of the institution of the suit. The plaintiff deity granted a lease to Narendra Kumar Chaudhury, defendant 1, on 13th April 1921 of the underground mineral rights in

181 bighas of land for 499 years on terms and conditions which are contained in the kabuliat (counterpart of the lease) printed at pp. 1 to 12 of Book B (Part 2). The relevant covenant is contained in para. 6 which is as follows :

In the pits which I shall make in the land settled I shall keep proper pillars of coal for supporting the roof, etc. I shall keep square pillars of coal at least 12 cubits in dimensions at an interval of every eight cubits and shall keep the mine clean. For inspection of the said work and other works, you or your officer or the surveyor appointed by you shall be entitled to go under the mine, and I shall be bound to show you or them all the places under-ground in the mine. If any sort of damage be caused to your property on account of not keeping such coal pillars or for not keeping the mine clean, I shall be liable for the loss at the rate of Rs. 2,000 (two thousand) per bigha for such extent of the property as would be damaged. Whenever any of you or your officers will inspect mine, he will note his remarks in my books. I shall keep intact the limits and boundaries of the land settled. I shall properly close the mouth of the exhausted pits by making pucca masonry structures approved of by you. If I do not do so, I shall be bound to pay the amount of loss sustained by you or the costs may be incurred by you for closing the same.

On 28th September 1921 there was a declaration of trust by defendant 1, Narendra, in favour of defendant 11 in respect of the leasehold property and it is common ground that defendant 11 Sudhangshu Bhusan Mukherjee is the real lessee under the lease of 13th April 1921 (Ex. 1). It is also common ground that the interest of Sudhangshu Mukherjee in the leasehold devolved by several intermediate transactions on 8th November 1922 on Bolai Sarkkar, defendant 2 ; and the said defendant along with his brother Sailendra, defendant 3, mortgaged the leasehold in the colliery along with other properties to the Dagas (defendants 5 to 9) on 17th December 1926 : see Ex. A (1) p. 47, Book B. This mortgage was by way of sub-lease for the residue of the terms less two days as the habendum clause at p. 51, line 20 would show.

The mortgage by way of sub-demise was for a consideration of over a lakh of rupees. And it provides that the Dagas were to take possession but the Sarkars were to pay rent and royalty. There was some discussion at the Bar as to the real nature of this mortgage. On the one hand it is argued for the respondent that this mortgage was an English mortgage and it was contended on the other hand by the appellants that this

1. *Holford v. Hatch*, (1779) 1 Doug 183=99 R R 119.

2. *Akshoy Kumar Chatterjee v. Akman Molla*, 1915 Cal 154=27 I C 397=20 C L J 551=19 C W N 1197.

was really a mortgage by way of sub-lease within the meaning of S. 108 (J), T. P. Act. We have no doubt that it is not an English mortgage which would have vested the whole legal interest in the mortgagees and created privity of estate between the mortgagee of the lessee and the lessor. It is an assignment of a lesser term and therefore it created no privity of estate between the lessor and the sub lessee. We are not unmindful of the recent decision of their Lordships of the Judicial Committee that even if the sub-lease is for the whole of the residue of the term, it would not operate otherwise than as a sub-lease: see 57 I A 110 (3). We may have to revert to the construction of the document later. To complete the narrative of events leading to the institution of the suit the following facts should be stated.

On 19th December 1926 the Dagas (defendants 5 to 9) took possession of the colliery and started working the same. On 8th March 1927 the firm of Balai and Sailendra (defendants 2 and 3) was adjudged insolvent. After a great deal of correspondence between the Dagas and the Sarkars about rent, on 7th September 1927, the Dagas proved their claim through their Agent Sakti Pada Bhattacharjee and the claim having been accepted on 5th June 1928 there was an order of discharge. On 14th September 1928 the plaintiff through the Shebait wrote to the Dagas (Messrs Harsook Das Balkissen Das & Co), a letter through their pleader marked Ex. 2 (d) complaining that they had broken many of the terms of the lease of 13th April 1921:

(2) in that you have not kept proper pillars and that your galleries are not kept in accordance with the terms of the kabuliyat; (4) in that you are not allowing my clients men to have access to the Colliery and pits to examine your works: see Book B, p. 207.

To this letter the Dagas replied refusing to make over khas possession: see Ex. 2 (e) Book B, p. 210. On 22nd January 1929 on the application of the Dagas to the insolvency Court there was an enquiry. On 29th January 1929 it was found that the Dagas had a valid and subsisting mortgage. On 7th February 1929 there was an order by the Insolvency Court to take accounts; on 22nd March 1929 the Registrar found that Rupees 1,24,629-9-9 was due to the Dagas under

the mortgage. On 21st May 1929 the Official Assignee sold the mortgaged property to Vithal Das, defendant 10. On 24th May 1929 the present suit was filed.

Two other material events after suit should be stated. On 14th June 1929 Vithal Das, defendant 10, took possession of the Colliery in question. On 25th October the receiver who was appointed took possession of the Colliery. In support of the ground that as there is no privity of contract between the sub-lessees (Dagas) and the head lessor (the plaintiff) the latter cannot sue the sub-lessee on any of the covenants in the head lease: reliance has been placed in (1779) (1) Doug 183 (1) and on the decision of this Court in 20 C L J 551 (2), at p. 554; reliance has also been placed on the following passage from Woodfall's Law of Landlord and Tenant, 23rd Edn. 334.

Where there is a contract to perform all the contracts of the head lease or to perform substantially the same covenants in substantially the same terms and both the contracts of the head lease and the sub-lease are broken the head landlord (although he can eject) cannot sue the sub-tenant for damages, there being no privity of contract between them; but the head landlord may sue the mesne landlord who, in his turn, may sue the sub-tenant, or pursue what seems to be the more convenient course of bringing him in as third party under S. 39, Supreme Court of Judicature (Consolidation) Act, 1925 (re-enacting S. 24, sub-s. 3, Judicature Act, 1873), and replacing O. 16 a, Rr. 48 to 55 of the Rules of the Supreme Court. If this be done, the High Court has a discretion under O. 65 to order the sub-tenant so made third party to pay the costs of an action by the head landlord against the mesne landlord reasonably defended.

The respondent points out that this question hardly arises, for in the Court below Dagas (defendants 5 to 9) admitted liability during their occupation from 26th December to 14th September 1928 and we were referred to O. 89, Vol. A, p. 18 which supports their case. The order is important and is reproduced below:

The pleader for defendants 5 to 9 states that their clients admit that after 30th December 1923 up to the time of delivery of possession to the receiver none but themselves did any work in the mine. They take upon themselves the responsibility for all the works done after 30th December 1926 up to commencement of possession of the receiver such as would be found by the expert in the locality on verification.

This no doubt simplified the position and the only question for determination would be whether damage was done during their occupation. But it is argued that the appellants are not bound by the admission of their pleader on a point of

3. Hansraj v. Bejoy Lal, 1930 P C 59=122 I C 20=57 I A 110=57 Cal 1176 (P C).

law and as the question was debated before us we proceed to deal with it. The case in 20 C L J 551 (2) is obviously distinguishable. In that case a tenure holder undertook in a lease not to excavate tanks in the property. He granted to a raiyat lease of some lands within the tenure but there was no restrictive covenant as to the excavation of the tank. The raiyat was unaware of any restrictive covenant in the lease of the tenure holder. In such circumstances it was held that the tenure holder and not the raiyat was liable in damages to his lessor for excavation of the tank by the raiyat. In the present case it is conceded that the Dagas had constructive notice (if not actual notice) of the covenants contained in the head lease, Ex. 1. It is argued however by Mr. P. R. Das, the learned counsel who has appeared for the appellant, that the basis of the principle is not whether the sub-lessee had notice of the covenants or not, but want of privity of contract or estate as between the lessor and sub-lessee. That may be so with reference to affirmative covenants, but not so with restrictive covenants where, as the authorities, presently to be noticed show, the question of notice becomes very material even if there is want of privity of contract or estate as between lessor and sub-lessee.

Indeed in support of the view taken in Woodfall's Landlord and Tenant in the passage referred to above the learned author refers to the case in (1881) 8 Q B D 329 (4) which was the case of an affirmative covenant—covenant by the defendant being "to repair and paint and leave in repairs" the demised premises. The equitable doctrine of restrictive covenants has been brought to a focus in the leading case of (1848) 2 Ph 774 (5). That doctrine has been affirmed in later decisions: see (1881) 8 Q B D 403 (6), and has more recently been approved by their Lordships of the Judicial Committee of the Privy Council in (1926) A C 108 (7), a case to

which I drew the attention of Mr. P. R. Das, in the course of his argument. If therefore the covenant to keep pillars of a certain width, which it is conceded is a negative covenant although affirmative in form be also a restrictive covenant, the authorities to which we have just referred and other authorities to be referred hereafter, and which will be discussed presently, lay down that it will be binding not only on assignees (absolute assignees) of the leasehold but also on sub-lessees and there can be no question that the head lessor has a remedy by injunction against the sub-lessee, for it is a covenant which "runs with the land" as also for damages against him. The case in (1926) A C 108 (7), before the Judicial Committee, to which I drew the attention of learned Counsel for appellant, contains a lucid statement of the principle as laid down in (1848) 2 Ph 774 (5) in the following illuminating passage. Lord Shaw said:

The general character of the principle on which a Court of Equity acts was explained in (1848) 2 Ph 774 (5), at pp. 776, 779. The plaintiff there was owner in fee of Leicester Square and several houses forming the Square. He sold the property to one Elms in fee, and the deed of Conveyance contained a Covenant obliging Elms his heirs and assigns, to "keep and maintain the said piece of ground and Square Garden . . . in its then form . . . in an open state, uncovered with any buildings." Elms sold to others, and the property came into the hands of the defendant, who admitted that he had purchased with notice of the covenant. The defendant, "having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it," the plaintiff who still remained owner of several houses in the Square filed a bill for an injunction. All this is familiar knowledge, but it appears to have been sometimes forgotten what was the nature of the argument for the defendant. He contended that the covenant did not run with the land so as to be binding upon him as a purchaser, and Sir Roundell Palmer, on his behalf, relied on the dictum of Brougham, L. C. (1834) 2 My & K 517 (8), at p. 547, to the effect that "notice of such a covenant did not give a Court of Equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract, had attempted to create a burden upon property which was inconsistent with the nature of that property and unknown to the principles of the law and could not bind such assignee by affecting his conscience." No reply was called for to this argument and the Lord Chancellor said that Lord Brougham never could have meant to lay down the doctrine "that this Court would not enforce an equity

4. Hornoy v. Cardwell, (1881) 8 Q B D 329.

5. Tulk v. Moxhay, (1848) 2 Ph 774=41 E R 1143=1 Ha & Tw 105=18 L J Ch 83=12 L T (O S) 469.

6. Haywood v. Brunswick Permanent Benefit Building Society, (1881) 8 Q B D 403=51 L J Q B 73=45 L T 699=30 W R 299.

7. Lord Strathcona Ltd. v. Dominion Coal Co. Ltd., (1926) A C 108=95 L J P C 71=134 L T 227=81 Com Case 80=16 Asp M C 585=42 T L R 86.

8. Keppell v. Bailey, (1834) 2 My & K 517.

attached to land by the owner, unless under such circumstances as would maintain an action at law." "If that be the result of these observations" added the Lord Chancellor, "I can only say that I cannot coincide with it."

and again Lord Shaw remarks

But (1848) 2 Ph 774 (5) is important for a further and vital consideration, namely that it analyses the true situation of a purchaser who having bought upon the terms of the restriction upon free contract existing, thereafter when vested in the lands attempts to divest himself of the condition under which he had bought: 'it is said that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.' In the opinion of the Board these views, much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a Court of conscience, one who obtains a conveyance or grant *sub-conditions* from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this; and a Court of equity will grant an injunction against it.

That constructive notice might before the Law of Property Act 1925 bind the lessee by the restrictive covenants of his lessor although he had no actual knowledge of them was laid down in (1869) 7 Eq 523 (9) and in one case Jessel, M. R. went so far as to say that even an express representation that there were no restrictive covenants affecting the demised property would not do away with the effect of constructive notice: see (1881) 17 Ch D 353 (10) and (1882) 19 Ch D 258 (11). That was also a case before the Law of Property Act 1925, which by S. 8 has altered in England the rule of "constructive notice" as laid down in these cases: see Woodfall's Landlord and Tenant, Edn. 23, p. 855. In (1902) 2 Ch 612 (12) it was held that the lessee of a

person bound by a restrictive covenant can be sued whether assigns are mentioned in the covenant or not.

The case in (1888) 37 Ch D 74 (13) cited for the respondent would show that remedy by way of injunction would lie at the instance of the head lessor against the sub-lessee if there has been a violation of a restrictive covenant. In this case the action was dismissed against the lessor as the lessor did not encourage the violation of the restrictive covenant in the lease by the sub-lessee, and the action was maintained against the sub-lessee. The appellant has, in view of the decisions just referred to, concentrated all efforts towards showing that Cl. (6) of the lease does not contain a restrictive covenant as it is argued that it is essential for a covenant to be restrictive that the covenantee must retain some interest in the land for the benefit of which the covenant is entered into. That this is an essential requirement of a restrictive covenant appears plain on the authorities as has been pointed out by Lord Shaw in (1926) A C 108 (7), at p. 121, in the following passage:

A perusal of the numerous decisions on this branch of the law shows that much difficulty has been caused by the attempt to extend these principles to cases to which they could not by the nature of the case have been meant to apply. It has been forgotten that to put the point very simply the person seeking to enforce such a restriction must, of course, have and continue to have an interest in the subject matter of the contract: for instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in (1848) 2 Ph 774 (5) applicable to the possession of real estate in Leicester Square. It was also clearly the case in (1858) 4 De G & J 276 (14) in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any chattel, an interest must remain in the subject matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question. This proposition seems so elementary as not to require to be stated. And it is only mentioned because in numerous decisions as is clearly brought out in the judgment of Lord Wrenbury, then Buckley, L. J. in (1914) 3 K B 642 (15), at pp. 656 to 658, it was necessary to shear

9. Fielden v. Slater, (1869) 7 Eq 523=38 L J Ch 379=20 L T 112=17 W R 485.

10. Patman v. Harland, (1881) 17 Ch D 353=50 L J Ch 642=44 L T 728=29 W R 707.

11. Nicol v. Fenning, (1882) 19 Ch D 258=51 L J Ch 166=45 L T 738=30 W R 95.

12. Holloway v. Hill, (1902) 2 Ch 612=71 L J Ch 818=87 L T 201=18 T L R 745.

13. Hall v. Ewin, (1888) 37 Ch D 74=57 L J Ch 95=57 L T 831=36 W R 84.

14. De Mattos v. Gibson, (1858) 4 De G & J 276.

15. London County Council v. Allen, (1914) 3 K B 642=83 L J K B 1695=111 L T 610=12 L G R 1003.

away this misapplication or improper extension of the equitable principle. As Romer, L. J. said in (1903) 2 Ch 539 (16) at p. 554, if restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him or in which he is interested, then the covenant must be regarded so far as he is concerned as a personal covenant, that is, as one obtained by him for some personal purpose or object.

The argument for the appellants is that by the grant of the 499 years' lease (Ex. 1) there remained no reversion in the plaintiff head lessor concerning the demised premises. There can be no question that the clause as to maintaining pillars of a certain width was for the benefit of the plaintiff's reversion in the land demised. Mr. Das has been driven to argue that the lease of 499 years which must be taken to be for all intents and purposes a permanent lease left no reversion in the plaintiff. But this argument generally speaking is contrary to all authority. The distinction between a conveyance in fee simple and a lease in perpetuity was pointed out by Sir Lawrence Jenkins in 24 Cal 440 (17) at p. 447, a distinction which was recognised by their Lordships of the Judicial Committee in 36 Cal 1003 = 36 I A 148 (18) where their Lordships expressed themselves thus:

Sir Robert Finlay in his able argument for the respondents contended that a mokarari lease is tantamount to a conveyance in fee simple, and that the lessee must therefore be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions had been well pointed out by Jenkins, J. in his judgment in 24 Cal 440 (17) at p. 447: 'Because at the present day,' says the learned Judge, 'a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result. . . . The law of this country does undoubtedly allow of a lease in perpetuity. . . a man who being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word lease, which implies an interest still remaining in the lessor.' He held, therefore, that whether the Transfer of Property Act applied or not, such a lease is forfeitable, notwithstanding that it is permanent. In this opinion their Lordships concur, and it follows that they are unable to give to the Limitation Act wider interpretation adopted by the High Court and to treat the lessee as a

purchaser under Art. 134 of the Act. The purchaser must be the purchaser of an absolute title.

The reversion in the Kajora Colliery still remained in the plaintiff and to protect that, the covenant that the galleries and pillars of certain width must be kept was entered into. The only case which supports the contention of the appellant, that there is no reversion in the plaintiff, is the decision of Beaumont, C. J. in 58 Bom 327 (19), but we are not prepared to follow it as it is contrary to the decision of Sir Lawrence Jenkins in 24 Cal 440 (17), which was approved by the Privy Council in 36 I A 148 (18). It was argued that the property for the benefit of which restrictive covenant was entered into must be independent of and outside the demised premises. But the fallacy in this argument is that it disregards the true legal position, viz. that what passes by the lease is not the entire property, for a lease is not an out and out sale so that nothing remains in the lessor. All that is necessary is, in order that a covenant may be a restrictive covenant, that the covenant must be for the benefit of some ascertainable property retained by the vendor. As was pointed out by Romer, L. J. in (1903) 2 Ch 539 (16) at p. 554:

If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is as one obtained by him for some personal purpose or object.

Here the covenant was made for protecting the reversion in the lessor. If for instance, there was a forfeiture by reason, say of breach of the covenant for rent, the lease was liable to forfeiture and leasehold property may in such circumstances revert to the lessor (the plaintiff). It was not the intention that the pillars and galleries should be worked except in the manner specified without the consent of the plaintiff. In this connection reference may be made to para. 17 of the lease (p. 8, Book B) about the official translation of which there was some dispute and which correctly translated would be in these terms:

When the cutting of the coal in all the land settled, on keeping pillars regularly is finished I shall be able to cut the pillars after informing you and presenting a petition to you and after making arrangements for the support of the roof.

16. *Formby v. Barker*, (1903) 2 Ch 539 = 72 L J Ch 716 = 89 L T 249 = 51 W R 646.

17. *Kalli Das Ahiri v. Mon Mohini Dassee*, (1897) 24 Cal 440 = 1 C W N 321.

18. *Abhiram Goswami v. Sham Charan Nandi*, (1909) 36 Cal 1003 = 4 I C 449 = 36 I A 148 (P C).!

19. *Keshav Lal v. Magan Lal*, 1934 Bom 134 = 148 I C 993 = 58 Bom 327 = 36 Bom L R 197 (F B).

It has been argued for the respondent that apart from the reversion being in the plaintiff for the protection of which the covenant was entered into it was also entered into for the protection of the surface which belongs to the plaintiff and the covenant is for that reason also a restrictive covenant in the sense stated by the authorities previously referred to. In reply the appellant has argued that the covenant was for the protection of the roof which is distinct from the surface and as the roof is a part of the demised premises the covenant is not a restrictive one. The argument of the respondent, however, seems to be plausible one and apart from the question of the protection of the reversion, the protection of the surface which belongs to the respondent might have been intended when the covenant to keep pillars of certain width was entered into. For the aforesaid reasons we are of opinion that the defendants 5 to 9 treating them as sub-lessees, i. e., treating their mortgage being by way of sub-demise are bound by the covenant and remedy by injunction was undoubtedly available against them apart from the principle of restrictive covenant on the principle laid down in the following passage in the judgment of Knight Bruce, L. J. in (1858) 4 De G & J 276 (14) :

Reason and justice seem to prescribe that at least as a general rule where a man by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

A principle, not without analogy, had previously been laid down in reference to the user of land. This principle enunciated as aforesaid in *De Mattos v. Gibson* (14) has been approved by their Lordships of the Judicial Committee in (1926) A C 108 (7) at p. 117. The question is that if the remedy by injunction was available as laid down in *Lord Strathcona's case* (7), even where the covenant broken was not a restrictive one, whether in the absence of a breach of restrictive covenant, remedy by way of damages would be available against a purchaser with notice of the covenants. It would seem that remedy by way of

damages would be available against the contracting party only and not his assigns : see *Lord Strathcona's case* (7). But in the case of breach of restrictive covenant remedy by way of injunction as well as damages would be available against the assignee. In the present case if there was secret working of the mine and the respondent was not allowed access to the working as by the terms of the lease they were entitled to till a year and a half after the institution of the suit and if these circumstances are established as to which we shall revert later, a Court of equity can surely award damages in lieu of injunction and in addition to an injunction : see (1924) A C 851 (20).

There is another point of view from which the covenant regarding the keeping of pillars may have to be approached. It would seem from a possible construction of the provisions of Cl. 6 read with Cl. 17 of the lease that it was not intended to pass the property in the pillars of the dimensions implied from Cl. 6. The vernacular of Cl. 17 was read to us and its correct translation has been given before. It would seem that square pillars of certain dimensions were intended to be kept for the protection of the roof. The words "your property" in Cl. 6 read with correct translation of Cl. 17 indicate that property in pillars did not pass and was excepted from the demise. It is a possible construction in any event. The clause that permission was intended to be taken (although not definitely expressed) in cutting pillars after "all the land on regularly keeping pillars is worked out" would suggest that property in the pillars remained in the lessor. As against this construction it is pointed out for the appellants that the pillars were not exempted from the demise and that what passed were the underground rights in the entire 181 bighas which included the pillars, and the lease in this case was sought to be distinguished from the lease in (1883) 23 Ch D 583 (21) to which I drew the attention of learned counsel for the appellant. According to Cl. 6, the pillars of certain width had to be kept for the protection of the roof and then fol-

20. *Leeds Industrial Co-operative Society v. Slack*, (1924) A C 851=93 L J Ch 436=10 T L R 745=63 S J 715.

21. *Taylor v. Mostyn*, (1883) 23 Ch D 583=53 L J Ch 818=48 L T 715=31 W R 686.

lows Cl. 17 which according to the correct translation agreed to by the learned advocates on both sides is in these terms:

When the cutting of ail coal in all the land settled on keeping proper pillars regularly is finished I will be able to cut the pillars after informing you and presenting a petition to you and after making arrangements for the support of the roof.

It is argued that the pillars are demised but that the lessee was prevented from cutting it without satisfying a condition precedent, viz., without informing the lessor and without presenting a written petition and without making proper arrangement for the protection of the roof. Although it is not so expressly mentioned the object of presenting a petition was to obtain the consent of the plaintiff (the lessor) of Ex. 1. It is true that in (1883) 23 Ch D 583 (21) the covenant on the part of the lessees was to the effect that they shall and will at the end of or sooner determination of this demise leave sufficient walls or pillars for the support of the roof and for preventing of thrusts and creeps and not remove the same without the consent in writing of the said Sir Thomas Mostyn, his heirs and assigns for that purpose had and obtained;

and this clause was treated as an exception and it was held both by Bacon V. C. and the Court of appeal that the pillars were exempted from the demise: see pp. 599 and 624 of 23 Ch D 583 (21) respectively. As the construction which we put on the words of Cls. 6 and 17 as indicated above is one of a doubtful character we do not propose to rest our decision on the ground that pillars were exempted from demise; but this in no way affects our view that the covenant in Cl. 6 is a restrictive one and binds the mortgagee sub-lessees (defendants 5 to 9) and that action for damages lie against them. It is next argued on this part of the case that the doctrine of restrictive covenants is embodied in S. 40, T. P. Act, and as the essence of a Code is to be exhaustive and whole law on the subject must be taken to be crystallized in S. 40 and any covenant that does not fall within S. 40 is not a restrictive covenant so as to bind sub lessees.

For the respondent it has been contended that S. 40 has no application to lessor and lessee as the rights of lessor and lessee occur in a different Chapters and are governed by different provisions: perhaps the broad contention of the respondent cannot be sustained. As I understand it the law in India closely fol-

lows the law in England with regard to restrictive covenants. In 36 Cal 675 (22) reference was made to the case in (1909) A C 98 (23) and it was held that a covenant is annexed to land if it binds the land in its inception or affects the nature, value and quality of the land. In the same case it was said that the principle of restrictive covenants as enunciated in (1900) 2 Ch 388 (24) as between vendor and purchaser was equally applicable to the case of lessor and lessee. The Rt. Hon'ble late Sir Dinshaw Mulla in his commentary on the Transfer of Property notices under his notes to S. 40 that the case law in India as to restrictive covenants is meagre and it has not yet been decided whether a restrictive covenant would be binding on trespasser as in (1906) 1 Ch 386 (25) or a mere occupier as in (1891) 2 Ch 554 (26). The words "immovable property" are not defined in the Transfer of Property Act. They are said to include timber, standing crops. We have to look for its definition to the General Clauses Act which again is not exhaustive. The definition is as follows:

Immovable property shall include land, benefits to arise out of land and things attached to earth.

A benefit to arise out of land is interest in land and is, therefore, immovable property. The question is whether plaintiff in whom there is reversion in the colliery after the expiration of the term of 499 years or treating the lease (Ex. 1) as permanent lease in whom there is a reversion is said to possess his own immovable property and if for the more beneficial enjoyment of the reversion a negative stipulation is made, I do not see any reason why the principle of S. 40 should not be applied to the present case. We have given longer time to the consideration of this question of law although this point was never sifted in the Court below in view of the admission made by the appellant's pleader undertaking all liability in damages for the breach if such

22. Mathewson v. Ram Kanai Singh, (1909) 36 Cal 675=1 I C 626=9 C L J 523.

23. Dyson v. Forster, (1909) A C 98=78 L J K B 246=99 L T 942=25 T L R 166.

24. Rogers v. Hosegood, (1900) 2 Ch 388=69 L J Ch 652=83 L T 186=48 W R 659=16 T L R 489.

25. In re Nisbet & Potta's Contract, (1906) 1 Ch 386=75 L J Ch 238=94 L T 297=54 W R 286.

26. Mandor v. Fakke, (1891) 2 Ch 554=65 L T 203.

breach was established. The first contention of the appellants that in law damages are not recoverable from the appellants (Dagas) for breach of covenants regarding the keeping of pillars on the ground that there is no privity of contract between them and the plaintiff must for the reasons aforesaid fail.

The second ground taken on behalf of the appellants is that the plaintiff claimed no damages for breach of covenant regarding keeping of pillars and galleries and the decree awarded by the Subordinate Judge on this head is contrary to the pleadings in this case. In support of this we were referred to the plaint (Vol. A), p. 107. Paras 5 to 8 refer to various breaches of covenants. Para. 7 refers to the particular breach of covenant regarding keeping of pillars and galleries. Reference is made in particular to the following sentence in para. 7 of the plaint:

In consequence of this there is a likelihood of great damage being done to the coal mine,

and it is argued that damages claimed by plaintiff would be damages which would be sustained by them in future. It is to be noticed however that the plaintiff states in the said para. 7 that plaintiff was not allowed to go underground and has not been able to know the actual state of things in the mine. The plaintiffs claim damages both for breach of covenants and trespass. An issue was joined on the question of liability of defendants 5 to 9 regarding damages for breach of covenants (see issue 5) on the question as to whether the alleged breaches of covenants on the part of defendants 5 to 9 were done with the knowledge and consent of the plaintiffs and if so whether there was waiver or acquiescence and there was no issue on the question of liability of defendants 5 to 9 as to damages which was admitted. See, p. 36, Vol. A, order sheet. See also the written statement of the defendants para. 17, p. 124, Vol. A, the question of waiver by the plaintiff is suggested. There is no substance in this ground, which must fail. It is also to be mentioned in fairness to learned counsel for the appellant that although this point was taken in the opening it was not eventually persisted in.

The third ground taken is that the evidence does not show that there has been any breach of covenants by the appellants (Dagas, defendants 5 to 9). It is

argued with great force that there is no evidence that breaches of covenants regarding pillars and galleries took place after the Dagas entered into possession in December 1926. On the other hand it is submitted that the plan Ex. 4 (i), which was adduced in evidence on behalf of the plaintiff, is conclusive on the point that all the breaches of covenant regarding pillars and galleries took place before the Dagas (appellants) took possession. Ex. 4 (i) is map No. 5 in the book of maps. It is pointed out that the dotted red lines show the workings before the Dagas took possession and all breaches are on the eastern side. It is argued that by the preliminary judgment which determined the liability of the appellants this plan was apparently accepted by the Subordinate Judge, for there is nothing in the preliminary judgment to show that the plan Ex. 4 (i) was not a correct plan and the Subordinate Judge passing the final decree had no authority to reject this plan from evidence.

In order to decide on the soundness of this contention a few facts and dates have to be kept in view. Sometime in July 1930 the plaintiff applied for a direction on the defendants to dewater the mine. On 8th July 1930 the Subordinate Judge appointed a receiver to dewater the mine. Either on 25th or 31st October 1930, the receiver obtained possession of the mine. On 21st November 1930, the receiver applied for directions on the defendants to make over plans and papers relating to the property. On 10th December 1930, defendant 10 produced the working plan Ex. 4 (i). Then a very important event happened. On 29th January 1931 plaintiff applied for directions on the receiver to work the mine. Defendant 10, Vithal Das, objected; on 11th April 1931, the appellants applied for appointment of experts to examine the mine. On 22nd June 1931 two experts, Mr. Samson and Mr. Ram Gopal Chatterjee, were appointed to examine the mine; on 30th June 1931 a writ was issued to the commissioner: see Vol. A, p. 200. The commissioners submitted a report by which they challenged the accuracy of the plan Ex. 4 (i). The commissioners' report has been subjected to considerable criticism by the learned counsel for appellants and it is broadly contended that the commissioners' report should be brushed aside as they never conducted an underground survey.

The scope of the commissioners' enquiry was extended by an order dated 6th July 1931 (Vol. A, p. 26). The commissioners commenced work on 3rd August 1931 and continued the work till 21st September 1931 and they attached two sketch maps 1 and 2 to their report. It is said that the commissioners never made an underground survey but as they had the map Ex. 4 (i) with them they merely examined the roof-falls and it is submitted that the defendants plan Ex. 4 (i) could not be verified at all without drawing a map to scale and all that the commissioners did was to note the roof-falls in the enlarged plan [enlargement of plan Ex. 4 (i)]. Here a little correction must be made in the printed map 5, Ex. 4 (i). The printed map shows working up to 1929—in the original it is up to 27th June 1928. It is to be noticed that during the hearing plaintiff produced Ex. 4 (b) which was filed by the defendants to the Chief Inspector of Mines under the Mines Regulation, Ch. (i). Rr. 10, and 12 of the Regulation and the commissioner relied on the same. The appellants strongly object to the reception of this map in evidence as it was made for another purpose. The first exception taken to the Commissioners' report, viz. that Ex. 4 (i) plan could not be verified as the Commissioners never made an underground survey must fail seeing that the Commissioners in para. 5 of their report, Vol. A, p. 213 say:

We held an investigation after giving due notice to the parties and made a thorough inspection of all the underground working accompanied by the representatives of the parties.

The Commissioners were never examined on this point although there were ample opportunities of examining them as we shall show hereafter. It is said that it was physically impossible for the commissioners to measure the galleries in the affected area of 15 bighas within 16 hours and 45 minutes which was the time occupied according to the time noted in inspection book of the commissioners regarding the real Kajora Colliery (see pp. 208 210 Book A). In these sittings they examined some witnesses. It is difficult to give effect to this objection seeing that neither of the commissioners were asked about it and learned counsel was consequently driven to argue that the Court did not give the appellants any opportunity to examine the commissioners. If

this point is made out there may be necessity for a remand, but the following facts will make it abundantly clear that the appellants are themselves to blame for not availing themselves of the opportunity to examine the commissioners. The report of the commissioners was filed on 20th September 1931. The appellants filed an application on 22nd April 1932, (p. 244), Book A, stating that the matter of the commission need not be pursued specially at that stage. On this the Court passed order No. 162, (see p. 35, Book A) postponing at the instance of the appellants the considerations of the objections to the commissioners' report. On 30th April 1934 Mr. Samson was in India and no attempt was made to get his evidence. On 5th July 1934 the appellants applied for issue of a summons on the other commissioner (Book A, p. 469) Mr. R. G. Chatterjee, and on 10th August 1934 the defendants put in a petition to examine the other commissioner after Mr. Samson had left for England: see p. 470, Book A, and we agree with the opinion of the Subordinate Judge that defendants 5 to 9 did not really want to examine either of the commissioners and with the reasons on which the said opinion was founded. The appellant argues that it was the duty of the Court to tell Mr. Chatterjee on 19th July 1934 that he was to attend on 9th August 1934. We do not agree with him. It was the duty of the appellants to take steps under the Code to enforce attendance of Mr. Chatterjee when he did not turn up on the 9th August.

The second exception to the commissioners' report is that they should not have relied on Ex. 4 (b), a plan submitted by the defendants-appellants to the Inspector of Mines under the Mines Regulation as it was prepared for a different purpose and its accuracy cannot be presumed and in support of this view reliance is placed on the case 2 W R 28 (27) at p. 29, and the case in 14 C L J 578 (28) at p. 582. It is said that for the purpose of Mines Regulation R. 12, Ch. (i), it was not necessary to show the correct working on the eastern side. The mine authorities were not concerned with the question as to whether there was depillaring

27. John Kerr v. Nuzzur Mahomed, (1865) 2 W R 28 (P O).

28. Preet Nath Mozumdar v. Durga Tarini Ghose, (1911) 14 C L J 578=10 I O 376=16 C W N 317.

or not or whether the galleries were driven wide. The report of the commissioners, it may be stated in passing, was not attacked on the ground that it was a dishonest report. So far as the statements of fact were concerned learned counsel for the appellants said he was prepared to accept them, e. g., the fact that roof stones have been exposed and collapsed, but what is challenged is the findings of the commissioners that these devastating acts were committed after the appellants came on the scene. The respondents wanted to prove depillaring and for that purpose they would rely on Ex. 4 (i) but they are not prepared to accept the date of depillaring as given in Ex. 4 (i), viz. all the depillaring was done before 30th December 1926, the crucial date as the defendants came on the scene after that date. It is argued that it is not permissible to dissect the admission in plan Ex. (4) (i) in that way. From this digression we proceed to deal with the objection as to the admissibility of Ex. 4 (h) on the ground that it was made for a different purpose. We are not impressed by the reasoning on which the objection is founded. Surely the Mining Regulations (Reg. 4 of 1923) require that the galleries would be of a certain width and the pillars must be of certain dimensions. It must follow that the plan should show all the galleries and pillars. In this connexion the evidence of Golokeswar p. 286, (Book A) is important. He states this:

I know the real Kajora Colliery. A letter for permission to work the mine underground under a Local Board Road together with a plan thereof was sent from the real Kajora Colliery to the Mines Board at Dhanbad. Aswini Kumar Banerjee was at the time the surveyor in the colliery. He signed the plan in my presence. This was traced in my presence by Aswini Babu from the original plan.

Then follows a note by the Subordinate Judge showing how the copy produced from the Mining Office was marked as Ex. (4) (h). The note is as follows: [The original plan was called for from defendants 5 to 9 but not produced. The copy produced from the Mining Office on being called for by the plaintiffs is marked as an exhibit against defendants 2 to 10 only as Ex. 4 (h) and not against others after objection]. The witness adds:

The plan from which this was copied was the working plan of the company; and the deposition of Narendra, the surveyor of defendant 10, would show

that there was a working plan of the real Kajora Colliery when I worked (in September 1927). In the plan the galleries shown by me were duly shown (p. 282, Book A);

and again at p. 283, Book A, this witness states at line 26:

This plan produced from the office of the Chief Inspector of Mines (shown) is a tracing from the original working plan referred to by me; only some additional work done after September 1927 has been shown in it.

The deposition of these two witnesses can leave no doubt that the mine office plan was a true representation of the workings to January 1928 and it is difficult to understand how Ex. 4 (h) can be rejected from evidence on the ground that it was made for a different purpose. In our opinion the map Ex. 4 (h) would be a perfectly relevant document on the workings of the mine up to January 1928 and has been properly admitted in evidence. The admission of this map in evidence has this important effect that it discredits Ex. (4) (i), the map No. 5, to a large extent and justified the view of the Subordinate Judge that if not a fabrication it does not correctly represent the working of the mine with reference to the dates of the workings in particular. It is a matter of very great significance that Aswini under whose supervision the working plan, of which Ex. 4 (h) is a tracing, was prepared was not examined to prove that Ex. 4 (h) was incorrect although he was cited as a witness by the defendants and was present in Court: see p. 248 (Book A). For the reason given, we must overrule the objection to the reports of the Commissioners on the ground that the Commissioners should not have compared their own plan with Ex. 4 (h) as the same was inadmissible. It may also be mentioned in this connexion that under S. 35 of the Mines Act 4 of 1923, that Act prescribes a punishment for not preparing a plan. It is very unlikely that in such circumstances an incorrect plan would be submitted. We agree therefore with the Subordinate Judge in the preliminary judgment that it is clear from a comparison of Ex. 4 (h) and Ex. 4 (i) that almost all the breaches complained of happened after the date of the mine office plan Ex. 4 (h), i. e. January 1928, and before the last date of working as shown in second plan Ex. 4 (i), i. e. November 1928, i. e. at the time of the occupation of the mine by defendants 5 to 9.

The second report of the Commissioner dated 7th July 1933 on the question of damages in so far as it has been adopted in the final judgment of the Subordinate Judge dated 5th October 1934 has been attacked in this appeal. It appears that out of the damaged area of 15 bighas referred to in the first report of the Commissioners 5-1/4 bighas have been sealed by the receiver. The Commissioners found that the plaintiff sustained a loss of 8,800 tons of steam coal and 2,200 tons of Slack Coal for permanently isolating 5 1/4 bighas which was found unworkable. For the appellants it has been argued that the Subordinate Judge should have exonerated defendants 5 to 9 from liability in damages in respect of the loss of the 5 1/4 bighas as the sealing of 5 1/4 bighas was not due to any breach of covenant by defendants 5 to 9 but was an act of God and an inevitable accident. No foundation has been laid for sustaining this ground. The report (second) of the Commissioners dated 7th July 1933 point out that an area has been sealed off to prevent fire and indicated the loss which the plaintiff had to sustain by the sealing of the 5 1/4 bighas: see Book A, p. 404. On 24th July 1933 the defendants-appellants took as many as 21 exceptions to the report, and none of the exceptions refers to exemption from liability for loss due to sealing off of the 5 1/4 bighas on the ground that the loss was due to inevitable accident, and in the grounds of appeal to this Court we find no such ground. We do not think it would be right to allow this objection to be taken at this stage as the matter depends on evidence. On the other hand we are rather inclined to think that the risk of a fire was due to depillaring by defendants 5 to 9.

The next ground urged on behalf of the appellant is one of substance. If the plaintiff is entitled to price of coal the defendants are entitled to deduction of Rs. 2 per cent per ton for severing the coal and bringing it to the pit's mouth, and the commissioners have recommended a deduction of Rs. 2 per ton. The Subordinate Judge, while conceding that in assessing damages all expenses incurred by defendants for raising coal should be deducted from the whole value of the coal, felt himself bound by the preliminary judgment and held that he could not allow any deduction on account of costs

for bringing it to the pit's mouth and for severing the coal. The learned counsel for the appellant has contended that this view is opposed to a recent decision of the Judicial Committee in 60 I A 297 (29) and as the present appeal is directed both against the preliminary and final judgment there is nothing to prevent us in giving the relief on this head asked for by the defendant. The rule laid down in 60 I A 297 (29), is this :

As against the gross value of the coal there will be charged all expenses properly incurred by the defendants in getting the coal, bringing it to Bank and marketing it, including any rents or royalties so incurred ; if these are not ascertainable the Court will fix a proper rate to be deducted from the gross value in respect of these matters. A deduction from the gross value will also be allowed, to be leased on a reasonable rate of depreciation on any capital expenditure by the defendants in respect of development of the mines, structures above and below ground, boilers and machinery properly incurred for colliery purposes.

The commissioners have taken all this into account but have not allowed development cost or interest on capital, but have allowed 6 annas per ton for depreciation and Calcutta charges. We think that a deduction of Rs. 2 per ton should be made from the price of coal as recommended by the Commissioners. Mr. Brojo Lal Chakravarti appearing for the respondents has contended that this rule of making allowances for bringing the coal to bank and severing the coal, etc., was made in *Currimbhoy's case* (29) for there the party made liable was working under a colour of title and in the bona fide belief in the exercise of a right ; but if a man causes damage without a right, in that case he is allowed only a deduction for bringing coal up to the pit's mouth.

It is complained that in the present case the defendants acted in a very high-handed and fraudulent manner and their acts have been described as acts of vandalism by the Subordinate Judge below and in these circumstances no deductions should be allowed, and we were referred to the decision of the Judicial Committee in (1899) A C 351 (30), where the facts were that the appellants had furtively, for a series of years, taken the respondents' coal by means of a wilful and secret underground trespass and no laches

29. *Currimbhoy v. L. A. Creet*, 1933 P C 29=141 I C 209=60 I A 297=60 Cal 980 (P C).

30. *Bulli Coal Mining Co. v. Osborne*, (1899) A C 351=68 L J P C 49=80 L T 480 = 47 W R 545=15 T L R 257.

was attributable to the respondents in not discovering the existence of wrongful workings by the appellants, and it was held in those circumstances that the respondents were entitled to recover from the appellants the market value of all the coal worked and gotten by them from the respondents' land, no allowance being made for the cost of working. The present is not a case of that kind for defendants 5 to 9 were, at least for a period before the notice to quit on the ground of forfeiture, working the colliery on a legal title as mortgagees from the lessees. There were covenants that inspection would be allowed and although the correspondence shows that defendants 5 to 9 had refused the plaintiff proper facilities for inspection, the present case does not stand on the same footing as the *Bulli Coal Mining case* (30) cited above. As the commissioners have proceeded on the evidence of Sakti Pada Bhattacharya, plaintiff's agent, see Book A, p. 394, line 10 et seq, we think a deduction should be made on the basis of Rs. 2 per ton. It has been conceded by Mr. Chakravarti that from the quantity of 25,338 tons, there would be a deduction of 6,490 tons upon which royalty was allowed so that the profit must be calculated on the basis of the steam coal and dust coal being in the proportion of 80 per cent and 20 per cent. To this extent the decree must be varied on this head. The result is that the decree of the Subordinate Judge on this head of damages must be varied in this way. On the head of damages, for 25,338 tons of coal raised after December 1927 up to the date of suit the Subordinate Judge has awarded a decree to plaintiff for Rs. 80,449-8-0 (see p. 487, Book-A). This figure was arrived at on the basis indicated in the 2nd and 3rd report of the commissioners (see pp. 405 and 458, Book-A). For 20,271 tons steam coal at Rs. 3-10-0 per ton. ... Rs. 73,482-6-0
5,067 tons Slack coal at

Rs. 1-6-0 per ton. 6,967-2-0

Rs. 80,449-8-0

According to the concession made by Mr. Brojo Lal Chakravarty the price of 6,490 tons of steam and slack coal in the proportion of 80 to 20 per cent must be deducted, i. e. the price of 5,192 tons of steam at Rs. 3-10-0 per ton and of 1,298 tons of slack coal at Rs. 1-6-0 per ton will

have to be deducted. The aggregate of the price comes to Rs. 20,606-6-0 deducting that from Rs. 80,449-8-0
.. 20,606-6-0

The price of coal comes to Rs. 59,843-2-0

From this sum of Rs. 59,843-2-0 according to the commissioners a sum of Rs. 2 per ton must be deducted for the cost of cutting, hauling, etc. on (25,338—6,490 tons) 19,048 tons which amount comes to Rs. 38,096. For the reasons already given disagreeing with the Subordinate Judge we are of opinion in view of the decision of the Judicial Committee in 60 I A 297 (29) that the defendants are entitled so far as the price of coal is concerned to a deduction of Rs. 38,096, i. e. their liability on this head of damages would be Rs. 59,843-2-0 less Rs. 38,096, i. e. Rs. 21,747-2-0. At p. 487 of the judgment at Book-A for the figure Rs. 80,449-8-0 under the head of account of damages on account of coal raised after December 1927 up to date of suit, the figure Rs. 21,747-2-0 will have to be substituted. The liability of the Daga defendants under this head is reduced from Rs. 80,449 to Rs. 21,747-2-0. Although the principle in (1899) A C 351 (30), does not apply to the taking of coal after December 1927 a distinction will have to be drawn when we are considering the question of damages for breach of covenant which has been assessed by the Commissioner and the Subordinate Judge to Rs. 50,001-4-0, a damage which has been the result of secret working of the pillars contrary to the covenant. No laches is attributable to the respondent in not discovering the secret working and in such circumstances we think that no deduction on the head of severing the coal etc. should be allowed.

The whole series of correspondence beginning on 13th August 1928 Ex. 2 (b), (p. 200, Book B), and ending with 19th September 1928, Ex. 2 (e), (p. 210, Book B), viz. letters Exs. 2 (b), 3 (e), 3 (d), 3 (f), 2 (e), 2 (d), 3 (j) and 2 (c) reveal the fact that the Daga defendants were putting off the inspection of the mine from day to day on some pretext and other and in the meantime were secretly working underground and unlawfully working the pillars with the result that 15½ bighas of mine has become unworkable and has caused great loss to the plaintiff. With re-

ference to such state of facts, the following observations of Lord Hatherby in (1880) 5 A C 25 (31) at p. 34, quoted in the *Bulli Mining Co. case* (30) ought to be usefully reproduced here in order to clear the ground as to the extent of the legal liability of the defendants-appellants on this head. There is no doubt, said his Lordships:

That if a man furtively and in bad faith robs his neighbour of property and, because it is underground, is probably not for some time detected the Court of Equity in this country will struggle or I would rather say will assert its authority to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has done as would have been justly made to him if the parties had been working by agreement or if as in the present case they had been the one working and the other permitting the working through a mistake. The Courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud.

In the case before us the pillars were being worked out secretly contrary to the covenants. No one can deny that it is a fraud to rob the owner of the colliery of the pillars of coal contrary to the covenant resulting in portions of the mine being sealed. The respondent made several attempts to find out what the Dagas were doing and they were prevented from doing so. The shebait, the earthly representatives of the plaintiff, who was the party defrauded by the robbing of the pillars remained in ignorance of the fraud without any fault of their own. As appears from the first report, Vol. A, p. 214, of the Commissioners, as also from the second report, see Vol. A, p. 483, the result of the depillaring has been that an area of 15 bighas has been damaged out of which 5½ bighas have been sealed off altogether and the basis of the damages of Rs. 50,000 has been given at p. 483, Book A.

In (1880) 13 Ch D 574 (32), there is an exhaustive discussion on the question as to what allowances are to be made to the defendant in taking the account. Accounts in actions of this character in the Court of Chancery have been directed on two footings; sometimes an allowance for the costs of severance or getting the

coal has been made and sometimes it has not. In all cases an allowance has been made for the costs of bringing the coal to the bank. In (1880) 13 Ch D 574 (32), there is an enumeration of cases which decide whether the milder or the harsher rule should be applied. The harsher rule has been applied where the Courts have found fraud: see (1877) 4 Ch D 845 (33). It has been applied where the Court has said that the defendant has acted in a manner wholly unauthorized and unlawful: see 11 Equity 188 (34). We find in this case the Act of the Daga defendants in depillaring contrary to covenant was wholly unauthorized and fraudulent and we think the harsher rule should be applied. The defendant would only be entitled to a deduction of bringing the coal to the Bank from the price of coal. There is hardly any evidence on this head and we have to proceed to some extent on guess. Sakti Pada Chakravarty at Book A, p. 394, was asked the question: "What is the cost of hauling up the cost to the surface?" Answer: "Cannot give the exact figure without calculation." A deduction might be made at the rate of 4 annas per ton for steam coal and slack coal for the cost of carriage of the coal to the Bank. In place of Rs. 50,001 on this head there will be a deduction of 4 annas per ton. So at p. 483, Vol. A in place of 45,675—42,525 will have to be substituted on the basis of 12,600 tons at Rs. 3-10-0 less 4 annas per ton, and in lieu of Rs. 4,331-4-0 the figures Rs. 3,544-2-0 will have to be substituted, and in lieu of Rs. 50,001-4-0 the sum of Rs. 46,044-2-0 will have to be substituted. The respondent contended that on the evidence 1 anna 4½ pies per ton might be allowed for bringing coal to pit's mouth. Although there is some evidence to that effect it is not decisive. We think 4 annas per ton might be allowed.

It has next been argued that the report of the Commissioners as to the amount of coal worked is wrong as the Commissioners have not acted on the raising reports which would show that the raisings during the material period were much below 25,538 tons. The Subordinate

31. *Livingstones v. Raw Yards Coal Co.*, (1880) 5 A C 25=42 L T 234=28 W R 357=44 J P 392.

32. *Trotter v. Maclean*, (1880) 13 Ch D 574=49 L J Ch 256=42 L T 118=28 W R 244.

33. *Ecclesiastical Commissioners for England v. N. E. Ry. Co.*, (1877) 4 Ch D 845=47 L J Ch 20=36 L T 174.

34. *Llynvi Co. v. Brogden*, (1871) 11 Equity 188=40 L J Ch 46=23 L T 518=19 W R 196.

Judge has held that the defendants did not produce the real raising reports which were contained in a bound book and we agree with the Subordinate Judge that Ex. 7 was not the original despatch book of the colliery as is testified to by the witness of the plaintiff. Both the witnesses of the plaintiff state that the original despatch book of the colliery was a big bound book and had printed heading on each page. We have looked into Ex. 7 and we are not satisfied that the conclusion of the Subordinate Judge on this part of the case is wrong. Besides the raising book does not show local sales. It is argued by the appellant that it is idle to talk of forgery of Ex. 7 when forgery could be demonstrated in this case with reference to the railway books and mining books. It is said that the Court should have undertaken the duty of believing or not believing documentary evidence instead of leaving the same to the Commissioner and our attention has been drawn to the decision of the Judicial Committee in 58 I A 173 (35). The facts of the case, however, were very different. There an order was made by the High Court appointing a Commissioner to examine the books of business and report whether it was of a gambling nature and this was disapproved by their Lordships of the Judicial Committee and it was held that it was not a question which could safely be left to be so determined. Besides, the Subordinate Judge in the present case has considered the evidence, and after considering them he has concurred with the findings of the commissioners: see Book A, p. 484 (1).

This ground appears, when closely examined to be of no substance and must fail. It is next argued that the plaintiff is not entitled to any damage for trespass after notice to quit had been given as under Cl. (24) of the Kabuliyat, see p. 9, Vol. B, the plaintiff was not entitled to re-enter until the settlement was cancelled with the help of the Court and much argument was spent on the provision of S. 111, T. P. Act. In the first place this point was not taken in the Court below, no issue was joined on it, defendants 5 to 9 admitted liability in damages provided that the damages occurred during their occupation were established. This point

was not taken in the grounds of appeal. We do not think in these circumstances we should allow this point to be taken. This argument was not submitted to the Court below and it would not be right to allow this point to be raised for the first time in appeal. The next point taken is that the Subordinate Judge should have awarded no interest on damages. The definition of "mesne profits" in the Civil Procedure Code includes interest on such profits and we see no reason why interest on such profits should not be given. The preliminary decree directed that the plaintiffs will get a decree against defendants 5 to 9 for the price of all coal raised by them during the period and interest thereon after date of notice (14th September 1928) up to the date of suit for which period they are trespassers: see p. 341, Book A. In the final judgment at p. 484, Book A, the Judge expresses himself thus:

I again quote the following from the judgment of the Court to show what the intention of the Court was if it were not possible to ascertain separately the quality of coal mined after the date of notice and that raised after January 1928. If however it cannot be ascertained how much coal was raised after January 1928 and the date of notice (14th September 1928) then the price of coal raised after January 1928 will have to be allowed: see p. 333 of the preliminary judgment.

In passing the final decree the Subordinate Judge said: "The plaintiffs are entitled to interest on price of coal as directed in the said judgment and decree." Interest has therefore been rightly allowed from date of suit up to the date of final judgment. Another point has been taken that the Court both by preliminary decree and final decree has awarded the costs of dewatering the mines, viz., Rs. 16,834-14-3 as against defendants 5 to 9: see Vol. A, p. 344; also Vol. A, p. 490. It is contended that this direction is wrong as it has not been established that mines have been flooded as the result of depillaring. This ground has been specifically taken at p. 359 ground 43. We think the Court is wrong in giving the direction in the preliminary judgment and final judgment regarding Rs. 16,834-14-3 which must be deleted as there is no evidence that the flooding of the mines was the result of depillaring by the defendants. The result is that the final decree of the Subordinate Judge as against defendants 5 to 9, appellants, must be varied in this

35 Ram Krishna Muraji v. Ratan Chand, 1931 P O 136=132 I C 613=58 I A 173=53 All 190 (P O).

way : The plaintiffs will have a decree against the Daga defendants for

Rs. 21,747-2-0 On account of coal raised after December 1927 up to date of suit after allowing for deduction of severing coal, etc.

Rs. 46,044-2-0 On account of the loss of coal from the damaged area of 15 bighas after allowing deductions.

Rs. 67,791-4-0

To this will have to be added interest at 6 per cent per annum from date of suit up to the date of final decree, i. e. 5th October 1934, and to this will have to be added the cost of logs and timberings, Rs. 6,100 + Rs. 1,800 = Rs. 7,900. This aggregate sum will be the decretal amount against defendants 5 to 9. The decretal amount will bear interest at 6 per cent per annum until realisation from date of final decree. A decree will be drawn up on the lines indicated in the judgment. The appeal is partly allowed. Costs will be costs in proportion throughout.

Patterson, J.—I agree.

B.D./R.K. Appeal partly allowed.

A. I. R. 1936 Calcutta 744

D. N. MITTER AND PATTERSON, JJ.

Prasanna Deb Raikat — Plaintiff — Appellant.

v.

Bengal Duars Bank, Ltd.—Defendant —Respondent.

Appeals Nos. 121 to 125 of 1933, Decided on 16th June 1936, from original decree of Sub-Judge, Jalpaiguri, D/- 23rd December 1932.

(a) Hindu Law — Religious endowment — Shebaitship — Presumption is that it vests in the heirs of founder till proved to be disposed of otherwise — "De facto shebait" — Person founding the deity and becoming responsible for its worship is a de facto shebait — Foundation of worship is not necessarily associated with dedication of property for carrying on worship.

Where a worship of a Thakur is founded the shebaitship is held to be vested in the heirs of the founder in default of evidence that he has disposed of it otherwise. It is the worship that is founded and the rights of worship have to be considered in determining the question as to who is to be regarded the shebait. The consecration of a deity is conceived as a living image regaled with the necessaries and luxuries of life even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest. The person founding a deity and becoming responsible for these duties is a de facto

and in common parlance called shebait. The idea of the foundation of a worship must not necessarily be associated with the dedication of properties for the carrying on of worship. Hence merely because a person has gifted certain property for the worship of the idol, he or his successor cannot claim any right to shebaitship unless he has imposed any condition regarding it : 17 Cal 3 (P C), Rel. on; 1925 P C 139, Expl. [P 747 C 2 ; P 748 C 1, 2]

(b) Hindu Law — Religious endowment — Transfer of right of management—Surrender of shebaitship in consideration of satisfying debts owed by shebait — Surrender amounts to sale—Sale is void in the absence of custom —Vendee cannot maintain suits even on behalf of deity to eject lessees under lease granted by shebait even though in actual possession of debuttar property.

Where by a deed of surrender, the shebait transfers his right of management in consideration of debts owed by him being satisfied by the transferee, the deed though mentioned as a deed of surrender, amounts to a sale and the sale therefore of the right of management by the shebait for consideration is absolutely void in the absence of custom and transferee though in actual possession of the debutter properties by virtue of the deed of sale, cannot maintain suits even on behalf of the deity to eject lessee under a lease from the shebait: 1 Mad 235 (PC) and 23 Mad 271 (PC), Rel. on; 1933 P C 75 and 1935 P C 44, Disting. [P 749 C 2; P 750 C 1]

Braja Lal Chakravarty, Bankim Chandra Mukherjee, Girija P. Sanyal, Rajendra Bhusan Bakshi and Nalini Ranjan Ghose—for Appellant.

Atul Chandra Gupta, Biraj M. Roy and Santosh K. Basu—for Respondent.

D. N. Mitter, J.—These are five appeals by the plaintiffs against as many decrees of the Subordinate Judge of Jalpaiguri dated 23rd December 1932, by which he dismissed the plaintiff's suits in ejectment. The nature of the reliefs claimed in these five suits might be divided into two heads. The suits in which appeals Nos. 121, 122 and 125 arise were for the setting aside of permanent leases created by the previous shebait of the deity Sree Sree Iswar Ram Chandra Bigrha, the appellant before us represented by Prasanna Deb Rakshit who claims to be the present shebait of the said deity. The other two appeals Nos. 123 and 124, arise out of suits in ejectment which have been brought on the ground that the defendants are temporary tenants of the deity on whom proper notices to quit have been served. All these suits having been dismissed by the Subordinate Judge the present appeals have been brought by the plaintiffs.

In order to understand the controversy raised by these appeals it is necessary to

set forth the precise case made by the plaintiffs in these plaints on which they found their title. The case made in the plaints is that there was an idol of the name of Sree Sree Iswar Ram Chandra Bigraba which was installed at a very distant time, and it is said that the origin of this foundation is lost in obscurity; but the allegation is that some predecessor of Prasanna Deb Rakshit, who also figures as plaintiff 2 in these suits, in his own personal capacity apart from his capacity as the shebait of the deity installed—the deity of the name of Sree Sree Iswar Ram Chandra Bigraba, dedicated some land of taluk Bahadur and Lantari Nawabgunj for defraying the expenses of the Sheba and Puja of the deity; that for the purpose of carrying out the Sheba the ancestor of plaintiff 2 appointed a certain pious person as Pujari or Pujak, and on the death of the said person it was the plaintiff's ancestor who was entrusted with the appointment of the succeeding Pujari. The plaint after reciting this proceeds to narrate certain events which happened in 1290 B. S. corresponding to 1883. In that year while the charge of the Sheba and Puja of the said deity were entrusted with Sita Ram Bairagi the said Sita Ram Bairagi became negligent in the performance of the Sheba on account of his bad character and Jagadindra Deb Rakshit, the predecessor of plaintiff 2, removed him from the said work of shebaitship by a parwana which is dated 10th Agrahayan, 1290 B. S., and brought the property in his own management in the first instance and subsequently by another parwana the said Jagadindra passed an order appointing Buddhu Baishnavi, step mother of the said Sita Ram, as pujarini for taking over the charge of Sheba and Puja of the said deity.

It is further stated in the plaint that Buddhu Baishnavi carried on the worship of the deity till the time of her death. It appears that in 1909 when there was a proceeding for record of rights the lands of Schs. Ka and Kha of the plaint were recorded in the name of the said Buddhu Baishnavi as shebait of the said deity. Buddhu Baishnavi died on 25th Aswin, 1316 B. S. during the pendency of the settlement operations and the lands which are the subject matter of these five suits came to be recorded as khas lands of plaintiff 2. At the time of the death of

Buddhu Baishnavi it is alleged the estate of plaintiff 2 came into the management of the Court of Wards; and the Court of Wards wanted to bring the deity and the property set apart for the sheba of the deity into the khas possession of the plaintiff. But it is stated that Sita Ram made an application to the Deputy Commissioner of Jalpaiguri who was in charge of the Court of Wards and obtained the charge of the worship of the deity and the management and preservation of the property set apart for the sheba of the deity along with it in order to carry on the work of sheba and puja. On the death of Sita Ram which happened on 17th Ashar 1331 B. S. the charge of sheba and puja of the deity under his management was with the consent of plaintiff 2 entrusted to his son Khagendra Nath Bairagi. Then comes the important allegations in paras. 8 and 9 of the plaint which are the foundation of the plaintiff's title suit in the present case.

It is alleged that Khagendra having expressed to plaintiff 2 his inability to carry on the sheba and puja of the said deity with the income of the property described in Sch. Ka to the plaint and other properties set apart for the purpose, proposed to restore the said deity and the property so set apart to the possession of the plaintiff, and the plaintiff having consented thereto, the said Khagendra executed and delivered a registered document in favour of the plaintiff on 29th Kartick 1332 B. S. and restored the said deity and the property set apart for the sheba and puja of the deity to the possession of the plaintiff. It is alleged that the said bigraha at the time of filing the plaint was in the residential house of plaintiff 2 in Jalpaiguri and plaintiff 2 as shebait of the said deity was carrying on the sheba and puja. Para. 9 of the plaint, in the suit out of which Appeal from Original Decree No. 121 of 1933 arises, contains allegations regarding the cause of action for the suit, and must be reproduced here. Para. 9 commences as follows:

The plaintiff has come to learn on enquiry that Sita Ram Bairagi, the predecessor of Khagendra Nath Bairagi, had misused in various ways the said debuttar property.

One of the acts of such misuse or breaches of duty is alleged to have been committed in settling with the defendant in mukarari mourashi right, the land of Sch. (Ka) to the plaint in this suit, with-

out any right and for the purpose of securing his own interest, and improperly and without any reason, executing a registered potta in favour of the defendant to the suit, namely Bengal Duars Bank, Ltd., on 22nd February 1918. The defendant is said to have been possessing the said lands. It is further said that there was no legal necessity for this mukarari, mourashi lease and consequently the plaintiff who has succeeded to the office of the shebaitship is entitled to challenge the said transactions. Alternatively the plaintiff stated in the plaint that if the Court holds that the property in suit be not debuttar property but is property which appertains to the zemindary of plaintiff 2 the reliefs which are asked for may also be given as Sita Ram Bairagi had in those circumstances no right to grant a lease which would be binding on the plaintiff. The cause of action is said to date from 22nd February 1918, the date on which the permanent mukarari lease was granted of the lands which form the subject matter of Appeal No. 121. The plaintiffs on these allegations prayed for a declaration: (1) That the disputed land is the debuttar property of Sree Sree Iswar Ram Chandra Bigrha Thakur; (2) that plaintiff 2 as the representative of the original grantor is the present shebait of the deity; (3) that the defendant may be ejected from possession of the disputed land by removing the house, etc., therefrom and the plaintiff as shebait may be put in possession thereof. Then there is an alternative prayer Gha to which it is not necessary to refer; for this prayer is not now insisted on and nothing more need be said about the alternative prayer which proceeded on the footing that if the Court held that the land be not debutter then the zamindary right of plaintiff 2 may be declared and possession may be given to him. The plaints in the two appeals Nos. 122 and 125 follow the same line as the plaint in the suit out of which appeal No. 121 arises. The permanent Mekarari lease which was sought to be avoided in the suit in which Appeal No. 122 arises was dated 1st December 1919 and it has been marked as Ex. 22 in the suit: see p. 108, Part 2 of the paper book.

With regard to appeal No. 125 the Mourashi Mekarari lease which is sought to be avoided is dated 8th Falgun 1330 B.S. corresponding to 20th February 1924 and it has been marked as Ex. Z (4) in

the suit: see p. 141, Part 2 of the paper book. In the case to which Appeal No. 121 relates the date of the lease has already been given. The lease has been marked as Ex. 23 and is printed at p. 104, Part 2 of the paper book. The other two appeals, F. A. Nos. 122 and 123, relate to suits which, as have already been stated are suits for ejectment on the ground that the defendants are non-permanent tenants on whom notices to quit had been served. The title of the plaintiff, however, as set forth in the plaints to these suits, is the same as the title in the suit out of which Appeal No. 121 arises, which have been set forth with sufficient fullness before. The cause of action is only different. The defences to the suits fall under several heads: (1) that the deity was not installed by the ancestor of plaintiff 2 who may be described as the Raikats; (2) that the properties were not debuttar but were lakheraj Baishnabottar properties belonging to the ancestor of Sita Ram Bhairagi and therefore the leases were valid; and (3) that in case of ejectment the defendant was entitled to compensation for the substantial structures which have been erected on the land by the defendant.

On these pleadings the Subordinate Judge framed a number of issues and it is necessary only to refer to issues 2, 5, 6, 8 and 9 which are issues which have been debated before us in these appeals. On this state of pleadings after taking evidence both oral and documentary the Subordinate Judge has reached the following conclusions: (1) that the deity was not installed by the ancestor of Prasanna Deb Raikat and that the work of Sheba was not entrusted to Sita Ram by any ancestor of the Raikats; (2) that the properties in suit were debuttar properties in the sense that they were made gift of by the ancestor of the Raikats, who was the owner of the estate of Baikunthapur on the footing that although the deity was installed by the Bairagi there was a grant for carrying on the Sheba by the Raikats out of the estate; (3) with regard to the Mekarari Mourashi leases the Subordinate Judge came to the conclusion that these being Mekarari leases which were executed without legal necessity and consequently these leases were not valid against the endowment. But the Subordinate Judge comes to the conclusion that as a Raikat was not a shebait he was not competent to institute the suits in which

these appeals arise for avoiding the leases; (4) that Raikat's claim to shebaitship is barred by limitation; and (5) defendant is not entitled to compensation as the lease was taken with the knowledge that it was debuttar. On these findings the Subordinate Judge has dismissed these five suits out of which these five appeals arise.

In these appeals the plaintiffs have raised several contentions (1) that the learned Subordinate Judge is not correct in his finding that the deity was not installed by some ancestor of Raikat, (2) he should have held that the plaintiff as descendant of the founder would be entitled to cancel the alienations which were in breach of duty of shebait and would be entitled by reason of the misconduct of the shebait for the time being to assume shebaitship and to see to the restoration of the properties endowed after setting aside the invalid alienations. (3) That even on the findings of the Court below that the properties in suit were not debuttar properties and were only made a gift of by the ancestor of plaintiff 2, the plaintiff, as descendant of the donor, has the right to have the lands restored to endowment upon recovery of the same from a trespasser. (4) In any view of the matter the learned Judge having found that the property was debuttar and that there was a loss in the income of the deity the suit on behalf of the deity is maintainable, and assuming that the plaintiff has no right the Court can take possession of it by appointing Raikat as the next friend, for it is common ground that since Kartic 1332 B. S. Raikat, plaintiff, was carrying on the work of the shebait; and (5) that the finding of the Court below that the rights of the plaintiff Raikat as Shebait had become barred by limitation is wrong. We will deal with the points which have been raised in these appeals on behalf of the appellants in the order in which we have stated them.

With regard to the first point the contention of the appellants is that there is no evidence on the side of the defendants that the installation of the deity was by the ancestor of Sita Ram. (His Lordship then examined the evidence on the point and held that the Idol was installed by Sita Ram Bairagi and the judgment proceeded.) This disposes of the first point taken in this appeal on behalf of the appellant. We proceed now to deal with the second point that plaintiff as a descen-

dant of the founder would be entitled to cancel the permanent and Mokarari leases which were tantamount to breaches of duty in the Shebait owing to the misconduct of the Shebait and to assume Shebaitship for the time being and to restore the properties endowed after letting the invalid alienation to be set aside. In this part of the case considerable time has been spent on the question as to whether the predecessor of Prasanna Deb Raikat could be regarded as the founder of the worship. It is argued by Mr. Chakravarty on the one hand that as it is admitted that Baikunthapur Raj Estate dedicated certain properties for carrying on the worship of the idol the predecessor of Raikat must be regarded as the founder of the worship notwithstanding the finding of the lower Court which has now been affirmed that the deity was installed by Sitaram. The argument of the appellant is that there can be no foundation of the worship until properties were dedicated for carrying on the worship. In other words it is said that the idea of the foundation of a worship must necessarily be associated with the dedication of properties for the carrying on of the worship. This contention seems to be opposed to the two decisions of their Lordships of the Judicial Committee of the Privy Council which have been referred to in the course of the argument, namely the decisions in 16 I A 137=17 Cal 3 (1), and 52 I A 245 (2).

It appears the facts in the first mentioned case were that a picture was consecrated. The picture had a peculiar sanctity attached to it by the Ballav Acherjee sect or community of Vishnuvites and as incident thereto offerings made to the idol, and subsequently a temple was built in Calcutta where the Idol was located. In 1825 one Dowji, the grandfather of the plaintiff, in that case, paid a visit to Calcutta and presented to his disciples there a consecrated portrait of himself which was worshipped and which was the subject of contention in that case. It appears that a lady of the name of Mune Bibi was moved to provide for a better habitation

1. Gossamee Sri Gridharjee v. Romonlaljee Gossami, (1890) 17 Cal 3 = 16 I A 137 = 5 Sar 350 (P O).

2. Pramatha Nath v. Pradumnya Kumar Mallick, 1925 P C 139=87 I C 305 = 52 I A 245=52 Cal 809 (P O).

of the consecrated picture. She was a disciple of Purushottum and to him she addressed a deed of gift conveying a new house to Dowjee and to her family Thakur Beharyjee who is another presentment of Krishna. This gift was burdened with a certain condition and it was held that the founder or founders of the worship had accepted the condition imposed by the donor, he was bound by the same, he might or might not have accepted it but having accepted it that condition must prevail. It appears that a temple had been erected for the idol on condition that the defendant in that case would be the shebait. It was held by their Lordships of the Judicial Committee that the plaintiff in that suit could not recover possession of such temples though it had in part been created after the grant by the subscription of the worshippers, no evidence having been given that the subscribers did not know of the condition, or had paid their money with any reference to the question of shebaitship. This case is authority for the proposition that where a worship of a Thakur is founded the shebaitship is held to be vested in the heirs of the founder in default of evidence that he has disposed of it otherwise.

The question as to who is the founder of worship is considered also in the decision of the case in 52 I A 245 (2). There are passages in the judgment of their Lordships of the Judicial Committee of the Privy Council which throw light on the question in controversy in the present case. It appears that one Mutty Lal Mullick, a wealthy inhabitant of Calcutta, established the idol in question in that case and he subsequently dedicated properties for the worship of the idol. In this state of facts their Lordships of the Judicial Committee observe :

It seems accordingly clear that in Mutty Lal Mullick's lifetime the idol was, as already stated, established as household god ; and the pious founder narrating his own upkeep and maintenance of the deity gave funds in order that these should be continued ; and he prescribed the duty of continuance to the widow during the adopted son's minority.

In this case it is true that worship was being carried on by the mother but there was a dedication of properties after the worship was founded. And according to the passage which has already been quoted it seems that Mutty Lal Mullick was regarded as the founder. It is the wor-

ship that is founded and the rights of worship have to be considered in determining the question as to who is to be regarded as the shebait. The consecration of a deity is conceived as living image regaled with the necessities and luxuries of life even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest. The person founding a deity and becoming responsible for these duties is de facto and in common parlance called shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or as in the case of Sudras, to which caste the parties belonged, by employment of a Brahmin priest to do so on his behalf. That there is no distinction between the founder of a worship and the person who makes a subsequent grant of property for carrying on the worship has been sought to be supported by a passage which was cited to us by Mr. Braja Lal Chakravarty from the decision in 30 C L J 177 (3) which was affirmed by the Privy Council in 48 I A 187 (4) at p. 188 of the said report. Mookerjee, J. applied to Debuttar Estates the rule established in England with regard to charitable foundations established by a private person that he and his heirs are the visitors and it is only when the line of the heirs of a private founder has become extinct or cannot be found or are incompetent to act, (1750) 1 Ves Sen 462 (5) at p. 472, that the visitatorial power devolves on the Crown. In support of this well-recognized principle of English law Mookerjee, J. cited a passage from (1750) 1 Ves Sen 462 (5) at p. 472 which is as follows :

This right, according to Lord Hardwicke, has its origin in the property of the donor and the power which every one has to dispose, direct and regulate his own property.

On the other hand Mr. Gupta who appears for the respondent contends that the passage just quoted is merely a truncated portion of Lord Hardwicke's judgment and that when the whole passage is looked at it would appear that Lord Hardwicke is drawing a distinction between the donor of properties for a chari-

3. Monohar Mukherjee v. Peary Mohan Mukherjee, 1920 Cal 210=54 I O 6=24 C W N 478=30 C L J 177.

4. G. H. Hook v. Administrator General of Bengal, 1921 P O 11 = 60 I O 631 = 48 I A 187=48 Cal 499 (P O).

5. Green v. Rutherford, (1750) 1 Ves Sen 462.

table institution and the person who subsequently adds properties to the charitable institution. At p. 471 of the report the following passage occurs :

This leads to the second and main point, on the merits of the plea. I agree, that the presentation set forth by plea, is not a proper subject of visitatorial power. To argue this clearly, the original and visitatorial power must be considered. The original of all such power is the property of donor, and the power every one has to dispose, direct, and regulate his own property, like the case of patronage; *cujus est dare*, etc., therefore, if either the Crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder or his heirs, or the person especially appointed by him to be visitor, to determine concerning his own creature. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power; from which account it appears, the nature of this power is *forum domesticum*, the private jurisdiction of the founder, and cannot extend further, unless some other person grafts upon it and by express words or necessary implication subjects the estate or emolument given by him, to the same visitatorial power and to be governed by the same rules.

If the whole of this passage is taken into account it would appear that a charitable foundation so far as it is formed to give effect to a charitable purpose in reference to property provided by the founder is the creature of the founder who has the power to direct or regulate his own property or he or his heirs have the same power with reference to the other properties that may be given in support of the same charitable institution unless the second donor grafts a condition that the estate given by him is subject to some other visitatorial power. In the present case it does not appear that when the Baikunthapur estate made a gift of the properties in suit for the worship of the idol it imposed any condition regarding shebaitship. The second ground fails and so does the third which is practically the same as the second, for the second ground is that the gift of the properties was that of the predecessors of plaintiff 2, Raikat, and, therefore, the lands ought to be restored to him upon recovery from the trespassers.

The fourth ground is, as already stated, that as the property is debuttar and as there is a loss in the income of the deity, the suit on behalf of the deity is maintainable; and assuming that the plaintiff

has got no right the Court is competent to appoint the plaintiff as shebait in the sense of his being the next friend of the perpetual infant, the idol and thus allow him to continue the suits on behalf of the deity. It is argued for the respondent that the plaintiff really rested his case of getting the Shebaitship on the basis of the sale of the shebaitship to the plaintiff by Khagendra on 29th Kartic 1332 B. S. which has been described in the deed of surrender, Ex. 2 : see p. 155 of the paper book (Part 2). It seems to us that this deed although described as a deed of surrender is really a deed of sale of the shebaitship by Khagendra. The consideration of Rs. 7,500 is mentioned as being paid out of kindness of Khagendra. The material passage of this document is this :

So at present I have no other alternative than to surrender the post of the said shebait and to return the said deity to you together with the debuttar property of the said deity described in the schedule hereunder. In connexion with the sheba of the said deity of you from the time of my predecessors I am at present indebted to the extent of Rs. 7,500 and I have no other means of being released from the debt. I, in succession to my predecessors, have been performing the work of shebait of the deity under you and your predecessors and have become indebted; so, out of kindness, and with a view to relieve me from the indebtedness, you have given me Rs. 7,500 and I, without any objection, and out of my free will, return the said deity to you and give up possession of the debuttar property described in the schedule hereunder in your possession.

Looking carefully into the document and whatever has been described in it, one has no hesitation in coming to the conclusion that it was really a deed of sale of the shebaitship to plaintiff 2 by Khagendra. If that is so then on the authorities to which we shall refer presently this transfer of the shebaitship is absolutely void in the absence of any custom sanctioning such transfer. No custom as to the transfer of the shebaitship has been alleged or proved in these cases. In these circumstances according to the decisions in 4 I A 76 (6) and 27 I A 69 (7) the sale is void. Their Lordships of the Judicial Committee expressed themselves on this point in the following language in the last mentioned case:

6. *Raja Vurmah Valia v. Ravi Vurmah Kunshi Kutti*, (1876) 1 Mad 235=4 I A 76=3 Sar 687 (P O).

7. *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*, (1900) 23 Mad 271=27 I A 69=7 Sar 671 (P O).

In 4 I A 76 (6) this committee held that an assignment by the Urallars (managers) of a pagoda of the right of management thereof was beyond their legal competence under the common law of India, and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraj and the possession which was taken by the purchasers was adverse to them: see p. 76 of the report 27 I A 69 (7).

The deed of sale evidenced by Ex. 2 being void the title to shebaitship still remains in Khagendra. It is true that possession has been taken by plaintiff 2 from Khagendra both of the idol and endowed properties, at least some, and at the expiration of 12 years from the date of execution of Ex. 2 the question might arise whether plaintiff 2 has acquired the right of shebaitship by adverse possession for more than the statutory period of 12 years. Such circumstances occurring it may be open to the plaintiff to raise new contentions with regard to the matters now in controversy on different grounds. We are not concerned with them at present. The question at present is whether on the issue as framed and in the circumstances which we are now dealing with the plaintiff is entitled to maintain these suits. We are of opinion that this deed of sale is void and we agree with the Subordinate Judge on this point. We do not think that in these circumstances plaintiffs had any right to maintain the suits. Another point which was raised in the final reply by the appellants does not seem to have been taken in the Court below. It is based on the actual possession of the properties in question by the plaintiff as de facto shebait and our attention has been drawn to two recent decisions of their Lordships of the Judicial Committee of the Privy Council in 60 I A 124 (8) and 62 I A 47 (9), and Mr. Chakravarty in his final reply stressed the importance of the decisions of these cases on the question that his client being in actual possession is entitled to succeed in these suits both to set aside the leases as also for ejecting the temporary tenants. At the first blush there are passages which if read divorced from the context might support the contention that the

shebait who is in de facto possession of the debuttar properties, might maintain suits of the kind we are dealing with. It is said that as de facto shebait plaintiff 2 is entitled to maintain the suit for recovering debuttar properties from trespassers. But it is to be noticed that these observations of their Lordships to which we shall refer presently have to be read with reference to the facts of the particular case in which these observations were made. While dealing with the transfer by the previous Mohant by sale in the first case Lord Russell of Killowen expressed himself thus:

Their Lordships however are not now concerned with any question of title, because both the Courts below have found that the plaintiff is the person in actual possession of the Pilgunj Math and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the Math.

It would appear from the original judgment of the Patna High Court as the case is reported in 9 Pat 885 (10) that in that case the plaintiff was claiming the property as the property of the math or the idols installed in the math and that he was in actual possession of the math his possession having been recognized all round as the possession of the mohant of the math. The learned Judges of the High Court remarked :

The learned Subordinate Judge obviously refers to this fact when he styles him as the de facto mohant of Paliganj, an expression which has been severely criticized by the learned advocate for the appellants.

In that case an appeal was taken to the Privy Council by the mohant, 60 I A 124 (8), and in those circumstances their Lordships of the Judicial Committee held that the plaintiff, who was in actual possession of the math, was entitled to recover for the benefit of the math the property which belonged to the math. Reliance has been placed on the passage in the case cited, 62 I A 47 (9), where Sir Shadi Lal in delivering the judgment of the Judicial Committee said as follows:

As observed by this Board in 60 I A 124 (8) a person in actual possession of the math is entitled to maintain a suit to recover property appertaining to it not for his own benefit but for the benefit of the math.

Also previous to this part of the judgment after stating the facts of the case, their Lordships observed as follows :

There can be little doubt that Karia has been managing the affairs of the institution since

8. Ram Charan Das v. Naurangi Lal, 1933 P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).

9. Mahadeo Prosad Singh v. Karia Bharti, 1935 P C 44=153 I C 1100=62 I A 47=57 All 159 (P C).

10. Naurangi Lal v. Ram Charan Das, 1930 Pat 455=127 I C 817=9 Pat 885=11 P L T 403.

1904, and has since the death of Rajbans been treated as its mohant by all the persons interested therein. The property entered in the revenue records in the name of Rajbans was, on his death, mutated to Karia, and it is not suggested that there is any person who disputes his title to the office of the mohant. In these circumstances their Lordships agree with the High Court that Karia was entitled to recover for the benefit of the math the property which belonged to math and is now wrongly held by the appellant.

The facts of the present case are distinguishable. In the first place the cases cited are cases of mohantship of a math whereas the present case is one of shebaitship of an endowment. We have already held that Khagendra's transfer is void. Even if plaintiff 2 had purchased from the shebait Khagendra, as his heirs were all living, these heirs according to our view would have been the next shebait. In the circumstances it cannot be said that there is no person who is capable of disputing the title of the present plaintiff to the office of the shebaitship. Besides, it is also an important circumstance to note that this was not the point of view which has been presented in this case. The plaint is not based on the possession of the present plaintiff 2 as de facto shebait but on the other facts which we have already stated. We think that these two Privy Council cases do not assist the appellants. It is not necessary in view of these considerations to deal with the last question about limitation of the plaintiff's right as shebait. It is just sufficient for our purposes to say that the present suits are not maintainable on the state of facts which have been pleaded in the plaint and raised by the pleadings. The result is that these appeals are dismissed with costs. Full hearing fees are allowed in Appeal No. 121 and half hearing fees are allowed in the remaining appeals.

Patterson, J.—I agree.

A.L./R.K. Appeals dismissed.

* A. I. R. 1936 Calcutta 751

D. N. MITTER AND S. K. GHOSE, JJ.

Sm. Annabati Dassi and others—Appellants.

v.

Parmeswar Mullick and others — Respondents.

Appeal No. 172 of 1935, Decided on 7th August 1936.

* Civil P. C. (1908), S. 151, O. 41, R. 1—Decree in suit for partition making no pro-

vision for maintenance of some members of family—Appeal directed to question of maintenance only — Certified copy of portion of decree relating to allotment of property need not be filed—Appeal filed without such copy is in proper form — Court can also admit appeal in exercise of its inherent powers.

Where a decree in a suit for partition is divisible in the sense, that it contains a part with regard to allotment to different parties, and makes no provision for maintenance for some of the members of the family, it is not necessary to file a certified copy of that portion of the decree which relates to allotment, along with the memorandum of the appeal, if the appeal is directed to the question of maintenance only. At any rate the appellate Court can, under such circumstances, exercise its inherent powers under S. 151, in admitting the appeal as being in proper form. [P 752 C 1]

Prokash Chandra Ghose — for Appellants.

Bankim Ch. Banerjee, Panna Lal Chatterjee (Deputy Registrar) and Radhika Ranjan Guha—for Respondents.

D. N. Mitter, J.—It appears that the appellants filed an appeal against the final decree in a suit for partition. The main grounds on which this appeal has been rested relate to an omission of the provision for maintenance of the appellants in the final decree for partition and although there are three grounds which possibly might lend colour to the contention of the respondents that the appeal is directed against the allotment made by the final decree, the learned advocate for the appellants is now prepared to delete those three grounds and to confine his case only to the question of maintenance. It appears that the memorandum of appeal was presented on 28th June 1935, and on 17th July 1935 the Registrar passed this order. "Let the part of the decree be accepted at present subject to objection by the respondents, when they appear." The report of the commissioner which included a large number of maps was made a part of the decree. The portion of the certified copy of the decree which was filed with the memorandum of appeal included the commissioner's report but not the maps which form a part of the report of the commissioner. The question is whether the memorandum of appeal conforms to the provisions of O. 41, R. 1, Civil P. C., which enacts that :

Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the

decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded.

It is contended on behalf of the respondents that the memorandum of appeal does not conform to the provisions of O. 41, R. 1, seeing that the appellants have not filed a copy of the entire decree. Question arises, where the decree is divisible in the sense that it contains a part with regard to allotments to different parties in a partition suit and makes no provisions for maintenance for some of the members of the family, whether in such circumstances that portion of the decree which relates to allotment need also be filed along with the memorandum of appeal if the appeal is directed to the question of maintenance only. One should take a sensible view of the statute. There does not seem any sense in filing the unnecessary and expensive certified copy of the Commissioner's Report including the map where no objection is taken to the allotment made by the commissioner and the appeal is only confined to that portion of the decree which does not direct or make any provision for maintenance of the appellants. It is possible to read the language of the statute to mean that the memorandum shall be accompanied by a copy of that part of the decree appealed from and against which the grounds of appeal were all directed. But even if we have any doubt with regard to strict and literal interpretation of O. 41, R. 1, we can exercise in the circumstances like the present our inherent powers under S. 151, Civil P. C., which says that:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

In our opinion there does not seem to be any sense in asking the appellants to file the maps forming part of the decree although the appellants' grounds of appeal are only limited to the question of maintenance. The cost for taking a certified copy of the maps is considerable for it appears that their printing cost is about Rs. 694. In these circumstances we overrule the objection of the respondents and hold that the part of the decree which has already been filed will be sufficient and the memorandum of appeal is in order. In our opinion the appeal in the circumstances is in order. This ap-

plication of the appellants to exclude the maps from the list of papers to be printed is granted subject to the condition that the appellants delete the grounds other than the grounds which they want to take for making a provision for grant of maintenance.

S. K. Ghose, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 752

GUHA AND BARTLEY, JJ.

Serajgunj Co-operative Urban Bank, Ltd. and another—Petitioners.

v.

Bindhubashini Dassya and others — Opposite Parties.

Civil Revn. Case No. 221 of 1936, Decided on 3rd August 1936, from order of Second Court, Sub-Judge, Pabna, D/- 13th January 1936.

Civil P. C. (1908), O. 44, R. 1 — Appeal in forma pauperis — Review application from judgment on it is maintainable without payment of court-fees.

It cannot be the intention of legislature that when a suit or an appeal is allowed to be presented by any party as a pauper and exemption in the matter of payment of court-fees is granted under the law, any application for review of judgment arising out of the same proceedings would require payment of court-fees.

[P 753 C 1]

An application for review of judgment passed on appeal, must under the law, be considered to be in continuation of the appeal itself which was in forma pauperis and therefore on grounds both of sound reason and obvious justice, such application must be held to be maintainable without payment of court-fees: 20 All 410, Rel. on.

[P 753 C 1]

Gopal Chandra Das and Jnanendra Kumar Roy—for Petitioners.

Bijan Kumar Mukerji and Jatindra Mohan Lahiri—for Opposite Parties.

Order.—This Rule is directed against the order passed by the learned Subordinate Judge, Second Court, Pabna, on 13th January 1936, holding that an application for review of judgment by a party who has been allowed to appeal as a pauper was maintainable, without payment of court-fees. The question raised in the case, namely whether an application for review of judgment passed on appeal which was allowed to be prosecuted by the party concerned as a pauper, under O. 44, R. 1, Civil P. C., attracted the provisions of the Court-fees Act, relating to an application for review of judgment, is an important one; but in our judgment,

there is no difficulty in answering the same in the negative in view of the clear provisions of the law contained in the Code of Civil Procedure, relating to suits and appeals by paupers. As was pointed out by the Allahabad High Court in 20 All 410 (1), the word "suit" meant the suit instituted on permission to sue as a pauper being given.

That suit is then to proceed as an ordinary suit under the Code of Civil Procedure. One of the incidents of such a suit is that a party aggrieved by a decree or order in that suit may under certain circumstances present an application for review. The presentation of such an application is a proceeding connected with the suit. It follows therefore that when an application for review of judgment is presented in the course of the proceedings in a suit in forma pauperis, that application like the plaint in the suit, is not liable to any court-fee. The observations of the learned Judges of the Allahabad High Court referred to above with which we entirely agree, apply with equal force to the case of an application for review of judgment passed on appeal by a pauper, regard being had to the specific provisions contained in O. 44, R. 1, Civil P. C., allowing a person to appeal as a pauper, subject in all matters to the provisions relating to suits by paupers, in so far as those provisions are applicable. There can be no question that an application for review of judgment passed on appeal, must under the law, be considered to be in continuation of the appeal itself which was in forma pauperis; and both sound reason and obvious justice in a case of this description demand, that such an application must be held to be maintainable without payment of court-fees, at the time of filing the same, as in the case of the memorandum of appeal allowed to be presented without payment of adequate court-fees.

It may be stated that it cannot possibly be presumed that the legislature intended that when a suit or an appeal is allowed to be presented by any party as a pauper and exemption in the matter of payment of court-fees is granted under the law; any application for review of judgment arising out of the same proceeding would require payment of court-fees. The rule is discharged; the order of the Court

below, rejecting the preliminary objection raised by the petitioner in this Court on the question of court fees is affirmed. The opposite party is entitled to her costs in the Rule. The hearing-fee in this Court is assessed as two gold mohurs.

D.S./R.K.

Rule discharged.

*** A. I. R. 1936 Calcutta 753**

DERBYSHIRE, C. J. AND COSTELLO, J.

Rash Behari Shaw (Handa) and others
—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 446, 461 to 466 of 1935, Decided on 10th July 1936.

*** (a) Criminal P. C. (1898), Ss. 235 and 239—It is discretionary with Court to try accused jointly or separately—High Court has power to hold that joint trial was not proper and to set aside convictions—Joint trial should not be held where there is risk of embarrassment to defence.**

Under S. 239, a discretion is given to a Court to try certain persons either jointly or separately. The manner in which this discretion is to be exercised must depend upon the facts of each case and the High Court, on a consideration of the circumstances of the case, has power to hold that the accused should not have been tried jointly and can set aside the conviction and sentences without directing a retrial should it think fit. Even where Ss. 235 and 239 justify a joinder it should not be resorted to, if there is a risk of embarrassment to the defence: 1915 Cal 743 and 1925 Cal 341, *Rel. on.* [P 759 C 2]

(b) Criminal P. C. (1898), S. 235—Conspiracy having one or more objects in view—Offence of conspiracy and acts committed in pursuance of it come under one transaction—Transaction continues so long as conspiracy continues.

Where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of such conspiracy, the several offences generally form part of the same transaction within the meaning of that expression as used in S. 235. The principle will also apply where the several offences are by different persons. The offence of conspiracy and the acts done in pursuance of the conspiracy can rightly be said to come under one transaction and transaction continues so long as the conspiracy continues. [P 759 C 2; P 760 C 1]

Where, therefore, there is a conspiracy and specific offences are committed in pursuance of such conspiracy, persons who are parties to that conspiracy and concerned in the specific offences can lawfully be tried under one and the same trial: 1922 Cal 107; 1925 Rang 296; 1930 Rang 114 and 1915 Cal 719, *Ref.* [P 760 C 1]

*** (c) Penal Code (1860), S. 120-A—Each of accused not in agreement to do same illegal act or cause same illegal act to be done—They are not parties to one and same conspiracy.**

In order to constitute the offence of conspiracy as defined in S. 120-A, it is only necessary for the prosecution to show that the persons concerned had agreed to do or cause to be done an illegal act or an act which is not illegal by illegal means, and it is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to the object. Where it cannot be said, except by straining language, that every one of the accused was in agreement to do the same illegal act or cause the same illegal act to be done, they cannot be held to have been parties to one and the same conspiracy within the meaning of S. 120-A.

[P 760 C 1, 2]

Certain persons were charged under S. 120-A read with S. 39, Electricity Act, and S. 379, Penal Code, with having been parties to a criminal conspiracy to commit theft by dishonest consumption and user of electric energy belonging to a certain company. It was the case of the prosecution that there were two classes of operators, namely (1) those who did the actual tampering and their adherents, and (2) the consumers and their servants who allowed the tampering to be done. It appeared that the first class of the operators were in an agreement with each other and had in view one object, namely to obtain unlawful money by tampering with meters wherever possible and the other class had in view the object of wrongful gain to themselves by allowing tampering of those meters and the making of a false record of the amount of electric energy consumed by them with consequent reduction in the amount of their bills to be paid to the electric Company and it also appeared that each of the consumers abetted by his employees or servants was acting in conjunction with some of the tamperers but not in agreement with other consumers:

Held: that the accused could not be said to have been parties to one and the same extensive conspiracy, nor could the acts complained of be said to have been done in pursuance of any conspiracy and therefore did not arise out of the same transaction. The tendency on part of prosecution of joining several persons in one trial under the general charge of conspiracy along with charges for other substantive offences which could be tried separately, commented upon and deprecated.

[P 760 C 2]

(d) Criminal P. C. (1898), S. 239—Accused jointly tried under S. 239—Validity of trial—In judging validity, test to be applied is accusation made and not result of trial—Matter must be looked at as it appeared to Magistrate when framing charges.

The test to be applied, in judging the validity of a trial, which purports to have taken place under the provisions of S. 239, is the accusation made and not the result of the trial provided the accusation is a real one, and not a mere excuse for the joinder of charges which cannot be otherwise joined. In order to decide, whether several persons can be tried jointly with having committed offences forming part of the same transaction the Court has to look to the accusation, i. e. the prosecution case as set forth in the charges and if according to that case the offences are such as could be regarded as parts of the same transaction, it will be justified in holding a joint trial.

[P 761 C 1]

The matter must be looked at, as it appeared to the Magistrate at the time when he framed the charges against the accused before him and not to the state of affairs existing long after the trial has proceeded on its way leading to the conviction of the accused.

Where having regard to all the facts which were before the Magistrate when he framed the charges against the accused it appears that the Magistrate was acting judicially and properly exercising his discretion given to him under S. 239, there is no illegality in the joint trial of the accused as to warrant quashing of the proceedings: *Case law reviewed*.

[P 764 C 2; P 765 C 1]

(e) Criminal P. C. (1898), S. 239—Several persons jointly tried in same trial—Irregularity, if any, not causing prejudice to accused—Proceedings cannot be questioned, more so when no protest has been made on behalf of accused.

Where the irregularity, if any, in the joint trial of several persons at one and the same trial, is not such which, on the actual facts of the case, caused any prejudice to the accused or by itself entailed any failure of justice, it is no ground for quashing the proceedings, more so when no protest or complaint is made by or on behalf of the accused against the course adopted by the Magistrate.

[P 765 C 1]

*(f) Electricity Act (1910), S. 39—Meaning of—S. 39 only means that offender is to be treated in same way as if he had committed offence of theft.

Section 39 does not say that dishonest abstraction or consumption or use of energy is theft. S. 39 means no more than that the offender is to be tried in the same way as if he had committed the offence of theft: 1929 *Rang* 203, *Ref*.

[P 765 C 2; P 766 C 1]

(g) Sale of Goods Act (1930)—Applicability of—Whether Act applies to electricity—(*Quaere*).

Quaere:—It is doubtful whether the Sale of Goods Act is applicable to electricity.

[P 766 C 1]

(b) Electricity Act (1910), S. 39—Abstraction is not always necessary ingredient—Consuming of energy and regular causing of record of that use to be altered amounts to dishonest user.

Abstraction is not always a necessary ingredient for an offence under S. 29. The consuming of electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered, amounts to a dishonest user within the meaning of S. 39; and the persons causing or allowing the alteration of the figures on the dial must be deemed to have committed theft within the meaning of S. 379, Penal Code: *Reg. v. White*, (1852) 6 *Cox's C C* 213, *Disting*.

[P 766 C 2; P 767 C 1, 2]

(i) Electricity Act (1910), Ss. 39 and 44—Scope of.

Sections 39 and 44, Electricity Act, are to be considered as separate enactments for purposes of S. 26, General Clauses Act.

[P 768 C 1]

Birbhusan Dutt, Jyotish Chandra Guha, Hiralal Ganguli, Carden Noad, S. K. Sen, Debi Prosad Khaitan, Satindra

Nath Mukherji and N. K. Basu—for Appellants.

Page, J. K. Mukherji, Bholanath Dutt and Srish Chundra Roy Choudhury—for the Crown.

Judgment. — The appellants in these appeals are Rash Behari Shaw, Sushil Kumar Ghose, Patal Chandra Santra, Jagadish Singh, Manindra Nath Dey, Babulal Chowkhani, Ganesh Bahadur and Sailendra Nath Mukherji. They together with four other persons, Panchkari Bannerji, Kumud Nath Nandy, Sailendra Nath Sanyal, and Harnarian Chatterji were jointly tried before the Chief Presidency Magistrate, Calcutta, and as a result of the trial the present appellants were convicted and sentenced on various charges, and the other four persons were acquitted. All the accused persons were charged with having been parties to a criminal conspiracy to commit theft by dishonest consumption and user of electrical energy belonging to the Calcutta Electric Supply Corporation between the month of January 1934 and 20th January 1935, and in consequence of such conspiracy theft was committed at the Bharat Laxmi Cinema, at the Jupiter Cinema and at other places. They were charged with being parties to this conspiracy together with, amongst others, three persons, Krishna Chandra Shome, Bholanath Chatterji and Hardwar Singh, who were originally in the position of being accused persons but later were discharged and called as witnesses on behalf of the prosecution. Certain other persons were alleged to be parties to the conspiracy, namely Aswini Kumar Panja, Nanilal Ghose, Md. Abdul Azim and Bhudeb Chandra Seth, all of whom were stated to be absconders at the time of the trial out of which these appeals arise, and they were subsequently arrested, tried and convicted, and the first three of them are the appellants in the supplementary case.

Against Babulal Chowkhani, who is the proprietor of the Bharat Laxmi Cinema which is situate at No. 2, Chittaranjan Avenue, there was a further charge that between April 1934, at the time when the Cinema was started, and 16th January 1935, he committed theft by dishonest consumption or user of electrical energy belonging to the Calcutta Electric Supply Corporation. Against Sailendra Nath Mukherji, Kumud Nath Nandy and Ganesh

Bahadur there was a charge of aiding and abetting Babulal Chowkhani in the commission of the offence of theft of electrical energy belonging to the Calcutta Electric Supply Corporation. Sailendra Nath Mukherji, Rash Behari Shaw, Sushil Kumar Ghose and Jagadish Singh were charged with having aided and abetted Md. Abdul Azim, proprietor of the Jupiter Cinema, in the commission of theft of electrical energy at that Cinema between the month, of February 1934 and 23rd December 1934.

Put shortly therefore all the 12 persons who were tried together before the Chief Presidency Magistrate were charged with an offence punishable under S. 120.B, I. P. C., read with S. 39, Electricity Act, 1910, and S. 379, I. P. C. Babulal Chowkhani was charged with an offence punishable under S. 39, Electricity Act, 1910, read with S. 379, I. P. C. Sailendra Nath Mukherji, Kumud Nath Nandy and Ganesh Bahadur were charged with an offence punishable under S. 109, I. P. C., read with S. 39, Electricity Act, 1910, read with S. 379, I. P. C. Sailendra Nath Mukherji, Rash Behari Shaw, Sushil Kumar Ghose and Jagadish Singh were charged with an offence punishable under S. 109, I. P. C., read with S. 39, Electricity Act, 1910, read with S. 379, I. P. C.

The learned Magistrate in his elaborate and exhaustive judgment first of all gave a survey of the circumstances leading to the institution by the Calcutta Electric Supply Corporation of the proceedings against the present appellants and the other accused persons who were tried, and the Magistrate refers to certain evidence which was given for the purpose of showing that prior to the investigation which led to the arrest of the present appellants and other persons there had been an abnormal loss of electricity which could not be accounted for. As a consequence of this three special meter readers, Khambata, (P. W. 30), W. J. Hutchison (P. W. 31) and M. C. Hart (P. W. 32), were appointed on 7th July 1934. As a result of the readings taken by these three persons proof was obtained that in three places meters had been tampered with as they showed reverse readings, i. e., lower readings taken on certain dates than the readings taken on previous dates. The next step taken by the Corporation was to instruct a meter reader named N. K.

Chatterji, (P. W. 6), to take daily readings at the Bharat Laxmi Cinema. When giving evidence on 30th January 1935 N. K. Chatterji stated that for the previous nine months he had, under orders, been taking weekly readings of the Cinemas and Theatres which he had been entering in two books, one for Central Calcutta and one for North Calcutta. He began to take weekly readings at the Bharat Laxmi Cinema and at the Jupiter Cinema on 4th June 1934, (Exs. 20 and 21). At the Bharat Laxmi Cinema he noticed a decrease in consumption which he reported to his superior officer, one Augustin, who thereupon ordered him to take daily readings at the Bharat Laxmi Cinema. This he did from 20th August 1934 to 4th September 1934 entering readings in a special note-book (Ex. 22). As a result he noted that there were reverse readings on two Mondays on two light and fan meters and also on one electric motor meter.

The next event, says the learned Magistrate, which led to the institution of this case, was a matter which was really put before the Court by the defence. This was a letter (Ex. D), dated the 21st September 1934, which purported to have been written by one Chandi Charan Mukherji to the Agent of the Calcutta Electric Supply Corporation, who sent it to the Commissioner of Police, Calcutta, for investigation by the police. In that letter Chandi Charan Mukherji stated that for the previous five or six months the teashop known as Chhaya Cabin, opposite Mukherji's house, and run by one Krishna Chandra Shome, had been used as the rendezvous of certain persons engaged in tampering with electric meters. He mentioned five persons and offered to assist in the arrest of the culprits. Inspector Sukrul Hossein (P. W. 11-A) of the Detective Department was deputed to investigate the matter. He made arrangements for a watch to be kept on the Bharat Laxmi Cinema from the third week of September 1934 and that watch continued till the latter part of December 1934. During the period from the 1st to the 12th November two officers of the Calcutta Electric Supply Corporation, Mr. M. S. Thacker (P. W. 8) and N. S. Rau (P. W. 9), took readings at the Bharat Laxmi Cinema. The prosecution case was that the readings taken by these two officers showed that the meters at

that Cinema had been tampered with. On the 17th November a formal complaint was made to the Court of the Chief Presidency Magistrate, Calcutta, by M. S. Thacker on behalf of the Calcutta Electric Supply Corporation, that complaint being in compliance with the requirements of S. 50, Electricity Act.

Subsequently, a large number of persons were arrested, some of whom were discharged, and the others tried on charges out of which these appeals arise. Inspector Sukrul Hossein (P. W. 11-A) and Sub-Inspector P. K. Dutt (P. W. 44) kept watch on the Jupiter Cinema on the 23rd December 1934. At about 5-30 a. m. on that date Krishna Chandra Shome arrived at the Cinema on a bicycle and went to an office room in a building beside the Cinema. Five or ten minutes later the police officers entered and arrested him there and also the Darwan of the Cinema, Jagadish Singh. They subsequently searched the house of Krishna Chandra Shome and there took possession of certain articles, namely, a brass die marked M-11 and another marked C. E. S. C. Ltd., certain lead seals, and wires etc., and also a letter addressed to one Aswini Kumar Panja, and another letter to Krishna Shome by one N. K. Chatterji (Ex. 36). While the search at Krishna's house was taking place, the police officers went out and saw a Baby Austin Saloon Car No. 36683 which was pursued and stopped near Jagannath Ghat. Sailendra Nath Mukherji who was in the car was then arrested. On the same day, that is, the 23rd December 1934, four other persons, Sushil Kumar Ghose, Manindra Nath Dey, Bholanath Chatterji and Rash Behari Shaw were arrested making a total of the persons arrested up to that time 7. On the 26th December two persons, Hardwar Singh and Panchkori Banerji were arrested. On the 29th December 1934 Kumud Nath Nandy and Saliendra Nath Sanyal were arrested: on 7th January 1935 Harnarain Chatterji was arrested; on the 8th January 1935 Patal Chandra Santra was arrested; and on the 10th January 1935 Ganesh Bahadur, the Darwan at the Bharat Laxmi Cinema. On that same day, that is, the 10th January 1935, the Bharat Laxmi Studio at Tollygunge owned by Babulal Chowkhani was searched by Sub-Inspector Jiban Chandra Chatterji and among the papers seized were six files of vouchers (Exs. 54/1 to 54/6),

inside of which were two pay orders (Exs. 12 and 14) with vouchers attached (Exs. 12/2 and 14/2). These pay orders bore the signature of Babulal Chowkhani and he was arrested on the 16th January 1935, and on the 20th January 1935 his Studio was searched for the second time and another pay order bearing his signature was discovered; that is Ex. 16.

Of the persons arrested the following made confessions which were recorded by an Honorary Magistrate Rai Bahadur Ashutosh Ghose as follows: Krishna Chandra Shome on the 28th December 1934; Bholanath Chatterji on 29th December 1934; Hardwar Singh on the 30th December 1934; Rash Behari Shaw and Manindra Nath Dey on the 31st December 1934; Panchkori Banerji and Sushil Ghose on the 1st January 1935; and Jagadish Singh on the 2nd January 1935. At the beginning of the trial before the learned Chief Presidency Magistrate, on the application of the prosecution, Krishna Chandra Shome, Bholanath Chatterji and Hardwar Singh were discharged under S. 494, Criminal P. C., and they were examined as witnesses for the prosecution, and the other five, they all retracted the confessions that they made. Three other persons were arrested and put on trial, namely Somrath Chowbey, Krishna Swamy Ghaneshyam, but they were discharged before the charges were framed. That was on the 2nd February 1935. The order recorded by the learned Magistrate runs as follows:

6 P. Ws. more examined. The accused Somrath Chowbey, Krishna Swamy Ghaneshyam, Sristidhar Bhattacharji, are discharged under S. 253, Criminal P. C. Charges framed against the rest and their plea recorded.

The enquiry before the Magistrate really commenced on the 21st January 1935. Between that date and the 2nd February the Magistrate had taken the evidence in chief of no less than 36 witnesses called on behalf of the prosecution. That is an important fact to be borne in mind in considering whether or not there was any illegality in connection with the joinder of the charges made against these appellants. The charges were framed clearly on the basis of the evidence given by these 36 witnesses prior to the time on 2nd February when the charges were framed by the learned Magistrate including such evidence as was given as to the events leading up to the investigation and the sending up to trial of the accused per-

sons. The Magistrate thought fit to charge the appellants with the other four persons who were tried with an offence under S. 120-B, I. P. C. The learned Magistrate in his judgment having referred to the charges framed against the 12 persons whom he was trying says this:

All the accused persons have pleaded not guilty and most of them have filed written statements explaining their position. Amongst them only one, Kumud Nath Nandy was in the service of C. E. S. C. at the time of his arrest. Sailen Mukerji, Sushil Ghosh, Sailen Sanyal, Hara Narayan Chatterji are ex-employees of the Electric Supply Corporation: accomplice witnesses Krishna Chandra Shome and Hardwar Singh are also ex-employees of the Electric Supply Corporation. Those accused persons who do not fall in that category are accused Rash Behari Shaw and Manindra Nath Dey, the accomplice witness Bholanath Chatterji P. W. 2 and the accused Aswini Kumar Panja and Nanilal Ghosh who are awaiting trial after disposal of this case. Babulal Chowkhani is proprietor of the Bharat Lakshmi Cinema and Ganesh Bahadur is durwan of that place. The accused Ganesh Bahadur is durwan of the Jupiter Cinema the proprietor of which Abdul Azim and his servant Bhudeb Chandra Sett are awaiting trial hereafter. . . .

The learned Magistrate then proceeded to set out the evidence tendered by the prosecution regarding the association of the accused persons, evidence to show that there was one general conspiracy between all the accused. According to the prosecution case, there were two groups of persons operating: (1) the consumers of the electrical energy and their servants who allowed meter tampering to be done and (2) those who did the actual tampering. The latter were either employees or ex-employees of the Calcutta Electric Supply Corporation or they were outsiders. Of the latter some had mechanical knowledge and had made or supplied articles required in connection with the tampering operations. The operators who were employees or ex-employees of the Electric Supply Corporation were Sailen Mukherji, Kumud Nandy, Sushil Ghosh, Sailen Sanyal, Harnarayan Chatterji and Hardwar Singh, and those who were not in the services of the Supply Corporation either before or at the time of their arrest were Rash Behari Shaw, Manindra Nath Dey, Bholanath Chatterji, Aswini Kumar Panja, and Nanilal Ghosh.

It was further the case of the prosecution that Nanilal Ghosh was the originator of the plan and he it was said, got the idea from one B. N. Dey, a former employee of the Calcutta Electric Supply

Corporation. It was said that Nanilal Ghosh brought in Sailen Mukerji who in his turn recruited Kumud Nandy, Harnarayan Chatterji and Sailendra Sanyal, his colleagues in the Supply Corporation. The other persons recruited by Sailen Mukherji were Sushil Ghosh, Panchkori Banerji, Hardwar Singh, Aswini Kumar Panja and Bholanath Chatterji. Sailen and Krishna had been brought in by Nanilal Ghosh. Hardwar Singh introduced them to Babulal Chowkhani and his servants. Rash Behary was recruited by Sushil Ghosh and Bhudeb Chandra Sett was recruited by Rash Behary. Bhudeb secured his employer Md. Abdul Azim, the proprietor of the Jupiter Cinema, and finally the durwan Jagadish Singh. Patal Chandra Santra was the servant of Aswini Kumar Panja. The defence at the trial set up the contention that if there was any conspiracy it was not one conspiracy but two distinct separate conspiracies. The learned Magistrate was, however of opinion that the evidence which was put before him indicated that there was only one conspiracy and with regard to this he says in his judgment:

The whole thing after it had been implanted in the brain of Sailen Mukherji develops from him. He is alleged to have secured no less than 22 of the 45 places where tampering is alleged to have been done and of the 12 accused persons no less than five namely, Sushil Ghosh, Manindra Nath Dey, Panch Kari Banerji, Kumud Nandy and Patal Chandra Santra worked with or for Sailen Mukherji; also the three accomplice witnesses Krishna Shome, Bholanath Chatterji and Hardwar Singh.

Having dealt with the question as to whether or not there was one extensive conspiracy as alleged by the prosecution the learned Magistrate proceeded to deal with the evidence against each of the persons on trial before him separately and in detail and as a result of his careful survey of the evidence his findings and orders were as follows: 1. The accused Babulal Chowkhani, was found guilty of theft and conspiracy; he was sentenced under S. 39, Electricity Act read with S. 380, I. P. C. to one year's rigorous imprisonment and a fine of Rs. 1,000; in default, six months' rigorous imprisonment. The whole of the fine if realised, would be paid to the Electric Supply Corporation as compensation. There was no separate sentence on the charge of conspiracy. 2. Ganesh Babadur, his durwan, was sentenced for abetment under S. 39, Electricity Act read with S. 109, I. P. C.

to three months' rigorous imprisonment. 3. Jagadish Singh, Durwan of the Jupiter Cinema, was found guilty of conspiracy and abetment of theft; he took a far more prominent part than the durwan of the Bharat Laxmi Cinema. He was therefore sentenced under S. 39, Electricity Act, read with S. 109, I. P. C., to six months' rigorous imprisonment. No separate sentence was passed for conspiracy. 4. Sailendra Nath Mukherji, the leader of the gang, was found guilty of conspiracy and abetment of theft at the Bharat Laxmi Cinema. He was sentenced under S. 39, Electricity Act, read with S. 120-B, I. P. C. to two years' rigorous imprisonment. There was no separate sentence for abetment. On the charge of abetment at the Jupiter Cinema he was acquitted for want of evidence. 5. Sushil Kumar Ghose, Manindra Nath Dey and Rash Behary Shaw who played subordinate parts in the conspiracy were sentenced to one year's rigorous imprisonment each under S. 39, Electricity Act read with S. 120-B, I. P. C. 6. Patal Chandra Santra, servant of Aswini Kumar Panja, who also played a minor part was sentenced to six months' rigorous imprisonment under S. 39, Electricity Act, read with S. 120-B, I. P. C. 7. Panch Cowri Banerji, Kumud Nath Nundy, Sailendra Sanyal and Hara Narayan Chatterji were given the benefit of the doubt and acquitted of the charges framed against them.

The convicted persons have all appealed against these findings and sentences both on the ground that the findings of the learned Magistrate were not warranted on the facts adduced by the prosecution and that the convictions were wrong on legal grounds. As regards the facts Mr. Carden Noad appearing on behalf of Babulal Chowkhani put forward the contention that the arrest of Krishna Chandra Shome at the Jupiter Cinema at 5.30 a.m., on 23rd December 1934 was in reality the outcome of a plot engineered by one Mukerji, the writer of the letter a copy of which was enclosed with the Electric Supply Corporation's letter of 23rd September 1934, acting possibly in conjunction with N. K. Chatterji, a meter reader, or even acting in conjunction with the Police and/or the Calcutta Electric Supply Corporation. Mr. Carden Noad suggested that the whole prosecution was the result of a desire on the part of Mukerji to curry favour with the Calcutta

Electric Supply Corporation by arranging that somebody should be secured who could be made an example of in order to put a stop to the unlawful interference with electric meters which was presumed to be going on. Mr. Carden Noad further argued that the evidence given by Krishna Chandra Shome and Hardwar Singh being tainted evidence, was not such as ought to be relied upon for the purpose of establishing the case against his client. It is to be observed in this connection, however, that the learned Magistrate himself said (at p. 240 of the paper book, part 1) that he agreed with Mr. Carden Noad's statement on behalf of the defence that in the absence of certain vouchers it would not have been possible to place Babulal Chowkhani in the dock. Mr. Carden Noad as regards the evidence given at the trial further contended that even if there was any such conspiracy as alleged by the prosecution it could not be rightly said that Babulal Chowkhani was in any sense a party to that particular conspiracy.

Before dealing further with the evidence in the case, it is desirable that we should discuss and state our views upon the "legal grounds." These "legal grounds," or, in other words, the points of law which were raised and very fully and ably argued by Mr. Carden Noad, were these: Firstly that there was a misjoinder of charges and that the trial of all the accused persons in one trial was a violation of the principles laid down in Ss. 233, 234 and 235, Criminal P. C., and that the form of the trial was not justified by the exception provisions contained in S. 239 of the Code. Consequently, the whole trial was illegal and the misjoinder was of such a nature as to make it incumbent upon this Court to quash all the convictions. Other points of law raised by Mr. Carden Noad were that S. 39, Electricity Act, 1910, has no application to the facts of the present case and that even if there had been any tampering with the meter at the Bharat Laxmi Cinema resulting in a diminution in the payments made by Babulal Chowkhani to the Supply Corporation for the supply of electricity, still there had been no theft within the meaning of S. 39 and if any offence at all had been committed it was of no more serious a nature than that constituted by the provisions of S. 44, Electricity Act, 1910. Consequently, it would follow from this

that if S. 44 (c) was the appropriate section no charge of a general conspiracy could be laid against Babulal Chowkhani and/or the other accused without the sanction contemplated by S. 196 (a), Criminal P. C. These questions of law are no doubt matters of some complexity, and we have given them our anxious and careful consideration. With regard to the first point it is necessary to bear in mind the precise wording of the relevant parts of S. 239, Criminal P. C. which read as follows:

The following persons may be charged and tried together, namely,

(d) Persons accused of different offences committed in the course of the same transaction and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.

The general principle laid down in S. 233, Criminal P. C., is that:

For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in Ss. 234, 235, 236 and 239.

Under S. 239 (d) discretion is given to a Court to try certain persons either jointly or separately. The manner in which this discretion should be exercised must depend on the facts of each case, and no doubt the High Court on a consideration of the circumstances of the case has power to hold that the accused should not have been tried jointly, and can set aside the convictions and sentences with or without directing a re-trial should it think fit: See 19 C W N 121 (1). Mukerji, J. held in 52 Cal 253 (2) that:

Even where Ss. 235 and 239 of the Code justify a joinder it should not be resorted to if there is a risk of embarrassment to the defence.

That is a sound principle which should be borne in mind when charges are framed or indictments preferred against accused persons. It is to be observed at the outset that where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of such conspiracy, the several offences generally form part of the same transaction within the meaning of that expression as used in S. 235. The principle that where there is a conspiracy and certain offences are committed in pursuance of such conspiracy those several

1. Dwarka Singh v. Emperor, 1915 Cal 748=28 I C 732=16 Cr L J 348=19 C W N 121.

2. Alimuddin Naskar v. Emperor, 1925 Cal 341=85 I C 231=26 Cr L J 487=52 Cal 253=29 C W N 173.

offences will generally form part of the same transaction will also apply where the several offences are by different persons: See 49 Cal 573 (3). That case was followed in 3 Rang 95 (4). The offence of conspiracy and acts done in pursuance of the conspiracy can rightly be said to come under one transaction, see 7 Rang 821 (5), and it has been held that the transaction continues so long as the conspiracy continues: See 42 Cal 1153 (6). It follows therefore that where there is a conspiracy and specific offences are committed in pursuance of such conspiracy, persons who are parties to that conspiracy and concerned in the specific offences can lawfully be tried in one and the same trial.

In the present instance, as already mentioned, it was argued by Mr. Carden Noad that there never was a conspiracy of the nature alleged by the prosecution. The learned Magistrate refers to this in the passage in his judgment (p. 227) to which reference has already been made. In order therefore to elucidate and determine the main point of law raised by Mr. Carden Noad, it is necessary first to decide whether or not there was a general conspiracy of the nature and extent alleged by the prosecution. The learned Magistrate is definitely of opinion that "there was one conspiracy," and having considered all the evidence relating to the association and operations of all the accused persons, he found that the present appellants were all parties to that conspiracy. Upon a review of the evidence given at the trial, all of which has been fully placed before us and after a close and careful examination of that evidence, we have however come to the conclusion that the learned Magistrate was wrong in finding that all the accused persons were parties to one and the same extensive conspiracy. In order to constitute the offence of conspiracy as defined in S. 120-A (which is the section under which the present appellants and the

other persons said to be parties were charged) it is only necessary for the prosecution to show that the persons concerned had agreed to do or cause to be done an illegal act, or an act which is not illegal, by illegal means, and the "explanation" given in S. 120-A states that it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

In the present instance it is in our opinion not possible at any rate except by straining language to say that every one of the accused was in agreement to do the same illegal act or cause the same illegal act to be done. It was the prosecution's own case that there were two classes of conspirators or, at any rate, two classes of operators, namely (1) those who did the actual tampering and their adherents and (2) the consumers and their servants who allowed the tampering to be done, or as Mr. Carden Noad put it, that there were "tamperers and tamperees." In our opinion the circumstances and facts of the case do not warrant the conclusion that—to use the words of the principal charge—the accused and the other persons named in the charge were all parties to a criminal conspiracy to commit theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited. It seems to us that the first class of operators were in agreement with each other and had in view one object, namely to obtain money unlawfully by tampering with meters whenever possible and the other class had in view the object of wrongful gain to themselves by allowing tampering of their meters and the making of a false record of the amount of electric energy consumed by them with consequent reduction in the amount of the bills they would have to pay to the Calcutta Electric Supply Corporation. In our opinion upon the evidence there is very little doubt that all the tamperers were actually acting in conjunction in close contact with one another and were giving to each other instruction, advice, and assistance in their unlawful avocation. It seems quite probable that they were all operating in concert in such a manner as to constitute a criminal conspiracy within the meaning of S. 120-B, I. P. C. We are however unable to accept the contention that the

3. Abdul Salim v. Emperor, 1922 Cal 107=69 I C 145=23 Cr L J 657=49 Cal 573=26 C W N 680.

4. V. M. Abdul Rahman v. Emperor, 1925 Rang 296=89 I C 305=26 Cr L J 1329=3 Rang 95.

5. Maung Ba Chit v. Emperor, 1930 Rang 114=1930 Cr C 402=122 I C 273=31 Cr L J 387=7 Rang 821.

6. Harsha Nath Chatterjee v. Emperor, 1915 Cal 719=26 I C 313=16 Cr L J 9=42 Cal 1153=19 C W N 706.

consumers for example, Babulal Chowkhani and Md. Abdul Azim as proprietors of the Bharat Lakshmi Picture House and the Jupiter Cinema respectively, were acting in concert and/or in agreement with all the persons constituting the tamperer class or with each other. In our opinion the real position was that each of the consumers, abetted by his employees or servants was acting in conjunction with some of the tamperers but was not acting in agreement with other consumers. This was the position as disclosed at the end of the trial and therefore as a result of the trial it had become apparent that the offences charged against the accused were not in fact offences committed in the course of the same conspiracy. If therefore the question was whether or not there had been a misjoinder or a joint trial of several persons unlawfully the determination of which was solely dependent upon the right construction of the provisions of S. 239 (d), Criminal P. C. it might have been successfully urged that we should come to the conclusion that the whole trial was vitiated, because the acts complained of were not done in pursuance of any conspiracy and therefore not arising out of the same transaction. The subsection however says "persons accused of different offences committed in the course of the same transaction" which in itself implies that the criterion whether there is a defect in the trial of persons jointly, is to be the case alleged and not the case established against them. Most of the High Courts in India have held that the test to be applied for judging of the validity of a trial which purports to have taken place under the provisions of S. 239, Criminal P. C. is the accusation made and not the result of the trial. In order to decide therefore whether several persons can be lawfully tried jointly with having committed offences forming parts of the same transaction, the Court has to look to the accusation, that is to say, the prosecution case as set forth in the charges and if according to that case the offences are such as could be regarded as parts of the same transaction, it will be justified in holding a joint trial. One of the earliest cases on this point is 30 Bom 49 (7), where the meaning of the word

'transaction' was discussed and Batty, J. at p. 54 said :

According to its etymological and dictionary meaning the word 'transaction' means 'carrying through' and suggests, we think, not necessarily proximity in time, so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is 'in the course of the same transaction.' In S. 235, the phrase is used in a connection which implies that there may be a series of acts. Illus. (f) to that section indicates that the successive acts may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In S. 239 therefore a series of acts separated by intervals of time are not, we think excluded provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial even if incidentally one of those jointly tried has done an act for which the other may not be responsible [vide S. 239, Illus. (b)].

The learned Judge previously stated at p. 54 :

Section 239 admits of the trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of S. 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test.

The next case in order of time is that in 49 Cal 573 (3). In that case it was pointed out by Newbould, J. and Subhawardy, J., that the law was not the same then as it was when the case in 25 Mad 61 (8) was decided. At p. 501 the learned Judges said :

It was also contended that the trial was bad for the misjoinder of this charge of conspiracy with the other charges framed against the accused individually. Separate charge sheets with two, three or four heads have been drawn up against each of the accused.

Having set forth what the charges were the learned Judge proceeded thus at p. 594 :

It is urged on behalf of the appellants that each of these ten sets of charges relate to entirely separate transactions for which the appellants could not be tried jointly. It is also urged that the charges of abetment of cheating and abetment of forgery under one head of charges are also separate transactions since in the cheating charges the person abetted is named while in the forgery charges he is described as a person unknown. There can be no doubt that these ten accused could not have been tried at one trial on the charges framed against them individually, if there had not been also the

7. Emperor v. Datto Hanmant Shahpurkar, (1906) 30 Bom 49=2 Cr L J 578=7 Bom L R 633.

8. Subrahmaniam Ayyar v. Emperor, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P O).

charge against them all of conspiracy punishable under S. 120-B read with S. 420, I. P. C. It is contended on behalf of the prosecution that once a charge of conspiracy is framed, anything done in pursuance of the conspiracy can be tried at the trial for conspiracy. This contention is supported by authority of decisions of this Court. In 19 C W N 672 (9), it was held that the offence of conspiracy and offences committed in pursuance of that conspiracy formed one and the same transaction, and could be jointly tried. It was also so held in 42 Cal 1153 (6) and both these cases were cited and approved in 42 Cal 957 (10). These decisions fully support the contention raised on behalf of the Crown, and we hold that there was no misjoinder of charges in the present case that would render the trial illegal.

It is also urged that, even if this misjoinder did not render the trial illegal, the Court had discretion, under S. 239, Criminal P. C. to try the accused separately, and this discretion was improperly exercised. But even if this be regarded as an irregularity it cannot be held to have occasioned a failure of justice.

There is not the same objection to the joinder of a number of charges in a conspiracy trial that there might be in other cases, since, even if they had not been charged, the offences alleged to have been committed in pursuance of the conspiracy could have been proved to support the charge of conspiracy. This being so, we do not think that there was even an irregularity or an improper exercise of discretion in putting in the form of charge the specific acts specifically relied on as against each individual accused to show that they joined in the conspiracy.

Later (at p. 596) the learned Judges said:

Another objection on the ground of misjoinder was based on the acquittal of the appellant, Ahamad Mia, on the conspiracy charge. It is urged that this shows that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial. The answer to this objection is to be found in the wording of S. 239, Criminal P. C. It begins 'when more persons than one are accused.' That is to say the legality of the joint trial depends on the accusation and not on the result of the trial. The charge of conspiracy against this appellant was a real accusation and not a mere excuse for trying him with the others. The learned Sessions Judge has recorded that he cannot account for the verdict of not guilty against this accused under Ss. 120-B and 420, I. P. C.

This decision was considered and quoted with "approval" by the learned Chief Justice of this Court, Sir George Rankin, with the concurrence of Chotzner, J. in

55 Cal 858 (11), where the learned Chief Justice put the matter of the test thus (at p. 867):

The indictment may be good or bad, but it cannot depend upon the facts which will ultimately be found by the jury, and it must be good or bad at the beginning of the trial.

In the meantime there had been a very important decision in the High Court at Allahabad in 1924 All 233 (12), where a very large number of persons had been tried jointly on charges of conspiracy and other offences said to have been committed in pursuance of the conspiracy. It had been contended on behalf of the convicted persons who were then appellants before the Court that there had been a misjoinder of charges sufficient to invalidate the entire trial in the Court below, and Mears, C. J. and Piggott, J., at p. 236, said:

When the learned Sessions Judge entered upon the trial of this case and was faced with the question whether the provisions of S. 239, Criminal P. C., did or did not authorize him, not merely to try the 225 accused persons before him at one and the same trial, but to try them on each and all of the charges set forth against them under the order of the committing Magistrate, he could not possibly know what conclusion he would arrive at after hearing the whole of the evidence. He had to look to the case for the prosecution as set forth in the charges themselves. He was therefore for the reasons which we have already indicated warranted by law in entering upon this trial of the 225 accused on the charges as framed. The convictions which he has recorded are warranted by the conclusions at which he arrived on the evidence. As he had to regard merely the "charges" it was not necessary for him to consider what the position would be, if he had eventually come to the conclusion, either that no offence punishable under S. 120-B, I. P. C. was committed by any persons at Dumri Khurd on the forenoon of 4th February 1922, or that if any offence was so committed it was one excluded from his cognizance by S. 196-A, Criminal P. C. In any event, the acquittal of all the accused persons on the conspiracy charge would have removed any possible objection to the validity of the trial.

In 49 Mad 74 (13), Krishnan, J., at p. 93 of the report put the matter thus:

The question of the legality of a joint trial, in my opinion, really depends upon the accusation made and not upon the result of the trial; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. It

9. Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy, 1915 Cal 688=26 I C 307=16 Cr L J 3=19 C W N 672.

10. Amrita Lal Hazra v. Emperor, 1916 Cal 188=29 I C 513=16 Cr L J 497=42 Cal 957=19 C W N 676.

11. Satyanarain Mohata v. Emperor, 1928 Cal 675=112 I C 350=29 Cr L J 1022=32 C W N 319=55 Cal 858.

12. Abdullah v. Emperor, 1924 All 233=92 I C 145=27 Cr L J 193.

13. Gam Mallu Doraj v. Emperor, 1925 Mad 690=90 I C 297=26 Cr L 1513=48 M L J 308=49 Mad 74.

was held in 49 Cal 573 (3) and I am prepared to follow it. Is it not pretended here that there was any conscious attempt to join charges which could not otherwise be joined or that the charge as framed under count 1 was so framed for that purpose. The legality of the joint trial in this case has to be judged on the accusation and not on what was subsequently proved.

There is in the present case, in our opinion, no reason whatever for supposing that the charge under S. 120-B, I. P. C., was made for any evil purpose. We must take it, as we have already observed, that the learned Magistrate acting in his judicial discretion was of opinion that *prima facie* the evidence given in chief by the prosecution witnesses had come to a stage in the proceedings warranting a finding of the conspiracy charge. In the course of his judgment Krishnan, J. commenting on the expression "the same transaction" observed thus (p. 94):

After all it cannot be said that any very satisfactory definition of the words has been given. Each case must be judged in my opinion on the facts of that particular case. Generally speaking I am prepared to follow the observations of the learned Judges in 33 Mad 502 (14), in which the effect of the previous decisions has also been considered as to the meaning of the expression. Abdur Rahim, J. says that the usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test, so far as I can see, is the unity of purpose. Continuity of action goes with unity of purpose.

Those observations are relevant to the question whether in the present case there was any conspiracy. The case in the Madras High Court was decided in October 1924. A few months later, namely in December 1924, the same point came before the High Court of Rangoon in 3 Rang 95 (4), where it was again held that the legality of a joint trial depends on the accusation and not on the result of the trial. The Chief Justice also added on the authority of the case in 49 Cal 573 (3),

that the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases (p. 105).

The point under discussion again came before this Court in the year 1928 when

14. Choragudi Venkatadri v. Emperor, (1910) 33 Mad 502=5 I C 847=11 Cr L J 258.

in 30 Cr L J 619 (15), it was held by Cuming and Lort-Williams, JJ. that:

Section 239, sub-s. (d), Criminal P. C., contemplates all the offences committed by the accused persons, whether substantive offences or abetment of those offences, being tried together provided they were committed by the accused in the course of the same transaction. Therefore two persons can be jointly tried on three substantive charges and one of them of abetting those three offences. The legality of a joint trial depends upon the accusation and not on the result of the trial.

The curious feature of this case was as was pointed out by Cuming, J. in his judgment (p. 621) that it was contended not only by the *vakil* for complainant, but also by the *vakil* who appeared for the petitioner (i. e., the convicted person) that the legality of a joint trial depended on the accusation and not on the result of the trial. It was, in fact, conceded on both sides that that is the law. In the same year a case came before the Bombay High Court in which one Gopal and two others, Mhalrasa and Dada, had been charged under Ss. 489-A, 489-B and 489-D, read with S. 120, I. P. C., with conspiracy to collect and possess materials for counterfeiting currency notes, and with using such notes as genuine. In the alternative they were all charged under S. 489-D with having in their possession materials for counterfeiting currency notes. The two other persons Mhalrasa and Dada were further charged under S. 489-A with having counterfeited currency notes and the accused were charged under S. 489-B with having used as genuine a counterfeit currency note. The trial resulted in the acquittal of the two persons Mhalrasa and Dada on all the charges and in the conviction of the accused Gopal for an offence under S. 489-B. Gopal appealed and contended that his trial jointly with the two other persons was contrary to law. It was held that the trial of the accused Gopal was not vitiated and was covered by S. 239 (d), Criminal P. C., as no prejudice was shown to the accused Gopal, and as the act of which the accused was convicted was so connected with the subject-matter of the other charges as to form a single transaction: 53 Bom 344 (16). At p. 346 Madgavkar, J. said this:

15. Kali Kumar Das v. Nawab Ali Dhali, 1929 Cal 160=116 I C 369=30 Cr L J 619.

16. Gopal Raghunath v. Emperor, 1929 Bom 128=116 I C 243=30 Cr L J 588=53 Bom 344=31 Bom L R 148.

It is argued for the appellant that the joinder was illegal, the offences charged numbering more than three, and in any case they caused serious prejudice to the appellant by letting in evidence which would not have been admissible, had the present charge under appeal, under which alone he was convicted, been tried separately. For the Crown it is contended these charges form part of the same transaction, and are therefore covered by S. 239, Cl. (d), Criminal P. C., as well as by S. 235.

As is often the case with a number of elaborate charges, it is difficult to lay down any single test or criterion. The cases, in my opinion, divide themselves into three. First, a case such as the one in 25 Mad 61 (8), not covered by S. 235 or S. 239, in which case, prejudice or no prejudice, the illegality entitles the appellant to an acquittal. The second case is where without such illegality, prejudice might nevertheless be caused to the accused so that even though the Crown may have the power of joinder, it might be fairer not to exercise that power. The third class of cases is where there is such a common thread or purpose underlying the alleged offences of the accused, even though separated by time and space, that they form part of the same transaction, and are difficult to present separately, in which case the law permits, and the Crown usually adopts, a joint trial with numerous accused and numerous charges. The question in each particular instance is as to which of these three classes of cases covers the particular case for decision. In the present instance the question turns upon whether the offence now under appeal is part of the same transaction as the offences in the other charges. The only transaction, if any, is the alleged conspiracy. True, the prosecution in the result failed to prove it, but that of itself does not necessarily make the trial illegal, the test being not what the prosecution has proved in the end but what they alleged at the beginning in the charges.

In a case, which came before the Allahabad High Court in 1931 : 33 Cr L J 373 (17), it was again affirmed that the illegality of a joint trial depends on the accusation and not on the result of a trial. Sulaiman, J., at p. 375, says :

It may further be pointed out that the illegality of a joint trial depends on the accusation and not on the result of a trial, and that even if the charge of conspiracy were to fail ultimately, there would be nothing illegal in convicting the accused of the offence of being found in possession of cocaine under S. 60 (a).

Many of the cases dealing with joinder of charges and joint trials were reviewed in a case which came before the Madras High Court, the case in 1933 M W N 528 (18). The accused in the case had been charged with conspiracy as punishable under S. 120-B, I. P. C., read with S. 409, I. P. C., and with various

acts of criminal breach of trust and forgery in pursuance of the conspiracy between the dates 30th November 1929 and 19th September 1931. An objection was taken that the whole trial was vitiated as offending against S. 234 (1), Criminal P. C., relying on 25 Mad 61 (8). It was held by Sir Owen Beasley, C. J., that *Subramania's case* (8) had no application to a case of this kind where there was a charge of conspiracy under S. 120-B, I. P. C., which was an addition subsequent to that decision. The learned Judges also held that the offence of conspiracy and the offences committed in pursuance of that conspiracy formed one and the same transaction. The learned Judges adopted the view taken by Krishnan, J. in 49 Mad 74 (13), and reaffirmed the proposition that the legality of a joint trial in such a case depends on the accusation and not on the result of the trial ; provided of course that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. The same view was taken by the Allahabad High Court in 35 Cr L J 1349 (19) where Rachpal Singh, J. said at p. 1353 :

Here at one trial the accused persons were charged with conspiracy and some other offences said to have been committed in the furtherance of the object of the conspiracy. The charge was perfectly correct. Accused persons may be charged at one trial with the offence of conspiracy and also with the offence alleged to have been committed in pursuance of the conspiracy because substantively the offence of conspiracy and the offences committed in pursuance thereof form one and the same transaction. Such a joint trial is permissible under the provisions of S. 239, Criminal P. C.

Finally, in a recent case before this Court, the case in 39 C W N 741 (20), Lort-Williams, J., sitting with Jack, J. said at p. 743 :

It is to be observed that the provisions of S. 239, Cls. (a) and (c), refer to persons accused, that is to say, charged. The provisions are intended to deal therefore with the position as it exists at the time of charge and not with the result of the trial.

In view of this long line of authorities it is impossible for us to do otherwise than act on the principle therein laid down. We must therefore look to this

17. Emperor v. Mohammad Yakub, 1932 All 73 = 1932 Cr C 93 = 137 I C 73 = 33 Cr L J 373.

18. U. Satyanarayana v. Emperor, 1933 M W N 528 = 1933 M Cr C 316.

19. Ramdas v. Emperor, 1934 All 61 = 1934 Cr C 130 = 151 I C 442 = 35 Cr L J 1849 = 1934 A L J 852.

20. The Superintendent and Remembrancer of Legal Affairs v. Raghulal Brahman, (1935) 62 Cal 946 = 162 I C 943 = 37 Cr L J 728 = 39 C W N 741.

matter as it appeared to the learned Magistrate at the time when he framed the charges against the appellants and the other persons accused before him and not to the state of affairs as we see them long after the trial had proceeded on its way leading to the convictions of the appellants. We must therefore hold that having regard to all the facts before the Magistrate at the time when he was framing the charges against the accused as directed by S. 254, Criminal P. C., he was acting judicially and properly exercising the discretion given him by S. 239. Therefore, as regards the procedure adopted there was no such illegality as to compel us to quash the convictions on that ground. Moreover, if there was any irregularity at all, there was none which on the actual facts of the case caused any prejudice to the accused or by itself entailed any failure of justice. It is to be noted that no protest was made by or on behalf of any of the accused against the course adopted by the learned Magistrate in trying all the present appellants at one and the same trial, nor was any complaint made as regards the joinder either of the charges or of the persons charged. Moreover the learned Magistrate was careful to treat the case of each of the accused persons separately and upon the evidence properly directed against each. We hold, therefore, that there was no illegality in the joint trial of the accused persons.

The second point of law urged by Mr. Carden Noad was to the effect that in any event, even if the case for the prosecution was established, there had been no theft by his client of electrical energy under the provisions of S. 39, Electricity Act, 1910, by reason of the wrongful loss sustained by the Electric Supply Corporation consequent upon the consumer having procured an alteration and/or setting back of the figures of the dials of the meters. It is of importance to observe the exact language of S. 39. The section reads as follows:

Whoever dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Penal Code, and the existence of artificial means for such abstraction shall be prima facie evidence of such dishonest abstraction.

This section is no doubt based on an analogous provision in the English Electric Lighting Act of 1882 (45 and 46, Vict. Ch. 56), S. 23 which reads as follows:

Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes, or uses any electricity shall be guilty of simple larceny and punishable accordingly.

In the Indian Act wasting or diverting energy is dealt with in S. 40. That section is in these terms:

Whoever maliciously causes energy to be wasted or diverted or, with intent to cut off the supply of energy, cuts or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

In England the provisions which were formerly contained in S. 23 of the Act of 1882 are now to be found in the Larceny Act, 1916, S. 10 which runs as follows:

Every person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny.

Mr. Carden Noad argued that the expression "energy" as used in S. 39 can only mean "energy belonging to the licensee," that is to say, in the present case, the Calcutta Electric Supply Corporation, and in this connexion he referred to S. 19 (a), Electricity Act, 1910, which was added to that Act by the Electricity (Amendment) Act of 1922. That section declares that:

For the purposes of this Act, the point at which the supply of energy by a licensee to a consumer shall be deemed to commence shall be determined in such manner as may be prescribed.

That has, in fact, been "prescribed" in R. 31, Electricity Rules, 1922, which reads as follows:

The point at which the supply of energy by a licensee to a consumer shall be deemed to commence shall:

(a) Where the amount of energy supplied to a consumer or the electrical quantity contained in the supply is ascertained by meter, be in respect of a conductor from the service-line which passes through the meter the point at which such conductor enters the meter and in respect of a conductor from the service-line which does not pass through the meter on such conductor nearest to the meter;

(b) Where the amount of energy supplied to a consumer or the electrical quantity contained in the supply is not ascertained by meter, be the point at which the cut-out is inserted in the service-line by the licensee in accordance with R. 38.

Mr. Carden Noad argued that as by S. 39 the dishonest abstraction, consumption or use of energy is made theft, it must have been contemplated by the legislature that all the elements of "theft" as defined in S. 378, I. P. C., must be

present. In dealing with this line of argument one must bear in mind that the words of S. 39 are "shall be deemed to have committed theft," not shall have committed theft or shall be guilty of theft. Therefore, the section means no more than that the offender is to be treated in the same way as if he had committed the offence of theft. In this connexion we would refer to the case in 7 Rang 329 (21), per Heald, J. at p. 336.

Mr. Noad conceded that the element of taking possession of another's property might not be essentially present, but he did try to argue that what he called the root idea was a change in the possession of the property. Mr. Carden Noad said that S. 19 (a), Electricity Act, and R. 31 were necessitated by the fact that there can be no actual property in electrical energy. At the same time, he argued that as a man cannot steal what is his own there cannot be any "theft" of electrical energy once it passes through the meter installed on the consumer's premises, because in effect S. 19 (a) and R. 31 in law operated to transfer some sort of property in the electrical current supplied. Mr. Carden Noad sought to fortify his argument by reference to S. 78, Contract Act (Act 9 of 1872), which, he said, governed the contract for the supply of the electrical energy as between the Calcutta Electric Supply Corporation and Babulal Chowkhani. S. 78, Contract Act, 1872 is now reproduced in S. 5, Sale of Goods Act, 1913. Sir Frederick Pollock and Sir Dinshaw Mulla in their commentary on that Act express the view that it is doubtful whether the Act is applicable to such things as gas, water and electricity. In our opinion, that view is correct, certainly as regards electricity. It is, therefore, not possible for Mr. Carden Noad to derive any support by reference to the law relating to the sale of goods. It is to be observed that S. 39 does not say that dishonest abstraction or consumption or use of energy is theft, but merely that if a person dishonestly abstracts, consumes, or uses such energy, he shall be deemed to have committed theft and so be liable to punishment under the provisions of the I. P. C.

Mr. Carden Noad further argued that there could be no offence under S. 39, Electricity Act, 1910, unless there was, first of all, an "abstraction" of energy, and he invited us to read the section as if it read "whoever dishonestly abstracts and consumes or uses any electrical energy." In other words, Mr. Carden Noad invited us to take the view that the section only had reference to abstraction plus consumption or use and, therefore, could have no application to a case of mere user without abstraction. But for the close juxtaposition of the words "abstracts, consumes or uses" in the Indian section however, Mr. Carden Noad could not even have begun to put forward the argument with which we are now dealing. In the corresponding English Act the words "causes to be wasted or diverted" are interposed between the word "abstracts" and the word "consumes." As has been already pointed out, in the Indian Act "wasting or diverting energy" are dealt with in S. 40. But in our opinion their absence from S. 39 in no way militates against interpreting the section as if it read "dishonestly abstracts or consumes or uses." The absence of the word "or" between the words "abstracts" and "consumes" indicates nothing more than that the drafting of the section follows an ordinary literary form under which where there is a running series of words or expressions, a disjunctive or conjunctive word is placed only between the last two words or expressions. In our opinion, therefore, there is no substance whatever in Mr. Carden Noad's contention that abstraction must always be a necessary ingredient for an offence under S. 39. In our view what was here alleged against the consumers, if proved, amounted to dishonestly using and so comes within the purview of S. 39. One must bear in mind the definition of "dishonestly" as contained in S. 24, I. P. C., which runs thus:

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

"Wrongful gain" is defined in S. 23, I. P. C., as "gain by unlawful means of property to which the person gaining is not legally entitled." And "wrongful loss" is said to be loss by unlawful means "of property to which the person losing

21. Emperor v. Maung Pu Kai, 1929 Rang 203 = 1929 Cr C 177 = 118 I C 637 = 30 Cr L J 961 = 7 Rang 329 (F B).

it is legally entitled." In the present case upon the assumption that the allegations against Babulal are correct, he used electricity in such a way as to cause a wrongful loss of money to the Calcutta Electric Supply Corporation and so, in effect, wrongful gain to himself. The consuming of the electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered was, therefore, a dishonest user. The argument that as the electrical energy was being supplied under a contract, the consumer was merely using the electricity in a manner contemplated by the contract and that the tampering with the meters was something altogether distinct and separate from user cannot hold good. It obviously was never contemplated by the contract between the Calcutta Electric Supply Corporation and the Bharat Lakshmi Picture House, for example that there should be any supplying of electricity otherwise than in accordance with the provisions of Cl. 5 of that contract which says:

The supply of electrical energy shall be registered by a meter or meters upon the said premises to be provided, fixed and kept in order by the Company.

It follows that what was contemplated by the contract between the Calcutta Electric Supply Corporation and the Bharat Lakshmi Picture House, dated 4th April 1934, was that all electricity to be supplied by the Corporation should pass through the meters installed in the consumer's premises in such a way that a record of the supply would be made on the dials of those meters and that such record would remain intact and would not be interfered with in any way by the consumer and would be available to the Corporation's meter readers on their periodical visits. Mr. Carden Noad in the course of his argument referred to the case in (1852) 6 Cox's C C 213 (22), in order to support his contention that there could be no theft of electricity within the meaning of S. 39, once the electricity passed through the meter on the consumer's premises. But that case does not indicate that there can be no theft by way of dishonest user of electricity after it passes through the meter. That was a case where a householder in Berwick-upon-Tweed contracted

22. Reg. v. White, (1852) 6 Cox's C C 213.

with a gas company to consume gas and pay according to meter, in order to avoid paying for the full quantity of gas consumed, introduced into the entrance pipe another pipe for the purpose of conveying the gas to the exit pipe of the meter, and so to the burners for consumption without passing through the meter itself. The entrance pipe was the property of the householder, but he had not by his contract any interest in the gas or right of control over it until it passed through the meter. He was convicted of larceny, and that conviction was affirmed upon appeal. The argument put forward by Sergeant Ballantine, who appeared for the convicted person, was that an evasion of the meter and an interference with it stand on the same ground. He argued that the meter was only the voucher of an account, and if there was a delivery according to contract on the one hand, and only a fraudulent dealing with a voucher on the other, there was no larceny. The conviction was however affirmed, Lord Campbell, C. J. having remarked in the course of the argument: "Is not this a taking *invito domino*?"

In the present case it seems to us that consuming or using was *invito domino* in the sense that the Corporation never permitted or contemplated that electricity would be consumed or used save on the basis that the consumer would allow a correct and accurate record of the consumption and user to be made upon the meter and preserved until that record could be seen by the officer of the Electric Supply Corporation. There can be no doubt whatever in our opinion that the facts alleged against Babulal Chowkhani, if established, were sufficient to bring him within the words of S. 39 and that he must be deemed to have committed theft within the meaning of the Indian Penal Code. No doubt, they would also constitute an offence of cheating as defined in S. 415, I. P. C., and indeed Mr. Carden Noad did not dispute this. He merely took the same kind of line as was taken by Sergeant Ballantine in *Reg v. White* (22), *ubi supra* namely that the offence was one of cheating and not one of theft. As a final point of law, Mr. Carden Noad endeavoured to argue that the offence committed by his client if any fell within the ambit of the provisions of S. 44, Electricity Act, 1910. Sub.ss. (c) and (d) are as follows:

(c) Whoever maliciously injures any meter referred to in S. 26, sub-s. (1), or any meter, indicator or apparatus referred to in S. 26, sub-s. (7), or wilfully or fraudulently alters the index of any such meter, indicator, or apparatus, or prevents any such meter, indicator or apparatus from duly registering; (d) whoever improperly uses the energy of a licensee; shall be punishable with fine which may extend to Rs. 500 and, in the case of a continuing offence, with a daily fine which may extend to Rs. 50; and if it is proved that any artificial means exist for making such connexion as is referred to in Cl. (a) or such communication as is referred to in Cl. (b) or for causing such alteration or prevention as is referred to in Cl. (d), and that the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, it shall be presumed, until the contrary is proved, that such connexion, communication, alteration prevention or improper use, as the case may be, has been knowingly or wilfully caused by such consumer.

With regard to this last provision it was pointed out to Mr. Noad that to say that the behaviour of his client fell within sub-s. (d) is inconsistent with his previous argument that after the electrical energy had passed through the meter it in effect became the property or quasi property of the consumer. No doubt, the facts of this case bring all the tamperers within the purview of sub-s. (c), and possibly also Babulal Chowkhani, who it is alleged is a person who caused or allowed a fraudulent alteration of the index of the meters. But even if that were so, there can be no force in Mr. Carden Noad's argument that because a specific offence is provided for in S. 44, S. 44 should have been resorted to by the prosecution and not S. 39 or any other provision of the penal law. Mr. Carden Noad's argument on this point is entirely destroyed by the provisions of the General Clauses Act (Act 10 of 1897), S. 26, which says:

Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same.

We think that for the purpose of S. 26, General Clauses Act, it must be taken that Ss. 39 and 44, Electricity Act, are to be considered as separate enactments: see S. 3, sub-s. 17, General Clauses Act. There can therefore be no doubt that it was quite open to the prosecution to charge the accused Babu Lal Chowkhani with such offences as the facts and circumstances seem to warrant. All the points of law put forward and argued by Mr. Carden Noad on behalf of Babulal

Chowkhani were adopted and relied upon but without further argument by the learned advocates appearing for the other appellants respectively. Having disposed of all the legal points put forward on behalf of the appellants, and having held that the trial was not illegal by reason of any misjoinder of charges or of the joint trial, it becomes necessary to be considered whether upon the facts all the convictions or some and which of them ought to be upheld. We have already expressed the opinion that it was not proved that the accused were all parties to one large conspiracy.

It now becomes necessary to consider the facts. We are not at all sure that Mr. Page (appearing on behalf of the Crown in support of the conviction) himself did not realise that he was confronted with considerable difficulty in seeking to argue that there was one conspiracy and one conspiracy only as between all the tamperers and each of the consumers, each of whom, as one would have thought, was merely concerned to secure a reduction of his own electricity bills without any interest in or knowledge of all the nefarious practices of other consumers. The conspiracy alleged was to commit theft. Mr. Page endeavoured to justify that allegation by saying that the agreement between the tamperers and the consumers, either taken together or in groups so intimately connected as to form an integral confederacy, was something like this: the consumer vis-a-vis the tamperer agreed to give access to his meter and to allow the tamperer to alter the index. The tamperer on his part vis-a-vis the consumer agreed, if rewarded, to come to the consumer's premises and to alter the index of the meter there. The consumer agreed to pay the tamperer as a reward for what he did so much per week or per month or agreed to pay to the tamperer as reward one-half of that amount of which it was the consumer's intention to avoid payment by means of what the consumer did. The agreement by the tamperer was the agreement to do an illegal act, namely to do the altering of the index of the meter. The agreement by the consumer was also an agreement to aid the tamperer in altering the index.

The intention of the tamperer by reason of which he entered into such an agreement was to make gain by way of

a reward for aiding the consumer in destroying the evidence of dishonest consumption or user by the consumer of electrical energy, i. e., the evidence that the consumer had consumed or used energy which he had consumed or used with the intention of so doing without payment, i. e., to make gain as a reward for concealing evidence of theft by the consumer. It was the intention of the consumer, by reason of which he entered into the agreement, to make gain by dishonestly using electrical energy, i. e., to make gain by means of theft and to obtain the aid of the tamperer in destroying the evidence of that theft.

Mr. Page contended that the agreement constituted criminal conspiracy since it was an agreement to do illegal acts, forming one series of acts: dishonest user (theft); alteration of the index of a meter (to destroy the evidence of theft). The essential ingredient was theft by dishonest user. Without the common object of the parties, the making of gain, the agreement could not have come into existence. But that though the gain was the ultimate object, the subsidiary but necessary object was the commission of the theft by the consumer. In our view the situation, as now appears from a survey of the whole of the evidence in the case, is that in all probability there was a conspiracy or, at any rate, a close association between all the tamperers as such, and an agreement between each individual consumer and his assistants including members of his own staff and the particular tamperers who brought about all the tampering. Holding as we do that it was not established that there was any conspiracy of the kind mentioned in the charge laid under S. 120-B, I.P.C., it follows that the convictions on the conspiracy charge must be set aside.

It then becomes necessary to determine whether and to what extent the convictions of the appellants on the other charges can be maintained. At the outset it is to be borne in mind that although these appeals are upon questions of fact as well as upon questions of law, we are not in a position of retrying the accused and although we can alter the findings, these proceedings are not a rehearing of the case. Therefore due weight must be given to the conclusions arrived at by the learned Magistrate who had the advantage of seeing and hearing the wit-

nesses. We are satisfied that in spite of the form of the charge the accused were at no disadvantage by reason of the existence of the conspiracy charge and the learned Chief Presidency Magistrate dealt with the evidence as against each individual accused carefully and conscientiously.

We now proceed to consider whether the conclusions arrived at by the learned Magistrate as against each of the appellants severally were justified by the evidence given in the case. We have given this part of the matter our close and careful consideration. We deal with the case of each of the appellants in the order in which they are dealt with in the judgment of the Court below. Babulal Chowkhani was found guilty of theft as well as conspiracy. He was sentenced under S. 39, Electricity Act, 1910, read with S. 380, Penal Code. There was no separate sentence on the charge of conspiracy. The evidence on which the learned Magistrate based his conviction may be summarized thus: (The judgment then discussed the evidence and proceeded.) Looking at the evidence as a whole, we are quite satisfied that Babulal Chowkhani did employ persons to alter the index of his meter with a view to evading payment of a considerable portion of the electrical energy supplied to his premises by the Calcutta Electric Supply Corporation, that over a lengthy period as alleged by the prosecution, week by week, he had the intention of using electrical energy with the intention of evading payment for the electric energy used by him. In those circumstances, we are satisfied that his conviction on the charge under S. 39, Electricity Act, was correct and that he was rightly found guilty of theft. We think however that the sentences should have been passed under the provisions of S. 379 and not S. 380, Penal Code. We, accordingly, dismiss the appeal of Babulal Chowkhani (Appeal No. 464) and direct that the sentences of one year's rigorous imprisonment and a fine of Rs. 1,000, in default six months' rigorous imprisonment, be recorded as being passed under S. 39, Electricity Act read with S. 379, Penal Code. Babulal Chowkhani must surrender to his bail and serve out the sentence imposed upon him. (The judgment then discussed the evidence with regard to the other accused and proceeded.) It is perhaps desirable that we

should observe at this point that although we have held that there was no misjoinder of charges or mistrial of the appellants by reason of the framing of the conspiracy charge and combining that charge with certain other charges against certain of the accused persons, there is at the present time in this province too great a tendency to make charges against a number of persons that they were parties to a conspiracy and so guilty of an offence under S. 120-B, Penal Code, in circumstances where charges of ordinary substantive offences would be enough. The result is that what ought to be comparatively short and simple cases become long, complicated and unwieldy and instead of being disposed of quickly, drag on for a very long time. Moreover, there are, as we know, certain obvious advantages which the prosecution may derive and sometimes unfairly derive, from the existence of a charge of conspiracy covering a number of persons said to have committed several offences either of one and the same kind or of different kinds within the four corners of the dimensions of the conspiracy. In the present instance if we had the slightest reason to suppose that any of the convicted persons had been unfairly dealt with by reason of the whole body of them having been charged with conspiracy, we should have felt it our duty to quash the proceedings. It is fortunate for the prosecution that although we have given the closest attention and consideration to the points urged by the learned Advocates appearing for the appellants, we have not come to any such conclusion. The pieces of evidence which Mr. Carden Noad said would not have been admissible but for the existence of the charge of conspiracy, and also those pieces of evidence which Mr. Carden Noad declared would not be admitted in any event, none of these things have, in our opinion, had any influence adverse to the interests of the convicted persons or any of them. For the reasons given above, the appeal of Rash Behari Shaw (appellant in Appeal No. 446), Sushil Kumar Ghose (appellant in Appeal No. 461), Jagadish Singh (appellant in Appeal No. 462), Babulal Chowkhani (appellant in Appeal No. 464), Ganesh Bahadur (appellant in Appeal No. 465), and Sailendra Nath Mukherji (appellant in Appeal No. 466), are dismissed. These appellants will surrender to their bail bonds and will serve

out the sentences imposed upon them. The appeal of Patal Chandra Santra (appellant in Appeal No. 461) and the appeal of Manindra Nath Dey (appellant in Appeal No. 453), are allowed. These two appellants will be discharged from their bail bonds and released forthwith.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 770

R. C. MITTER, J.

Ali Hossain Shaikh and another—Defendants—Appellants.

v.

Jonabali Mondal and others—Respondents.

Appeal No. 1622 of 1933, Decided on 12th December 1935, from appellate decree of Addl. Sub-Judge, Nadia, D/- 14th June 1933.

(a) Landlord and Tenant—Suit for arrears of rent—Determination of status of tenant is unnecessary.

In a suit for recovery of arrears of rent, it is not necessary to go into the question of status of the tenants. [P 771 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 23.—Pottah—Recitals in—Pottah executed after commencement of tenancy—Recitals not admissible against tenant.

Recitals, in favour of a landlord, contained in a Pottah, executed since the creation of tenancy cannot be used in evidence against the tenant. These recitals have an effect like those in a third party document. [P 771 C 2]

(c) Transfer of Property Act (1882), S. 107.—Kabuliat—Applicability.

Section 107, T. P. Act, has no application to kabuliyat in respect of agricultural land [P 771 C 2]

(d) Tenancy—Agricultural land—Document if written must be registered—Unregistered document is inadmissible in evidence.

A tenancy in respect of agricultural land can be created by an oral agreement, but if an instrument is executed to that effect then it must be registered under S. 17 (1) (d), Registration Act; if not registered it becomes inadmissible under S. 49 of the same Act. [P 772 C 1]

(e) Registration Act (16 of 1908), S. 17 (1) (d)—Amalnama—Contract for sale of growing straw—Vendee acquiring interest in land—Document embodying such contract requires registration.

In contracts for sale of growing straw the vendees derive a benefit from the further growth of the thing sowed, from further vegetation and from the nutriment to be afforded by the land and thus acquire an interest in the land itself and hence an amalnama or a kabuliyat embodying such a contract requires registration: *Marshall v. Green*, 1 C P D 35, Ref. [P 772 C 1, 2]

A. C. Gupta and Shamsuddin Ahmed—for Appellants.

S. C. Choudhury, Abdul Ali and Ramendra Mohan Mazumdar (for Dy. Registrar)—for Respondents.

Judgment.—This appeal is on behalf of defendants 1 and 2 and arises out of a suit for recovery of arrears of rent for the year 1336 B. S. and the Ashar kist of 1337. The plaintiffs came to Court with the case that the defendants were Ijaradars under them for five years commencing from 1335 B. S. and that the rent payable by them is Rs. 475 a year. The case of the defendants is that they are raiyats and the rent is not Rs. 475 but Rs. 234-13-0 a year. An issue was framed as to the status of the defendants. The lower appellate Court has come to a finding that the defendants are Ijaradars as alleged by the plaintiffs and that their right to remain on the property demised had ceased in the year 1339. Having regard to the fact that it is a suit for recovery of arrears of rent, I am of opinion that it is not necessary to go into the question of status and that question ought to have been left open by the lower appellate Court. Both Mr. Roy Choudhury and Mr. Gupta agree that the said question ought to have been left open. I accordingly expunge that portion of the judgment of the lower appellate Court which deals with the defendants' status and leave the question open to be litigated if and when occasion arises.

The other question involved in this appeal is as to the rate of rent. The lower appellate Court has come to the conclusion that the rent is Rs. 475 and on that finding he affirmed the decree of the first Court. Mr. Gupta appearing for the appellants urges that this finding is based on inadmissible evidence and ought to be set aside and the case remanded to the lower appellate Court in order that the said Court may come to a finding as to what is the amount of rent, after excluding such evidence as is inadmissible. For the purpose of arriving at his finding, the learned Subordinate Judge has found the Dakhilas produced by the defendants to be not genuine. That finding is based on evidence and must stand. But the lower appellate Court in coming to its finding as to the rate of rent relied principally upon Ex. 7 which is said to be an Amalnama, and the recitals in three Pottas Exs. 1, 2 and 8, the recitals being that the defendants are Ijaradars holding at the rent of Rs. 475 and that the term of their Ijara at the date of the pattas had not expired but was to run on for another four years. The

question therefore raised in this appeal is whether Ex. 7 and the recitals in the three pottas are admissible in evidence against the defendants.

I shall first deal with the recitals contained in the pottas. In my judgment those recitals are not admissible in evidence. These pottas were executed in the year 1336 B. S. They are executed in favour of the plaintiffs by some of their co-sharers. I do not see under what provisions of the Indian Evidence Act those recitals could be in evidence against the defendants who had secured their interest from the plaintiffs and their co-sharers before the execution of these pottas. If the defendants' interest had been created after the execution of the pottas any recital therein would have been evidence against them, because they being undoubtedly evidence as against the plaintiffs would have been admissible in evidence against the defendants as their assigns. But having regard to the fact that the defendants had already acquired a right from the plaintiffs before the pottas were executed the recitals are like those in a third party document and are not admissible in evidence against them.

As regards Ex. 7, though it is no doubt described as an Amalnama in one part of the document and an ekrar in another part of it, it cannot be by any stretch of language an Amalnama or warrant for possession given by the landlords to the tenants because this document was not executed by or on behalf of the plaintiffs landlords but by the tenant defendants. I have gone through the terms of the document. The document is really a combination of a kabuliat and a bond promising payment of a portion of the selami which was paid then and there. By this document the defendants took Banda-bust or lease of the property for five years. The rent and all the terms of the settlement are given in detail. The land is described as kharban, that is to say, land covered by straw in its natural state. I am prepared to accept the contention of Mr. Roy Choudhury that it is a kabuliat in respect of agricultural land and the provisions of S. 107, T. P. Act, have no application whatsoever, that is to say for the purpose of creating a lease of such land, it is not necessary that the lease must be created by a registered document only. Settlement might as well have been

made by means of oral agreement. But when an instrument has been executed the question is whether it is affected by the provisions of the Registration Act. In my judgment, if it is a lease of immoveable property, it is affected by the provisions of S. 17, sub-s. (1), Cl. (d), Registration Act, and it requires registration, and not being registered it is not admissible by reason of S. 49, Registration Act, and on that ground it ought not to have been admitted in evidence. In the previous paragraph I have assumed that Ex. 7 is a kabuliyat evidencing the terms of a lease of immoveable property. But Mr. Roy Choudhury has argued before me that by this document no interest in immoveable property has been created, and it is merely a contract for sale of straw growing on the land and therefore it is a contract for the sale of goods and so required no registration. I am unable to give effect to this contention. The principle in such cases has been formulated in the case of *Duppa v. Mayo* (1) cited by Lord Coleridge, Chief Justice, in (1876) 1 C P D 35 (2) at p. 39 and is in these words :

The principle of these decisions appears to be this : that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled, that with respect to implements or *fructus industriales*, etc., corn and other growth of the earth which are produced not spontaneously but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land but merely for the sale of goods.

It is the admitted case of both sides that the straw which was on the land was not *fructus industriales*; it grew on the land in a wild state. On the terms of the Amalnama it is quite clear that the defendants were to derive benefit from further vegetation and from the nutriment to be afforded by the land. I accordingly hold that the Amalnama

created an interest in land in favour of the defendants and was not merely a contract for the sale of goods. In this view of the matter I do hold that Ex. 7 is not admissible in evidence because it is not a registered document. The judgment of the learned Subordinate Judge makes it quite clear that in arriving at his finding that the rate was Rs. 475 a year, he has relied greatly if not entirely upon the aforesaid four documents. Inasmuch as I have held that these four documents are not admissible in evidence, the decree of the learned Subordinate Judge must be set aside and the case remanded in order that the question as to the rate of rent payable by the defendant may be decided on the other evidence on the record. It must however be made clear that the finding of the learned Subordinate Judge on the genuineness of the Dakhilas produced by the defendants stands. The appeal is accordingly allowed and the case is remanded to the lower appellate Court to be disposed of in accordance with law. The costs of this appeal will abide the result.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 772

R. C. MITTER, J.

Ensup Mandal and another—Defendants—Appellants.

v.

Golapjan (Golapjannessa) Bibi and others—Respondents.

Appeal No. 1522 of 1933, Decided on 11th December 1935, from appellate decree of Sub-Judge, 2nd Addl. Court, 24-Parganas, D/- 31st March 1933.

Res judicata—Incidental issue—Issue decided not necessary—Result of former suit unaffected by decision of such issue—Such decision is not res judicata in later suit.

In a former suit between the same parties if an issue was decided but the finding of the issue was not necessary or if the finding on the issue was the other way, the result of the suit would have been unaffected, then that was an incidental issue and a decision thereon is not res judicata between the parties in a later suit: *Concha v. Concha*, (1886) 11 A C 541, *Ref.*

[P 774 C 1]

Narendra Chandra Bose and Satyendra Nath Mitter—for Appellants.

Hira Lal Chakrabarty, Rabindra Nath Bhattacharji and Ramendra Mohan Mazumdar (for Dy. Registrar)—for Respondents.

Judgment.—This appeal is by the defendants in a suit instituted by the plain-

1. 1 Wms. Saunders notes, 394 (395).

2. *Marshall v. Green*, (1876) 1 C P D 35=45 L J C P 153=33 L T 404=24 W R 175.

tiffs for a declaration that the lands recorded in Khatians Nos. 228 and 314 of Mouza Mathurapur and in Khatian No. 69 of Mouza Akatpur, constitute one Jama bearing a rental of Rs. 15 per year and that the decree obtained by the landlords defendants in rent suit No. 499 of 1931 is a fraudulent one. In the record of rights which was finally published under Ch. 10, Ben. Ten. Act, the land recorded in Khatian 314 of Mouza Mathurapur has been shown to be one holding held at a rental of Rs. 15 a year, and the lands in Khatian 228 of Mouza Mathurapur, and in Khatian 69 of Mouza Akatpur have been shown as constituting another holding bearing a rental of Rs. 15. In 1931 the defendants instituted a suit to recover rent for the years 1334 to 1337 at the rate of Rs. 15 a year from the plaintiffs in the present suit and their co-sharers tenants. The plaintiffs in this suit did not enter appearance but their co-tenants did. The decree was an ex parte decree against the present plaintiffs and a contested decree against their co-sharers. In the plaint of that suit the defendants described the tenancy by reference to the khatian number. They said that the tenancy consisted of lands recorded in Khatian 314 of Mouza Mathurapur. The contesting defendants in that suit appeared and raised the defence that the tenancy which they and their co-sharers held at a rental of Rs. 15 a year under the landlords, comprised the lands not only of Khatian 314 but also the lands in Khatian 228 of Mathurapur and Khatian 69 of Akatpur.

On that the following issue was raised: "Have the plaintiffs included in the two suits (we are not concerned with the second suit) all the plots of land covered by the Jamas in question? If not can they get a decree?" As I read the judgment it appears that the Court decided the issue in favour of the landlords. It held that although the documents exhibited in the case would tend to support the tenants' case, the record of rights must be taken to be correct inasmuch as there was no certain evidence to rebut it. On that footing a decree was passed against the tenants. For the purpose of defeating this suit the landlords defendants have raised two points, first of all they state that the decision on the aforesaid issue in the rent suit of 1931, operates as *res judicata* and prevents the plaintiffs in the present suit

from re-agitating the same question; and secondly, they say that in fact the record of rights is correct, there being really two Jamas each held at a rental of Rs. 15. On the merits the lower appellate Court has come to the conclusion that the plaintiff's case is true and the lands recorded in Khatians 314, 228 and 69 form one single holding at a rental of Rs. 15. On the question of *res judicata* the lower appellate Court has differed from the first Court. The first Court held in favour of the defendants, namely, the question is *res judicata*, but the lower appellate Court has taken a contrary view. In my judgment the view taken by the lower appellate Court is correct.

The rent suit was instituted after the amendment of the Bengal Tenancy Act. S. 148, Cl. (c) provides that when the record of rights is finally published the plaint in a rent suit shall contain a statement of the serial number or numbers borne by the tenancy in the record of rights and of the area and rental of the tenancy according to such record. Having regard to the proviso which is added to sub-s. (c), it is not necessary now that the plaint in a rent suit shall contain the statement of situation, designation, extent and boundaries of the land held by the tenant where a Record of Rights has been finally published, that is to say Cl. (b), S. 148, has no application.

The plaint in the rent suit filed after the amendment came into force, would be a good plaint if it contains the serial number or numbers of the tenancy in the Record of Rights and of the area and rental according to the Record of Rights. Such being the position the question is whether the issue which was raised in the rent suit of 1931 was a direct and substantial issue between the parties or was only an incidental issue. In my judgment even if that issue had been decided against the landlords the rent suit could not have been dismissed because the plaint had complied sufficiently with the requirements of law as indicated in S. 148, Cl. (c), Ben. Ten. Act, and there was no dispute as to the rate of rent. In (1886) 11 A C 541 (1) Lord Herschell at p. 550 has formulated a test for the purpose of deciding whether an issue raised and decided in a case, is a

1. *Concha v. Concha*, (1886) 11 A C 541=56 L J Ch 257=55 L T 522=35 W R 477.

direct and substantial issue or only an incidental or collateral issue. The passage runs thus :

Now I do not think it can be disputed that that finding was not essential to the judgment in the cause. If there had been no such finding or if the finding had been the other way, it might equally well have been the case that the learned Judge was bound to decree probate of the will to the executors.

In that case the probate Court in deciding whether a probate should issue or not, had to decide the issue as to whether the testator had a domicile in England or in Chilli. The learned Judge of the Probate Court, Sir C. Cresswell, came to the conclusion that the testator had an English domicile at the date of the suit. Later on, in a Bill instituted by the daughter of the testator, a question arose whether the testator could dispose of effectively the whole of the property, it being her case that if the testator had a domicile at Chilli he had disposing power only over a fourth part of his estate and she was entitled to the remainder of the estate under the Chillian law. The decision of the Probate Court was put forward and it was stated that the said decision operated as *res judicata* on the question of domicile. The said objection was overruled.

The facts of this case are that even if a decision on issue 1 in the rent suit had been justly the other way, that is to say, even if that issue had been decided in favour of the defendants in the rent suit the Court was bound to decree the rent suit inasmuch as there was no dispute about the relationship of landlord and tenant and as to the rate of rent or of the period in arrears. The plaint had complied with the provisions of Cl. (c), S. 148. For these reasons I hold the decision in the rent suit on the point in controversy being a decision on an incidental, and collateral issue, is not *res judicata* between the parties in this suit. For these reasons I dismiss this appeal with costs. The prayer for leave to appeal under Cl. 15, Letters Patent, is refused.

B.D./R.K.

Appeal dismissed.

* * A. I. R. 1936 Calcutta 774

D. N. MITTER AND PATTERSON, JJ.

Secy. of State—Defendant—Appellant.
v.

Krishna Prosad Roy Chaudhuri—Plaintiff 1 and another—Respondents.

Appeals Nos. 277 and 283 of 1931, Decided on 19th December 1935, from original decrees of Sub-Judge, 1st Addl. Court, Sylhet, D/- 31st July 1931.

(a) Assam Land and Revenue Regulation (1 of 1886), S. 8 (b)—Status of a land-holder—Acquisition of, dependent not on the length of possession but on the lessee's holding under the lease for 10 years.

Section 8 (b), Assam Land and Revenue Regulation, does not make it obligatory on the lessee to occupy the land for 10 years before he can acquire the status of a land-holder. All that it says is that he must hold, irrespective of the period of occupation under a lease given, for a term of not less than 10 years. The acquisition of the rights of a land-holder is not dependent on the length of possession under the lease but it is dependent on the lessee's holding under a lease which is given for a term of 10 years. [P 778 C 2]

(b) Assam Land and Revenue Regulation (1 of 1886), Ss. 12, 29 and 70—Scope of.

Section 70 was intended to cover only cases of such lands, that is waste land or lands which have been held on behalf of proprietor Government. [P 779 C 1]

* (c) Surrender—Rights acquired by party contracting himself out of rights in respect of property worth more than Rs 100—Registered document necessary—Besides some express declaration on the part of the party surrendering his rights is necessary.

In order to show that a party has contracted himself out of his rights and surrendered what he had already acquired with reference to property the value of which is more than Rs. 100, the transaction must be evidenced by a registered document under the Registration Act (1877). But apart from registration it is necessary to show some express declaration on the part of the party abandoning his rights. [P 779 C 2; P 780 C 1]

(d) Practice—Plea—Law point can be taken in appeal.

A plea that a particular deed requires registration is a pure question of law; and a pure question of law which is not dependent on any disputed facts can be allowed for the first time in appeal. [P 779 C 2]

* * (e) Lease—Forfeiture clause in lease was ultra vires of statute—Party can deny its binding nature—Deed void in part—Estoppel may arise from the part that is good—This is an exception to the general rule that there can be no estoppel against statute.

Where a forfeiture clause inserted in a lease deed is ultra vires of the statute and as there can be no estoppel against the statute it is permissible to a party to say that they are not bound by the term which is in contravention of

the statute, but it is well established that if a deed is void in part only and the rest be separable, estoppel may arise from the part which is good. This latter proposition is an exception to the general rule that where a deed has been executed in contravention of the statute, the law of estoppel does not apply.

[P 780 C 1]

Brojolal Chakravarti, Gopal Chandra Das, Ananda Ch. Karkoon and Nripendra Ch. Das—for Appellant.

Basak and Mukerji—for Respondents.

D. N. Mitter, J.—The suit in which this appeal arises was brought by the plaintiffs, now appellants, for a declaration that the Government have no right to resume any portion of certain Ilam lands covered by pottas Nos. 3 and 9 in suit, that is to say, potta No. $\frac{24512}{9} \frac{24505}{3}$ present No. 1 or to settle the same after resumption with any other third person and for a further declaration that the plaintiffs have the status of "landholder" in respect of the lands of the pottas in suit within the meaning of Assam Land Revenue Regulation, Regulation 1 of 1886, as well as for confirmation of possession of the two plaintiffs of the lands of the patta in suit and for a perpetual injunction restraining the Secy. of State from disturbing the possession of the plaintiffs. The plaintiffs also asked in the suit for a declaration that they have exclusive right to take settlement from the Government at a proper jama of all the land of the Ilam Pottas in suit and they prayed for other reliefs also. The plaintiffs also asked for restoration of possession of such portion of the lands of the pottas in suit from which they might have been dispossessed in the meantime by the action of the Government and they prayed for mesne profits. The suit was resisted by the Secretary of State who filed a written statement in which they raised several defences to which reference will be made hereafter. The Additional Subordinate Judge of Sylhet decreed the suit of the plaintiffs in a modified form. He held that the plaintiffs have the interest of land-holders within the meaning of S. 8 of the Regulation, in respect of all lands of the Ilam potta No. 1 in suit, as described in the Ilam potta of the English year 1902, but the Subordinate Judge came to the conclusion that the defendant is entitled to make khas and to select for making khas the remainder after setting apart $\frac{1}{5}$ th out of the culturable waste land within

the said property. He declared that the plaintiffs are entitled to get re-settlement of such portion of the mehal as is not included in the aforesaid resumption. The Subordinate Judge held further that the plaintiffs be confirmed in their possession of that portion of the land which the defendant is entitled to resume so long as the same is not resumed as well as of the remaining lands of the mehal. The plaintiffs have preferred an appeal against that portion of the decree which refuses to give the plaintiffs a declaration in terms of their prayer No. 1 in which they asked for a declaration that the Government have no right to resume any portion of the lands of the pottas in question. This appeal has been numbered as Appeal from Original Decree No. 283 of 1931 with which we will deal first. It may be mentioned that the Secretary of State has also preferred an appeal to this Court and that is against that portion of the decree of the Subordinate Judge which affirms the plaintiff's possession in that portion of the land which the Secretary of State is held to have been entitled to resume so long as the same is not resumed. That appeal has been numbered as Appeal from Original Decree No. 277 of 1931. It has been conceded by Dr. Mukherjee who appears for the Secretary of State that if the appeal of the plaintiffs, that is Appeal from Original Decree No. 283 of 1931, succeeds it would follow that the appeal of the Secretary of State, namely, Appeal from Original Decree No. 277 of 1931, must necessarily fail.

Appeal No. 283 of 1931.—We now proceed to deal with the appeal of the plaintiffs, namely, Appeal from Original Decree No. 283 of 1931. The facts which give rise to the contentions in this appeal are not many and are not substantially in dispute. The question really turns on the effect of certain provisions of the Assam Land Revenue Regulation as to the status of the plaintiffs as well as on the effect of the potta No. 1 which has been marked as Ex. Y in the suit and was executed on behalf of the Secretary of State in the year 1902. See p. 54 of Vol. No. 1, part 2 of the paper-book of Appeal from Original Decree No. 277 of 1931 which for the sake of convenience we shall hereafter refer to as Vol. "D." The plaintiffs case is this: that there was a settlement of two estates which will be described for the sake of brevity as

estates Nos. 3 and 9 with the plaintiffs in 1888. Estate No. 3 was granted for a period of eight years commencing from 1298 to 1302 B. S., on 23rd July 1888. See p. 144, Vol. D of the paper book. This document has been marked as Ex. M. With regard to the Estate No. 9 there was a kabuliat, Ex. N (1), which evidenced an Ilam settlement. It appears that under both these documents the land which was settled was the land which belonged to the Government and was in possession of the Government and which was not in the possession of the plaintiffs; and this was the land over which none of the plaintiffs had the right of the proprietor, land-holder or settlement-holder under the Assam Regulation. This was apparently the land to which provisions of S. 12 of the Assam Regulation of 1886 apply. This may be regarded as the first stage in the relationship of landlord and tenant between the plaintiffs and the Secretary of State with reference to this tenancy. It appears that before the terms of the lease expired a re-settlement of the lands in the two estates were made for ten years, that is from the year 1894 to 1904 or 1300 to 1310 B. S. The two leases in respect of the two estates, estate No. 3 and estate No. 9, have been marked as Exs. E E and E E.1 respectively and printed at pp. 64 and 67 respectively in Vol. D of the paper book. These leases were for a term of ten years and as soon as these leases were executed the plaintiffs acquired according to their contention the status of land-holders within the meaning of S. 8, Cl. (b) of the Regulation. It may be stated here that the Secretary of State acceded to this position claimed by the plaintiffs in the Court below. The learned Senior Government Pleader has, however, raised a new contention and he argues that the plaintiffs did not acquire the status of land-holders because in the first stage of the settlement they entered into these lands as lessees to whom provisions of S. 12 apply. We shall consider the soundness or otherwise of this contention after we have finished the narrative of the facts of this case. This is the second stage in the relationship of landlord and tenant as between the Government on the one hand and the plaintiffs on the other.

We come now to the third stage and we will have to refer in chronological

sequence to some of the events which led to the execution of potta No. 1 in 1902 which covered a period of 20 years and was to expire on 31st March 1922. (The judgment then describes the documentary evidence and the defences and then proceeds). After considering the oral and documentary evidence the Subordinate Judge has come to the conclusion that the pottas of 1894 conferred on the plaintiffs the status of landlord with a permanent heritable and transferable right for use and occupation of the lands comprising the two estates. The real issue which the Subordinate Judge had to determine in the matter of controversy before us is issue 8. That issue is to the following effect :

Is the order of the Governor in Council passed on 1st January 1926 for enforcing Cl. 7 of Potta resuming the waste and fallow lands valid and binding against the plaintiffs and can the plaintiffs claim re-settlement of the lands resumed by order of Government ?

The Subordinate Judge went into the history of the Ilam estates in great detail. It is not necessary to discuss the nature of these estates as they are stated with great fulness in the admirable introduction to the Assam Land Revenue Manual, Edn. 5, 1931, p. 93, by Sir E. Ward. The Subordinate Judge held the rules made under S. 29 cannot possibly take away substantive rights expressly granted, or arising out of the other provisions of the Regulation and not terminating with the term of a settlement. He also held that before 1902 a notification was issued inserting the resumption clause of the one-fifth rule. It shows that somebody has misread that important form prescribed by the notification which was intended to apply to all sets of the settlement-holders including land-holders. He held further that the Government is not entitled in the case of land-holders to impose any term it chooses at the re-settlement and that such terms as it may impose must be consistent with the status of a land-holder conferred by the statute. After coming to these findings which are favourable to the case of the plaintiffs the Subordinate Judge next rests his conclusion on the acceptance by the plaintiffs of this lease containing the forfeiture clause : Cl. (7). He says :

It is idle to contend that the plaintiffs had not accepted this Potta but accepted only the immunity from enhancement of the revenue for 20 years which the Potta secured.

The real basis of his decision to quote his own words is this :

When the 1894 leases were running, and the term of either was going to end in 1903 and the peril of a revision of revenue was almost in sight the plaintiffs applied for an extension of term for 20 years, that is for an immunity from further increase of the revenue for another 20 years. The Government offered a lease granting this immunity, but containing this special term that the lessee must reclaim the lands at his peril, or there would be a resumption of a proportion of the waste lands. I do not think that there was anything to prevent the plaintiffs from entering into such a contract, so that the question to which one is reduced is whether the plaintiffs had, in fact, entered into this contract.

The basis of the Subordinate Judge's judgment, as we read it, is that it is open to the plaintiffs to surrender their rights as landlords and the plaintiffs did surrender such rights when they agreed to the acceptance of Cl. (7) of the form in appendix E. He accordingly gave a modified decree in the light which has already been indicated. The plaintiffs have accordingly appealed and it is contended on their behalf that the basis on which the Subordinate Judge has rested his decision is wrong. It is argued that if one examines the correspondence which passed between the Chief Commissioner of Assam and the plaintiffs, and which eventually led to the execution of the pottas, it would show that there was really no necessity for introducing Cl. (7) of the potta which really takes away their rights as land-holders, and it is said that as land-holder they were entitled to re-settlement on the expiry of the term of 20 years on 31st March 1922, subject to the settlement of revenue as might be determined then. It is argued in the first place that the form in appendix E of the Regulation really refers to waste lands or such lands as could not be disposed of under S. 12 of the regulation ; and as the land now in question was not such land, because the plaintiffs have already been in possession of these lands as land-holders the form already inserted in the lease cannot affect the rights of the plaintiffs.

In the alternative it is argued that even if such form is sanctioned by the rules made by the Chief Commissioner such clause as Cl. (7) was not introduced in the execution of the powers given by the statute. In other words it was said that it was ultra vires of the statute and that the plaintiffs were not bound by any new term, a term which could not be

enforced under the provisions of the statute. On the question of consideration for this new lease it is said that the conveyance made by the Secretary of State with regard to the consideration was the freedom from enhancement for the period of 20 years. It is not really borne out by the plaintiff's correspondence, for the correspondence from the two previous Commissioners makes no mention of such consideration. It is true that at the end of the term of 1904 it would have been open to the Chief Commissioner to enhance the revenue in respect of these lands. But as this was not made it must be taken for granted that the settlement was on terms which were already in force. He is really extending the terms of ten years' leases of 1894 to 31st March 1922. It becomes necessary therefore to consider some of the provisions of the Assam Regulation with reference to the several grounds taken.

It is first contended that under the lease of 1894 the plaintiffs have acquired the status of a land-holder having regard to the provisions of S. 8 (1) of the Regulations. The Subordinate Judge has found this contention correct and we would not have dealt with this question but for the fact that the learned Senior Government Pleader has challenged this finding of the Subordinate Judge and has contended for the first time before us that the status of the plaintiffs after they had obtained the leases of 1894 and up till 1904 was not that of a settlement-holder. The argument is based on this reasoning: It is said that it being admitted that when the plaintiffs or their predecessors entered into this land they entered as lessees to whom leases were granted under S. 12 of the Regulation, and the persons who hold such leases are exempted from the benefit of S. 15. It is said that under S. 15 it is enacted that no person shall acquire by length of possession or otherwise any right over lands disposed of or allotted under S. 12, S. 13 or S. 14 beyond that which is given by the rules made under the section, and it is contended that as the initial leases of 1888 were leases granted under S. 12 the plaintiffs could not at that time acquire the status by length of possession any rights higher than what are due under S. 12. It is impossible to accept this contention, for in our view the granting of second lease for ten years certainly entitles them to acquire the rights of the

land-holders in view of what is said in S. 8, Cl. (b) which runs as follows:

Except as provided by S. 15, any person who has, whether before or after the commencement of this Regulation, acquired any such land under a lease granted by or on behalf of the Government, the term of which is not less than ten years shall be deemed to have acquired the status of a land holder in respect of the land.

The exception would refer to a case where the lessee was holding under a lease to which S. 12 applies. In the present case it can hardly be contended that at the time when the lease of 1902 was granted the present plaintiffs were holding lands under S. 12. We have therefore no hesitation in repelling this contention, which was for a very good reason not taken in the Court below. The learned Senior Government Pleader has also questioned the finding of the Subordinate Judge that the plaintiffs have acquired the status of a land-holder because he argues, under S. 9, a landholder shall have a permanent heritable and transferable right of use and occupancy in his land subject to the special conditions of any engagement into which the landholder may have entered with the Government. It is further argued that in this case as the plaintiff's rights were subject to the special incident in Cl. (7)—the forfeiture clause which lays down the one-fifth rule—the plaintiffs cannot be regarded as land-holders within the meaning of S. 8. We are unable to accept this contention either for Cl. (8) must be read in such a way as not to destroy the right of permanency, heritability and transferability and others, but at the same time impose some restrictions in the mode of user and these rights, viz., rights of easement, etc. This argument was not taken in the Court below and it seems to us not rightly taken. We must overrule this contention.

A further contention was raised that the plaintiffs have not acquired the status of a land-holder because they had not completed their possession under the lease of 1894 for a period of ten years. This contention also is of no substance if we consider the language of Cl. (b), S. 8. S. 8, Cl. (b) runs as follows:

Except as provided by S. 15, any person who has, whether before or after the commencement of this Regulation, acquired any such land under a lease granted by or on behalf of the Government, the term of which is not less than ten years, shall be deemed to have acquired the status of a land-holder in respect of the land.

This provision does not make it obligatory on the lessee to occupy the land for ten years before he can acquire the status of a land-holder. All that it says is that he must hold, irrespective of the period of occupation under a lease is given for a term of not less than ten years. There is nothing in this contention also having regard to the clear language of the statute. The acquisition of the rights of a landholder is not dependent on the length of possession under the lease, but it is dependent on the lessee's holding under a lease which is given for a term of ten years. We have just dealt with the objection which was really taken for the first time by Dr. Basak appearing on behalf of the Secretary of State.

Now we proceed to deal with the point raised by the appellant that this Cl. (7) of the patta Ex. 1 was really inserted in the lease apparently through some mistake and it is contended that the notification which added or inserted this clause to the terms of the patta really was with reference to an amendment made to the rules under Ss. 12 and 29 of the Regulations and it is said that the rules can only apply if the case is one which is covered by S. 12, and it is said that there is no point in confirming the clause as referring to both Ss. 12 and 29 unless it was intended that they must refer to such lands as are mentioned in S. 12. On the other hand it is contended on behalf of the Government that if one looks to Ss. 12 and 29 of the Regulations it would appear that they refer to rules regarding the different classes of duties, for instance it is said that under S. 12 the Chief Commissioner may make rules for the disposal by way of grant of lease, or otherwise, of any land over which no person has the rights of a proprietor, landholder or settlement-holder under the Regulation. Whereas under S. 29 the Chief Commissioner may make rules prescribing the principles on which the land revenue is to be assessed, the term for which and the condition on which, settlements are to be made, and the manner in which the Settlement Officer is to report for sanction of his rates and method of assesment. It is said on behalf of the Government that it is a general section, and our attention has been drawn on behalf of the Government to Rule No. 88 of the Rules to be found at page 97 of the Settlement Rules

Chapter I of the edition of the Assam Land Revenue Manual by Mr. Gait published in 1896 with an introduction by Sir William Erskine Ward, the then Chief Commissioner of Assam. It is said that Rule 88 refers to a case of re-settlement and not settlement of lands of which the Government is the proprietor nor settlement of waste lands. It appears to us, however, on examining Rule 70 to which reference was made and under which Appx. E is added to the statute, that it applies to all leases. Rule 70 runs as follows :

All annual leases shall be in the form given in Appx. D, in the form given in Appx. E.

This Rule, looking at the contents it would appear is put in that portion of S. 3 which deals with waste lands. S. 66 of the Rules gives the definition of waste land as used in this section. That refers to periodical leases and S. 70 deals with all annual leases. It is said and I think there is great force in what has been said on behalf of the plaintiffs that S. 70 was intended to cover only cases of such lands, that is the waste land or lands which have been held on behalf of the proprietor, Government. S. 80 expressly means the case of resettlement and it also appears to us that S. 29 was not really intended to apply to the provisions of any other case of settlement for it gives really a right of assessment of Government revenue in respect of which the Chief Commissioner framed rules. I think that this is the right view to take of the various rules under Ss. 12 and 29 published in the form printed at Appx. E. This form is to be found at page 281 of the same book. It appears that into this form in Appx. E by a notification dated 3rd July 1901, Cl. (7) which has been quoted in extenso above and which is to be found in the lease had been inserted; and it seems to us on reading the notice at the footnote to S. 70 that this was with reference to waste lands. That view is strengthened by the consideration that under S. 29 waste lands are not to be assessed. But if we are not right in the construction of rules it appears to us that Cl. (7) is made applicable to the rest of the lands which are not covered by S. 29, that is re-settlement of the lands of the persons who are already in possession and occupation of the lands of the lease is ultra vires under the statute for according to S. 9 of the

Regulation the present plaintiffs have acquired the status of land-holder and acquired heritable right and the right of use and occupation.

That cannot be taken away by the insertion of the forfeiture clause which would really mean surrender at the end of the term of the lease of valuable rights which had been acquired by reason of the plaintiffs being the land-holders within the meaning of S. 8. The Subordinate Judge has also taken that view, and we think, rightly. In this view the question next arises which is the more difficult point in the case with which we have to disagree with the Subordinate Judge as to what is the effect of the acceptance of the lease. Some argument has been advanced on behalf of the appellants that there has not been acceptance of the potta Ex. I as is contemplated by the Regulation. We do not think that we need be troubled by these technicalities as to whether there has been acceptance in conformity with these regulations. The fact remains that as the lease patta Ex. I was in the possession of the plaintiffs it must be presumed that they had full knowledge of the contents of the potta including Cl. (7). It is true that they did not execute a corresponding kabuliati and that becomes a question of no materiality, seeing what we have to determine is whether the plaintiffs have surrendered the rights which they have already acquired as land-holder by the execution by Government of the potta Ex. Y which they accepted and which they treated as the foundation of their title. It has been argued on behalf of the plaintiffs that in order to effect such a surrender of their rights a registered document is necessary. This point was not taken in the Court below but it is said that this is a pure question of law which should be allowed to be raised for the first time in appeal to this Court. It is true that this argument suffers from infirmity which attaches to the belated plea taken for the first time in appeal, but at the same time as it is a pure question of law which is not dependent on any disputed facts we might allow this point to be taken. We think that in order to show that a party has contracted himself out of his rights and surrendered what he had already acquired with reference to the property the value of which exceeds Rs. 100 the transaction must be evidenced by a regis-

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tered document having regard to the provisions of S. 17, Registration Act of 1877, which was the Registration Act prevailing at the time. But apart from the question of registration before one can hold that the party has contracted himself out of his rights some express declaration on the part of the party abandoning his rights must be forthcoming. In order to establish the fact that there was abandonment of their rights by the pottah there must be something to show in the most explicit terms that the parties understood when accepting the potta that they were giving up a very valuable right by reason of their being land-holders within the meaning of Ss. 8 and 9 of the Regulation. Besides it seems to us that this agreement, in so far as it incorporates Cl. 7, the forfeiture clause or the one-fifth rule being ultra vires of the statute to that extent is irregular, and as there can be no estoppel against the statute it is permissible for a party to say that they are not bound by a term which is in contravention of the statute. This term of the pottah is separable from the rest. It is well established that if a deed is void in part only and the rest be severable estoppels may arise from the part which is good. This is an exception to the general rule that where a deed had been executed in contravention of a statute the law of estoppel does not apply. We think therefore that the Subordinate Judge is not right in the view which he has taken that the acceptance of the potta which includes Cl. 7 is tantamount to surrendering their rights as "land-holders."

It remains to consider the other points on which the Subordinate Judge rests his decision, namely, that there has been consideration for the potta, Ex. Y. It is said that it would appear from the passage which has been already quoted that the consideration for the Pottah was that they got immunity from further increase of revenue for 20 years and that in view of this consideration they accepted the clause about the resumption of a portion of waste land as will appear from the correspondence with the revenue authorities. There is nothing in that correspondence which would show that any such concession was given to the present plaintiffs which would induce them to surrender their very valuable rights. We think,

therefore, that the decree of the Subordinate Judge must be modified and the plaintiffs must be declared entitled to a decree in terms of their plaint.

Appeal No. 277 of 1931.—As has already been stated that the learned Junior Government Pleader concedes that as a result of Appeal No. 283 of 1931 being allowed Appeal No. 277 of 1931 must be dismissed. In the circumstances of the present case we think that each party must bear its own costs throughout and this order as to costs must govern both the appeals.

Patterson J.—I agree.

A.L./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 780

M. C. GHOSE, J.

Dukhiram Madhu — Defendant 3—Appellant.

v.

Ramlakshmi Falia — Plaintiff and others—Defendants—Respondents.

Appeal No. 1661 of 1933, Decided on 12th November 1935, from appellate decree of Sub-Judge, First Court, Faridpore, D/- 22nd April 1933.

Mortgage—Mortgagee agreeing to pay proportionate rent of land mortgaged—Mortgagor found to be possessed of more land in that holding—Rent actually paid by mortgagee corresponded to larger portion of mortgaged property—Mortgagee cannot claim more than what was mortgaged.

The mortgagor borrowed certain amount from mortgagee and executed a mortgage bond in respect of 12 bighas out of the mortgagor's holding of 15 bighas of land which he held at a rent of Rs. 10-9-3. It was stated in mortgage bond that the proportionate rent of the portion mortgaged would be Rs. 8-7-0. When afterwards the mortgagee sued on the mortgage bond, it was found that the mortgagor in fact owned a holding of 25 bighas and the rent of Rs. 10-9-3 was for that entire holding. The mortgagee on seeing that the proportionate area for which he paid rent was 18 bighas and not 12 bighas, claimed that he should get possession of 18 bighas and not of 12 bighas only as stated in the mortgage deed :

Held : that it was not correct as between a debtor and a creditor to give the creditor a larger portion than what was mortgaged to him just because of the proportion of the rent.

[P 781 C 2]

Rishindra Nath Sarcar and Subodh Chandra Dutta—for Appellant.

Bijoli Bhusan Sanyal — for Respondents.

Judgment.—The facts in short are that many years ago defendant 3 and

another borrowed Rs. 100, from the plaintiff and executed a mortgage bond in respect of 12 bighas of the southern portion of the defendants' holding of 15 bighas of land which they held at a rent of Rs. 10-9-3. It was stated in the mortgage bond that the proportionate rent of the portion mortgaged would be Rs. 8-7-0. Many years afterwards the plaintiff sued on the mortgage bond. During the progress of the suit there was an agreement between the parties to compromise the litigation. The terms of the agreement were that the defendants would sell 10 bighas of the land to the plaintiff and mortgage 2 bighas in addition to that. But the defendants failed to carry out the agreement and thereafter the plaintiff got a mortgage decree for sale of the security. The mortgaged land was sold in auction and purchased by the plaintiff. His case is that he could keep possession of only 6 bighas of the land, but the defendants by force dispossessed him from the rest of the land. The plaintiff's claim is not only for 12 bighas as stated in the mortgage decree but for about 18 bighas on the basis that in a recent Cadastral Survey it was found that the defendants' holding consisted not of 15 bighas but of about 25 bighas, and inasmuch as the rent of the mortgaged portion was Rs. 8-7-0, while the rent of the whole portion was Rs. 10-9-3, the plaintiff is entitled to $\frac{4}{5}$ ths of the 25 bighas.

The first Court disallowed the plaintiff's claim for 18 bighas but gave a decree for the 12 bighas as stated in the mortgage bond. In appeal the learned Subordinate Judge has come to the conclusion on the reading of the relevant document that the plaintiff is entitled to $\frac{4}{5}$ ths of the total lands of the defendants as claimed by the plaintiff and has decreed the plaintiff's claim in full. Upon hearing the learned advocates on both sides, it is clear that the principle on which the learned Subordinate Judge has proceeded is entirely unjust and inequitable. In the bond only 12 bighas of land were mortgaged to the plaintiff. Even during the suit the plaintiff agreed to compromise the litigation on receipt of 12 bighas of land. That compromise failed by the negligence of the defendants. Thereafter the greed of the plaintiff increased and he claimed not only 12 bighas but 18 bighas and the only basis of it is that in

the mortgage bond it was stated that the proportionate rent of the mortgaged land was Rs. 8-7-0 while the rent of the whole was Rs. 10-9-3. It is not correct as between a debtor and a creditor to give the creditor a larger portion than what was mortgaged to him just because of the proportion of the rent. The plaintiff is liable to pay Rs. 8-7-0 per annum from 12 bighas of land. If the defendants hold from the landlords 25 bighas of land instead of 15 bighas, as was originally settled with them, the question may be fought out between the landlord and his tenants, the defendants. That matter has no concern with the plaintiff who lent his money on the security of 12 bighas of land bearing rent of Rs. 8-7-0 and he is not entitled to get more than that on any account. In the result, the appeal is allowed. The decree of the lower appellate Court is set aside and that of the first Court restored with costs throughout. Leave to appeal under the Letters Patent is refused.

B.D./R.K.

*Appeal allowed.***A. I. R. 1936 Calcutta 781**

EDGLEY, J.

Madan Mohan Das Mohanta Maharaj and another—Appellants.

v.

Jitendra Nath Roy—Respondent.

Appeal No. 303 of 1934, Decided on 24th January 1936, from appellate decree of Addl. Dist. Judge, Jessore, Khulna, D/- 31st July 1933.

(a) Bengal Cess Act (9 of 1880), Ss. 54, 58—Taxation statute—Strict interpretation—Notice under S. 54 must contain all details—Mistake in notice with regards dates and omission with regards specification of amounts constitute illegality—No suit maintainable under S. 58 under such circumstances.

Cess Act is a taxation statute and must be strictly interpreted and having regard to the mandatory nature of the language used in S. 54 read with S. 56, it would appear that unless the notices required by S. 54 have been properly published with all the details specified in S. 54, it is not legal for the holder of the estate to sue for cesses under S. 58 of the Act. Mistake with regard to the date fixed by the Board of Revenue which appears in the notices under S. 54, Cess Act, and the omission to specify the exact amounts payable, constitute not merely an irregularity but an illegality which vitiates the notices. Suit based on such incomplete notice is not maintainable. [P 783 C 1]

(b) Bengal Cess Act (9 of 1880), S. 58—Suit under three years' limitation applicable.

A suit for the recovery of a penal sum under S. 58, Cess Act, is not a suit for the recovery of an arrear of rent and the claim is only an ordinary money claim governed by the rule of three years' limitation: 1929 Pat 331, *Foll.*

[P 783 C 2]

Sarat Chandra Bose and Narendra Krishna Basu—for Appellants.

Hemendra Chandra Sen—for Respdt.

Judgment.—The defendants are the appellants in this case. The plaintiff in the suit, out of which this appeal arises, sought to recover cesses under S. 58, Cess Act, in respect of certain rent-free lands for the years 1333 to 1336 inclusive. The defendants were the holders as shebais of certain rent-free lands within the plaintiff's touzi No. 132. The plaintiff's case was that there had been a cess re-valuation and after due publication of the requisite notices, he had called upon the defendants to pay the cesses due from them but they had failed to do so. The defendants contended that their holding fell within touzi No. 203 and that they had already paid the cesses due from them to the patnidar under the touzi. It was further contended on their behalf that the plaintiff was not entitled to collect cesses from them as he had not observed the mandatory requirements of the Cess Act.

The learned Munsif dismissed the plaintiff's suit. In doing so he found that there was nothing to establish any connexion between the payments made by the defendants and the lands in respect of which cesses were claimed, but at the same time he held that it had not been proved that there was any publication of the notices required by S. 54, Cess Act. When the matter came before the learned Additional Judge on appeal on 31st July 1933, the lower appellate Court decreed the plaintiff's suit. In this connexion it may be noted that the learned Additional Judge accepted the finding of the Court of first instance with regard to the payments alleged to have been made by the defendants to the patnidar holding touzi No. 203. He held however that the notices required by the law had been duly served and that although the notices required under S. 54, Cess Act, did not strictly comply with certain provisions of that section he was nevertheless of opinion that the defendants should not be allowed to take advantage of this irregularity in order to repudiate their liability to pay the cesses. The first point which

has been urged before me by the learned advocate for the appellants is that the lower appellate Court should have held that the defendants had actually paid the cesses due from them for the lands for which the claim was made. With regard to this contention there is a clear finding in the judgment of the lower appellate Court to the effect that there is nothing to connect the receipts filed by the defendants with the lands for which cesses are claimed by the plaintiff. There is a similar finding in the judgment of the Court of first instance and both the lower Courts appear to have based their conclusions on this point on satisfactory evidence. I see no reason for disagreeing with his finding.

The most important point however which has been urged in connexion with this appeal is that having regard to the language of the statute, the plaintiff cannot recover the amount of cesses claimed by him under S. 58, Cess Act, because there has been substantial non-compliance with the provisions of S. 54 of the Act. Admittedly the demand for cesses in this case is based upon a re-valuation and it is clearly provided by S. 54, Cess Act, that, whenever such re-valuation takes effect in any district or part of the district, the holder of the estate or tenure to whom cesses are payable in respect of the lands held free of rent shall cause a notice to be published. It appears from Cl. 3, S. 54 that the purposes for which this notice must be published are twofold: (1) to inform all concerned of the rate which has been fixed for the levy of the cesses and (2) to require the persons concerned to pay the amount of the specified cesses as it falls due. The section goes on to specify certain details which must be mentioned in the notice and item 6 of these details reads as follows:

The dates fixed by the Board of Revenue under S. 57 for the payment of each instalment together with the amount for each instalment.

Admittedly in the case out of which this appeal arises there has been a non-compliance with item 6. The dates fixed by the Board of Revenue under S. 57, Cess Act, are to be found in R. 112 of the Statutory Rules published under the Act. Most of the amounts involved in the case out of which this appeal arises are admittedly less than Rs. 10. This being the case, the date to be mentioned in the

notices under S. 54 should have been 12th January whereas the dates actually mentioned in the relevant notices are 1st May and 1st November. Further as remarked by the learned Additional Judge in those cases in which more than one payment is allowed, the amounts payable in each instalment are not mentioned. Obviously the intention of item 6 was that the persons concerned should be informed of the actual dates upon which the cesses fell due and the exact amounts they would have to pay. If this is not done it may be argued that the persons who are liable to pay the cesses may be seriously prejudiced. These persons usually live in remote country villages and it is hardly to be expected that they would be acquainted with the notifications of the Board of Revenue under S. 57, Cess Act, which may be published in the Calcutta Gazette from time to time. It is therefore a matter of some importance that they should know the precise details regarding the payment of the cesses. It seems to me that, if such details are not mentioned in the notices, there is a substantial non-compliance with the provisions of S. 54, Cess Act. Taxation statutes of this nature must be strictly interpreted and having regard to the mandatory nature of the language used in S. 54, Cess Act, read with S. 56 of the same Act, it would appear that unless the notices required by S. 54 have been properly published with all the details specified in S. 54, it is not legal for the holder of the estate to sue for cesses under S. 58 of the Act. I must therefore hold that the mistake with regard to the dates fixed by the Board of Revenue which appears in the notices under S. 54, Cess Act, and the omission to specify the exact amounts payable constitute not merely an irregularity but an illegality which vitiates the notices. In these circumstances it is clear that the plaintiff's case must fail owing to non-compliance on his part with the mandatory provisions of the Cess Act.

The next point urged is that, in any case, the plaintiff is not entitled to sue for cesses for four years as he has done in this case and, in support of this contention, reliance is placed upon a decision of the Patna High Court in 8 Pat 358 (1),

1. Bhuneshwari Kuer v. Gopal Saran Narayan Singh, 1929 Pat 331=118 IO 783=8 Pat 358.

where it was held that a suit for the recovery of a penal sum under S. 58, Cess Act, is not a suit for the recovery of an arrear of rent, and that the claim is only an ordinary money claim governed by the rule of three years' limitation. Having regard to the circumstances of the present case I agree that this principle should be applied and that even if it could be held that the plaintiff's claim was maintainable, he would only be entitled to recover cesses for three years. A further point of minor importance has been mentioned to me with reference to the decree of the lower appellate Court. This decree appears to have been passed against defendants 1 and 2 personally but it is admitted on both sides that the intention must have been that the decree should be passed against them in their capacity as shebait. Having regard to the consideration mentioned above with reference to the interpretation of S. 54, Cess Act, this appeal must be allowed. The judgment and the decree of the lower appellate Court are set aside and those of the Court of first instance are restored. The appellants are entitled to get their costs in all the Courts. Having regard to the importance of the main legal point involved in this case, permission is granted to file an appeal under the Letters Patent.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Calcutta 783

M. C. Ghose, J.

Ekkari Ghose and others—Defendants 1 to 3—Appellants.

v.

Sideshwar Ghose and another—Respondents.

Appeal No. 1459 of 1933, Decided on 9th December 1935, from appellate decree of Sub-Judge, Second Court, Hooghly, D/- 25th March 1933.

Transfer of Property Act (1882), S. 53—Transfer to defeat or delay creditor—Suit to set aside—Representative nature—O. 1, R. 8, Civil P. C., is applicable—Suit if not validly framed relief cannot be granted.

Under S. 53, T. P. Act, a suit instituted by a creditor to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of transferor, shall be instituted for the benefit of all the creditors, that is to say, a suit must be instituted according to the provisions of O. 1, R. 8. Where a suit is not instituted according to the law as laid down in S. 53, the plaintiff is not entitled to claim the

benefit of S. 53. It would be evidently unjust to give him a decree under S. 53, since he does not make such a case in the plaint and does not give the defendant adequate opportunity to meet his plea: 32 Cal 198 (P C), Ref. [P 784 C 2]

Apurbadhan Mukherjee—for Appellants.

Nanda Gopal Banerjee—for Respondents.

Judgment—This is an appeal by defendants 1 to 3 in a suit for declaration that the lands in suit are saleable and attachable in execution of plaintiff's decree against the judgment-debtor, defendant 4 in the suit. The facts in short are that defendant 4's husband Annanda Prosad Ghose borrowed Rs. 76, from the plaintiff by a promissory note. The plaintiff brought a suit in 1929 on the promissory note against defendant 4 as widow and heir of the said Ananda. The suit was decreed on the 24th August 1929. The plaintiff in execution of the decree attached the lands in suit. The defendants 1 to 3 thereupon preferred a claim alleging that they had purchased the land on the 8th June 1929 and been in possession since the date, that the claim was allowed by the Court. Thereupon, the present suit was instituted. The plaintiff alleged in the plaint that the kobala by which the defendants purchased the lands from defendant 4 was a collusive and a benami document without consideration and was created in order to defraud the plaintiff. The trial Court found on the evidence that the appellants had purchased the lands for good consideration from defendant 4 and they are in possession since the purchase, and the Kobala was not a Benami transaction as alleged by the plaintiff. Thereupon, the trial Court dismissed the suit.

In appeal, the learned Subordinate Judge held that the appellants were not benamidars of defendant 4, but that they had purchased the land for consideration and that they are in possession since the date of their purchase. The Court, however, held that defendant 4 sold the lands to the appellants in order to defraud the plaintiff and defeat his claim in the suit, and therefore, though the kobala was for consideration it is hit by S. 53, T. P. Act, and the Court thereupon, passed a decree that if within the time stated, defendants 1 to 3 paid the decretal amount to the plaintiff, the suit would stand dismissed but in default of such payment the plaintiff would be

entitled to attach and sell the plaint lands for realization of the decree. In appeal it is urged that the case of the plaintiff was that the document was a benami transaction without consideration and on that basis the parties went to trial. The case under S. 53, T. P. Act, was not made out in the plaint. Even under S. 53, as it stood before the amendment of 1929 it was held that a suit must be properly constituted under S. 53. If it was properly constituted there might be a defence to such a proceeding. See the case in 32 I A 1 (1). The amended S. 53, which came into force in 1929 applies to the present suit which was instituted in January 1931. It is laid down that a suit instituted by a creditor to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditor of transferor, shall be instituted for the benefit of all the creditors, that is to say, a suit must be instituted according to the provisions of O. 1, R. 8. The present suit was not instituted according to the law as laid down in S. 53.

The plaintiff, therefore, is not entitled to claim the benefit of S. 53. It would be evidently unjust to give him a decree under S. 53, since he did not make such a case in the plaint and did not give the defendant adequate opportunity to meet his plea. It was urged by the learned advocate for the respondent that the plaintiff might be allowed to amend the plaint so as to comply with the provisions of O. 1 R. 8; if such amendment be allowed now it would be beyond time of limitation. The appeal is allowed, the decree of the Court of appeal below is set aside and that of the Court of first instance restored with costs.

B.D./R.K.

Appeal allowed.

1. Chutterput Singh v. Maharaj Bahadur, (1905) 32 Cal 198=32 I A 1=8 Sar 713 (P O).

A. I. R. 1936 Calcutta 784

S. K. GHOSE AND EDGLEY, JJ.

Rash Behari Nandi and others—Plaintiffs—Petitioners.

v.

Sm. Hafeza Khatun Chaudhurani and others—Opposite Parties.

Civil Rule No. 313 of 1935, Decided on 7th February 1936, from order of Addl. Dist. Judge, Tippera, D/- 7th May 1934.

Court-fees Act (1870), S. 12—Suit for declaring revenue sale is illegal—Possession to

auction-purchaser not delivered at time of filing of suit—Consequential relief not prayed—Fixed court-fee paid on basis of declaratory nature of suit—Objection to court-fee paid on basis of declaratory nature of suit—Decision of trial Court reversed by first appellate Court on appeal—On further appeal held, decision of lower appellate Court was wrong because order of trial Court was not appealable.

A suit was brought for a declaration that certain revenue sale was illegal and ultra vires. As no possession was delivered to the auction-purchaser when the suit was filed, no consequential relief was asked and fixed court-fee was paid on the basis of the purely declaratory nature of relief. The defence was that the suit was not maintainable till ad valorem court-fee was paid on a valuation of ten times the revenue, because subsequent to the suit possession was delivered to the auction-purchaser. The trial Court held that court-fee already paid was sufficient. First appellate Court reversed the order of the trial Court:

Held: the lower appellate Court had no jurisdiction to hear the appeal as the order of the trial Court was not appealable: 23 Bom 486; 16 I C 963; 1924 Cal 731 and 1919 Pat 270, *Disting.* [P 785 C 1, 2]

Abinash Ch. Ghose—for Petitioners.

Jatindra Mohan Ghose—for Opposite Parties.

Order.—The petitioners in this rule brought a Suit No. 52 of 1933 for a declaration that a certain revenue sale is illegal and ultra vires and not binding on the petitioners. The opposite parties being the defendants raised a defence that the fixed court-fee of Rs. 20 paid on the basis that the suit is purely of a declaratory character was insufficient and that the plaintiffs could not maintain the suit without paying ad valorem court-fees. Thereupon the trial Court took up the question of court-fees as a preliminary issue and by its order dated 20th March 1934 decided that the amount of court-fees paid by the petitioners was sufficient. Against that order an appeal was taken by the opposite parties defendants to the District Judge and the latter by his judgment, dated 7th May 1934 disagreeing with the decision of the trial Court held that the plaintiffs were bound to pay ad valorem court-fees at ten times the revenue payable for the estate in question. This judgment was passed ex parte. The petitioners having failed to get that judgment set aside moved this Court in revision and obtained this rule.

It is contended for the petitioners that the District Judge exercised his jurisdiction wrongly because the order of the trial Court holding that the case as

framed did not call for ad valorem court-fees was not appealable. On the face of it, it was not, but it is contended for the respondents-opposite parties in this Court that an appeal will lie from the decision of a Court where the decision necessarily involves a decision of the category or class under which a suit falls, even though it should incidentally decide the question of valuation. It is pointed out that the trial Court took the view that the defaulting proprietors had not been dispossessed at the time of the suit and therefore they were not bound to ask for delivery of possession and that on the other hand the appellate Court took the view that, as possession had been delivered to the auction-purchasers subsequently, the suit was not solely for a declaration. No doubt it has been held that an appeal will lie where a question involves a decision of the class under which a suit falls in spite of the bar under S. 12, Court-fees Act: see for instance the cases in 23 Bom 486 (1), 16 C L J 375 (2), 28 C W N 683 (3) and 49 I C 442 (4). In all these cases the matter came up properly before the superior Court either on appeal or in revision. In the present case the matter would have to be appealable under the provisions of the Code before it would be said that the matter could be argued in appeal before the lower appellate Court. As to this contention it is only said for the respondents-opposite parties that the order of the trial Court dated 20th March 1934 must be taken to be a decree. We are not prepared to accept this contention. In that view no appeal lay to the District Judge and so the order of the District Judge, dated 7th May 1934 cannot be sustained. The rule must be made absolute. The order complained against must be set aside. We make no order as to costs.

B.D./R.K.

Rule made absolute.

1. Dada Bhau Kittur v. Nagesh Ram Chandra, (1899) 23 Bom 486.
2. Sundar Mal Marwari v. Jessie Caroline Murray, (1912) 16 I C 963=16 C L J 375.
3. Taraprosanna Changdar v. Nrisinha Murari Pal, 1924 Cal 731=81 I C 763=28 C W N 683=51 Cal 216.
4. Chandramani Koer v. Basdeo Narain Singh, 1919 Pat 270=49 I C 442=4 P L J 57.

A. I. R. 1936 Calcutta 786

R. C. MITTER, J.

Maharaja Sashi Kanta Acharjya Bahadur—Plaintiff—Petitioner.

v.

Nasirabad Loan Office, Co., Ltd. and others—Defendants—Opposite Parties.

Civil Rule No. 1375 of 1935, Decided on 7th February 1936, from order of Munsiff, 1st Court Sadar, Mymensingh, D/- 8th August 1935.

(a) Revision—Powers of High Court—Appeal from order of lower Court, maintainable—Revision from such order can be maintained.

Revisional power of the High Court under S. 115 is a bar only when an appeal lies to High Court. The fact that an appeal lay to the lower appellate Court will not take away the powers of the High Court to revise the order of the trial Court. The language of S. 115 is that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court in which no appeal lies thereto. [P 787 C 1]

(b) Civil P. C. (1908), S. 9—Rights of civil nature—Enforceability in civil Courts by means of suits—Jurisdiction must be specifically taken away—Landlord's right to recover transfer fee under S. 26-E, Ben. Ten. Act—Bengal Tenancy Act not providing remedy to recover—Civil suit is maintainable.

A civil Court must entertain a suit of a civil nature unless the jurisdiction of the Court is either expressly or impliedly barred; this is the provision of S. 9, Civil P. C., which indicates that for the purpose of enforcing a civil right the normal and the ordinary method is by instituting a suit. The jurisdiction of the civil Court conferred by S. 9 may be taken away either expressly or impliedly by taking away the remedy, or the legislature may prevent institution of a suit to enforce a civil right by prescribing another mode of obtaining assistance of a Court, as for instance by an application. But unless the jurisdiction of a civil Court is taken away altogether, or for enforcement of a right another method is provided for namely, by means of a petition, a suit will be the proper remedy to get relief in respect of a civil right. [P 787 C 1, 2]

There is no indication in the Bengal Tenancy Act anywhere whether the remedy of a landlord to recover transfer fee under S. 26-E, Ben. Ten. Act, is to be sought by means of a suit or by means of an application. If the landlord is not paid his legitimate dues, he has a right to seek assistance of the Court to recover by means of a civil suit. *Obi jus ibi remedium* is a well settled principle of law: 1933 Cal 24 and 283, *Disting.*; 1932 Cal 135, *Dissent*.

[P 787 C 2; P 788 C 1]

Nagendra Nath Bose—for Petitioner.

Annada Charan Karkoon—for Opposite Parties.

Order.—This Rule has been obtained by the landlord whose suit to recover the

balance of the transfer fee due to him under the provisions of S. 26-E, Ben. Ten. Act, has been dismissed by the learned Munsiff at Mymensingh on the ground that no suit lay. The position is this: Opposite party No. 1, The Nasirabad Loan Office, Co., Ltd., obtained a mortgage decree against opposite parties Nos. 2 and 3. In execution of that decree the mortgaged property was sold, but the mortgage decree not being fully satisfied, opposite party No. 1 obtained a decree for the balance under the provisions of O. 34, R. 6, Civil P. C. In execution of this decree they put up the holding which is the subject matter of controversy, to sale. In the sale proclamation the holding was described as an ordinary occupancy holding. At the sale held by the Court opposite party No. 1 purchased the holding for Rs. 325 and deposited a sum of Rs. 65 in the executing Court, the sum being 20 per cent. of the purchase price. The sale was confirmed. The rent of this holding is Rs. 57-13-9 and therefore under the provisions of S. 26-E the landlord is entitled to either five times the annual rent or 20 per cent. of the purchase price whichever sum is greater. Five times the annual rent is Rs. 289-4-9 and therefore in accordance with the terms of that section the landlord is entitled to that sum in any case and not Rs. 65. The landlord accordingly instituted a suit to recover the balance of the money. The learned Munsiff has held that the value of the holding is Rs. 1,500 and on that basis the dues of the landlord will be Rs. 300. Mr. Bose who appears for the landlord says that his client will be satisfied if he is given a decree on the basis that he is entitled to five times the annual rent. In this Rule he prays for a decree for Rs. 224-4-9.

The question in this Rule therefore is whether the learned Munsiff was right in holding that no suit lay, but the proper remedy was by means of an application. In support of his view the learned Munsiff relies upon two decisions of this Court in 36 C W N 847 (1) and 36 C W N 924 (2). I shall indicate hereafter that the two aforesaid decisions have no bearing on the present question. In support of the Munsiff's view Mr. Karkoon has relied upon

1. *Srinath Bose v. Debendra Nath Barari*, 1933 Cal 24=141 I C 627=36 C W N 847.
2. *Aghore Chandra Jalui v. Rajnandini Debi*, 1933 Cal 283=141 I C 842=36 C W N 924=60 Cal 289=58 C L J 484.

two cases of this Court, namely, the case in 35 C W N 974 (3) and an unreported decision of a Division Bench in Civil Rule No. 1598 of 1934 (4) decided on 4th April 1935. I shall deal with the question on the merits later on but it is necessary first of all to decide a preliminary objection which has been raised by Mr. Karkoon. The suit was instituted in the Court of the Munsiff at Mymensingh in his ordinary file. The Munsiff had no powers under Small Cause Courts Act to try suits of the value of this suit. The decree which he passed was a decree against which an appeal could have been preferred by the petitioner to the lower appellate Court. Instead of filing an appeal an application has been moved in this Court under S. 115, Civil P. C. There cannot be any doubt that this case falls within the provisions of S. 115, Cl. (c) if not under Cl. (b) of S. 115, because the Munsiff by an erroneous decision on a point of law has refused to exercise jurisdiction which is vested in law. This is the principle which has been laid down by Rankin, J., as he then was, in 46 Cal 962 (5).

The question therefore is whether this Court can exercise its revisional jurisdiction in these circumstances. In my judgment the revisional power under S. 115 is a bar only when an appeal lies to this Court. The fact that an appeal lay to the lower appellate Court will not take away the powers of this Court to revise the order of the Munsiff. The language of S. 115 is that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court in which no appeal lies thereto. I accordingly overrule the preliminary objection on the view which I have indicated above, which is supported not only by the decisions of this High Court but also of the other High Courts to which it is not necessary to refer in detail.

Regarding the merits of the case the principle is clear. A civil Court must entertain a suit of a civil nature unless the jurisdiction of the Court is either expressly or impliedly barred. This is the

provision of S. 9, Civil P. C., which indicates that for the purpose of enforcing a civil right the normal and the ordinary method is by instituting a suit. The jurisdiction of the Court conferred by S. 9 may be taken away either expressly or impliedly altogether by taking away the remedy, or the legislature may prevent institution of a suit to enforce a civil right by prescribing another mode of obtaining assistance of a Court, as for instance by an application. But unless the jurisdiction of a civil Court is taken away altogether, or for enforcement of a right another method is provided for, namely, by means of a petition, a suit will be the proper remedy to get relief in respect of a civil right. This in my view is the principle from which the question ought to be approached and in the light of these principles I shall examine the cases which have been referred to in the Munsiff's judgment as also the two cases which have been referred to by Mr. Karkoon. The cases referred to in 36 C W N 847 (1) and 924 (2) relate to proceedings coming within the provisions of S. 36-J, Ben. Ten. Act. That section deals with only three classes of cases, namely where an occupancy holding is sold on the footing: (a) That it is a permanent tenure; (b) that it is a raiyati at a fixed rate or (c) that it is a lakhiraj. In these cases the landlord is expressly given the right to institute proceedings to recover the balance that will be due to him as landlord's transfer fee. The position in the above two cases in 36 C W N 847 (1) and 924 (2) was that although the holding was an ordinary occupancy holding, the transfer was made on the footing and with the false description that it was either a permanent tenure or a raiyati at a fixed rate. The landlord made an application to recover the balance but the transferee's reply was that the remedy was in a suit. S. 26-J does not say that the right is to be enforced by a suit or by an application, but S. 188 says that an application has to be made for enforcing the right given under S. 26-J. Therefore, in those cases which come under S. 26 J, it can be said with a good amount of reasoning that the legislature by providing for an application for enforcement of that right, has taken away the right to enforce it by a suit.

With regard to the case that I have before me there is no indication in the Bengal Tenancy Act anywhere whether

3. Sukh Chand Halder v. Jaineswar Mandal, 1932 Cal 135=135 I C 872=35 C W N 974.

4. Padma Lochan v. Barada Kanta, Civil Rule No. 1598 of 1934, Decided on 4th April 1935.

5. Hindley v. Joy Narayan Marwari, 1920 Cal 305=54 I C 439=46 Cal 962=24 C W N 288.

the remedy is to be sought by means of a suit or by means of an application. Mr. Karkoon says that where an ordinary occupancy holding is transferred but the transfer fee deposited is less than what is mentioned in Ss. 26-C and 26-E the landlord is without a remedy to recover the money. He says that he cannot recover money in any civil Court and he cites by way of analogy the case in 35 C W N 974 (3). That was a case in which the proper fee due to the landlord under S. 48-H had not been deposited and a suit was instituted to recover the legitimate dues of the landlord. This Court held that the landlord had no right to recover the same, and that all he can say is that the sublease was not binding on him. This is a judgment of a Judge sitting singly, and this decision accordingly is not binding on me. I cannot accept that view. If the landlord is not paid his legitimate dues certainly he has a right to seek assistance of the Court to recover. *Ubi jus ibi remedium* is a well settled principle of law. The question then is what is the proper form of procedure to enforce the right which is in controversy in this case. Inasmuch as the legislature has not indicated, either expressly or by necessary implication, that right of the landlord is to be enforced by an application, the power of the Court to entertain a suit under the provisions of S. 9 in my judgment remains unaffected. In this view of the matter I do hold that the proper remedy is a suit.

So far as the decision in civil Rule No. 1598 of 1934 (4) is concerned, the matter is not decided therein in a binding way. There was a gift of an occupancy holding on the footing that it was an ordinary occupancy holding, but the recital was that the donees were related to the donor by blood within three degrees and the landlord's fee was not therefore paid. The landlord filed an application and said that the recital was false and he successfully established his case and the Court decreed landlord's fee. The donees moved this Court and it was contended that an application would not lie and the remedy of the landlord was a suit. The learned Judges of this Court said that they were doubtful as to what would be the proper form of procedure. Then they said that there was no merit in the rule at all and discharged the rule on that ground, although in one passage of the judgment

they indicated that they were rather inclined to think that an application would be the proper form of procedure. Having regard to the form of that judgment I think that the matter has not been decided in a binding way. I accordingly set aside the judgment of the learned Munsif and in lieu thereof pass a decree in favour of the petitioner before me to the extent of Rs. 224-4-9. As this case is a case of first impression and the procedure is settled by me for the first time, I make no order for costs of this rule.

B.D./R.K.

Order accordingly.

* * A. I. R. 1936 Calcutta 788

HENDERSON AND R. C. MITTER, JJ.

Dr. Ranga Lal Sen—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 582 and 664 of 1936, Decided on 28th September 1936.

* * (a) Gambling—Common gaming house—Necessary requisites are keeping of instruments of gaming and keeper of such place must have some gain—Slips of paper for recording bets are instruments of gaming—Gain should be otherwise than as result of betting—Instances, when person is said to make gain—Mere chance of winning is not gain.

To make a house, room, place, etc., a common gaming house two things are necessary namely: (1) instruments of gaming must be kept or used there, and (2) such instruments must be kept or used for the purpose of gain of the person owning, occupying, using or keeping such house, room, place, etc. To satisfy the first element, slips of paper used for the purpose of facilitating betting operations, e. g., papers on which bets had been recorded are instruments of gaming: 1935 Cal 466, *Foll.* [P 791 C 2; P 792 C 1]

To satisfy the second element, the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him. The chance of profit or the actual profit made by the successful gambler is not such gain as it is contemplated. To take instances: an entrance fee charged by a person owning, occupying or using the place would be gain within the meaning of the section. A commission charged by such a person from persons winning wagers as a result of betting in that place is such gain. A person running a proprietary club where he allows gaming or betting would be the keeper of a common gaming house, whether he himself takes part in betting or not. Such a person makes profit or intends to make profit from his establishment which profit is not the direct result of betting in which he himself may have taken part. The mere chance of winning wagers is not gain. [P 792 C 1]

(b) Calcutta Police Act (4 of 1866), Ss. 47, 46—For application of S. 47 there should be proper warrant under S. 46—Section to

be strictly interpreted and complied with—Otherwise conviction will be bad—(Per Henderson, J.).

Per Henderson, J.—In order to determine whether S. 47 of the Act applies it is necessary to see whether there was a proper search within the provisions of S. 46. Unless the provisions of these sections are strictly interpreted and complied with, there can be no doubt that persons will be improperly convicted. [P 790 C 1]

(c) Calcutta Police Act (4 of 1866), S. 47—Search warrant—Search warrant proper in form—Recitals in warrant as to information on oath, enquiry and reason to believe that place is common gaming house—Presumption arises under S. 114, Evidence Act.

Where a warrant under S. 47 is issued by a competent authority and it recites the facts that an information on oath had been received and that an inquiry had been made, and then states that that authority had reason to believe that the place to be searched is a common gaming house, the presumption attaching to the regularity of official acts would be attracted and it would not be incumbent on the Crown to lead evidence on the point indicated above: 1926 Cal 966, *Expl. and Disting.* [P 792 C 2]

(d) Calcutta Police Act (4 of 1866), S. 47—Presumption under—Section creates special rule of evidence—Meaning of section explained.

The expression "It shall be evidence, until the contrary is made to appear" in S. 47 does not create a presumption in the technical sense in which that term is used in the Indian Evidence Act. In that case the Magistrate would be bound to convict unless the defence gives rebutting evidence of a negative character. But in nearly every case, it would be difficult if not impossible for them to do so. The natural meaning of the words is that the finding of certain things shall be evidence that the place is a common gaming house. Packs of cards may be found in hundreds of places which are not common gaming houses and it would be transparently absurd to say that the finding of a pack of card in a house would be evidence that that house is a common gaming house. This section was intended to create a special rule of evidence, because in view of the preliminary provisions there is not this absurdity in a case when there had been a proper search under S. 46. S. 47 only raises a presumption of fact, and so only a rebuttable presumption. If a search warrant is issued under S. 46 and if on a search made on the basis of a warrant instruments of gaming are found at the place or on the person gaming, this fact would be evidence of the further fact that the place is a common gaming house. The effect of such evidence may be nullified by other evidence on the record.

[P 790 C 2; P 791 C 1 P 792 C 1, 2]

Monindra Nath Mukherji—for Appellant.

D. N. Bhattacharjee—for the Crown.

Henderson, J.—These two appeals have been heard together. They originally came on for hearing before myself sitting alone. But in view of the importance of some of the points raised, I thought it

desirable that they should be heard by a Division Bench. The appellant in Appeal No. 582 is one Dr. Ranga Lal Sen. He has been convicted of offences punishable under Ss. 44 and 45, Calcutta Police Act. The other appellant is one Mr. Jacob who was convicted of an offence punishable under S. 45 of that Act. The facts are extremely simple. The alleged common gaming house is situated in a consulting room at the Eastern Drug Stores, 17 Park Street. The appellant Sen is one of the Doctors who may be consulted by patients at that place. P. W. 1 Sergeant Clarke, came with a search warrant from the Deputy Commissioner of Police, Mr. Duckfield, and searched the place on the 29th June last. His evidence is that he found both the appellants sitting at a table. Sen was filling in a betting slip and a sum of Rs. 11-8-0 was found on the table. Other betting slips were also found in a drawer. Now we have no doubt at all from this evidence that at the time of the search Jacob was making a bet with Sen. He never even suggested that he had gone there for the purpose of a professional consultation. Sen alleged that the money found on the table had been sent to him on account of his fees for professional attendance by a man named Herbert and he called the defence witness Bannerjee, who is one of the partners of the Eastern Drug Stores, to prove it. Bannerjee says that the money was sent in a letter from Herbert about ten minutes before the search. There is no reason why Bannerjee should know what the contents of the letter were and no reason why the money should be found on the table. Herbert has not been examined. We have no doubt that this explanation is false and that the money had been put on the table by Jacob in connection with his betting.

Now it is quite clear that this evidence in itself would be quite insufficient to show that this consulting room was a common gaming house. The prosecution in fact relied on the provisions of S. 47, Calcutta Police Act, and contend that the finding of the betting slips is evidence that the consulting room is used as a common gaming house and that Sen and Jacob were there for the purposes of gaming. Mr. Bhattacharjee contended on behalf of the Crown that, altogether apart from this section, if Jacob was betting with Sen, Sen was presumably

hoping to make a profit, and this is sufficient to establish that the room in question is a common gaming house. We are certainly not prepared to assent to that proposition; on such a construction the elaborate definition contained in S. 3 of the Act would be wholly unnecessary. The question has been considered in two cases to which our attention has been drawn. In 53 Cal 718 (1), S. 47 did not apply. It was however found that the evidence itself afforded sufficient proof on the point. In that case betting was carried on in the premises and fees were realised by the persons who were in charge of the place. The question was also elaborately considered by Costello, J. in 39 C W N 1114 (2). We respectfully agree with what is stated there. In our opinion the definition of a common gaming house implies that, altogether apart from money which may be made or lost at the actual gaming, some sort of profit must be made by the person referred to in the definition. In the present case, if persons merely bet with Sen, that would not be sufficient to make the place a common gaming house; on the other hand, if admission fees are levied or if Sen pays money to Bannerjee that he may allow the room to be used as a place for carrying on the betting, the terms of the definition show that the place is a common gaming house.

In order to determine whether S. 47 of the Act applies it is necessary to see whether there was a proper search within the provisions of S. 46. Unless the provisions of these sections are strictly interpreted and complied with, there can be no doubt that persons will be improperly convicted. Now in the present case the prosecution produced the warrant issued by Mr. Duckfield, Deputy Commissioner. It purports to be in full conformity with the requirements of S. 46 and the question which remains for consideration is whether the Court may presume that the necessary formalities were complied with. In 53 Cal 718 (1) cited above the learned Judges refused to draw any presumption. But in that case from the warrant itself, on its very face, it did not appear that

the Deputy Commissioner had any reason to believe that the premises searched were a common gaming house and on that ground it was held that a presumption ought not to be drawn. The last two sentences in the judgment of C. C. Ghose, J., might support an inference that such a presumption ought never to be drawn. But when the passage is carefully read it is clear not merely that the main part of the discussion was directed to the defect in the warrant but that in this sentence the learned Judge mentions "other cases of this description."

He was dealing with a case in which the warrant was, on the very face of it, defective and we do not think his judgment was really intended to lay down that no presumption may be drawn in a case such as the present where the warrant is in proper form. In our opinion, in a case such as the present, the Magistrate is entitled to draw a presumption in accordance with the provisions of S. 114, Evidence Act, Illus. (e). Of course it is for the Magistrate to say whether he will draw this presumption or not. In the present case there is also the evidence of Sergeant Clarke that a sworn information was taken by the Deputy Commissioner. That being so, in our opinion the matter ends. It is not open to the Court to go behind the warrant and look into the information in order to see what inference might be based upon it. The Deputy Commissioner is not really concerned with the eventual proof of the case. He is merely deciding whether there ought to be a search of certain premises or not and provided that it is upon information upon oath, that he makes an enquiry, if he thinks it necessary, and has reason to believe that the place is used as a common gaming house, the search warrant is legal and S. 47 automatically comes into play. Upon proof of such facts the legality of the warrant cannot be called in question. The next question for consideration is what is the exact meaning of the words "it shall be evidence, until the contrary is made to appear" in S. 47.

It is of course useful to refer to this provision as a presumption in the loose way in which this term is sometimes employed; for example, it is often used in this way in connection with questions about the permanency of a certain tenure although the term "inference" might per-

1. Walvekar v. Emperor, 1926 Cal 966=96 I C 264=27 Cr L J 920=53 Cal 718=30 C W N 713.

2. M. A. Adams v. Emperor, 1935 Cal 466=1935 Cr C 858=158 I C 1095=39 C W N 1114=62 Cal 1093.

haps be a more happy expression. But we are not prepared to say that this section creates a presumption in the technical sense in which that term is used in the Evidence Act. In that case the Magistrate would be bound to convict unless the defence gives rebutting evidence of a negative character. But in nearly every case it would be difficult if not impossible for them to do so. The natural meaning of the words is that the finding of certain things shall be evidence that the place is a common gaming house. Now packs of cards may be found in hundreds of places which are not common gaming houses and it would be transparently absurd to say that the finding of a pack of cards in a house would be evidence that that house is a common gaming house. In our opinion this Section was intended to create a special rule of evidence, because in view of the preliminary provisions there is not this absurdity in a case when there had been a proper search under S. 46. The only difficulty in the way of this interpretation is the use of the words "until the contrary is made to appear" which might suggest that the intention was to create a presumption in the technical sense. Now supposing these words were not there, it might have been contended that the intention of the Section was not to indicate a presumption, but to make the finding of such articles conclusive proof. The draftsman may have inserted these words to prevent such a contention being put forward.

The law with regard to presumption in the Evidence Act is well known and if the intention was to create such a presumption we see no reason to suppose that the ordinary language would not have been employed. We have reached the conclusion that this Section provides that something which would not otherwise be evidence is made evidence and it is for the Magistrate to take it into consideration. He may, if he likes, convict upon it or in certain cases he may say that it is not sufficient. If we were dealing with this case in revision, that would be sufficient to dispose of it. But we are, in fact, hearing appeals and we must reach a conclusion upon the evidence ourselves. Turning to the facts of the present case the learned Magistrate has come to a finding that Bannerjee was entirely ignorant of the fact that betting went on in this consulting room. Now if

this is a correct finding, it is very unlikely that the room is used as a common gaming house. There is no direct evidence to show that it is and the investigation stopped short at the search. We see no reason to suppose that if a fuller enquiry had been made, evidence of a positive character might not have been forthcoming. In view of this finding of the learned Magistrate we are not prepared to say that the case is one of more than suspicion and the appellants ought to be acquitted. We therefore allow these appeals, set aside the convictions and sentences and direct that the fines, if paid, be refunded. The order confiscating the money found on the table must also be set aside.

R. C. Mitter, J.—The appellant Dr. Ranga Lal Sen has been convicted of offences punishable under Ss. 44 and 45, Police Act (4 of 1866) and sentenced to pay fines of Rs. 200 and Rs. 100 respectively, and in default of payment to suffer rigorous imprisonment for one month under each of the aforesaid sections. The appellant, Jacob, has been convicted of an offence punishable under S. 45 and sentenced to pay a fine of Rs. 100 and in default of payment to suffer one month's rigorous imprisonment. In pursuance of a warrant issued by the Deputy Commissioner of Police, Detective, Department, Calcutta, the Eastern Drug Stores at No. 17, Park Street, was searched on 27th June last and in the consultation room of the said premises the two appellants were found seated. A writing pad (Ex. 2) and some slips of torn up paper were seized, as also a sum of Rs. 11-8-0. I have no doubt that Ex. 2 is a piece of paper which contains the record of bets on horse races, and that both the appellants were at the time betting in that room. The appellants, however, cannot be convicted under those sections simply because they were betting there. The convictions can be maintained only if the place where they were betting was a common gaming house. To confine to the case of Ranga Lal Sen, who had the use of that room, he being a doctor attached to the said drug shop, he can be convicted under S. 44 if he kept or used the same as a common gaming house. Both the appellants can be convicted under S. 45 only if they are gaming or betting in a common gaming house.

Common gaming house is defined in S. 3. To make a house, room, place, etc.,

a common gaming house two things are necessary, namely: (i) instruments of gaming must be kept or used there, and (ii) such instruments must be kept or used for the purpose of gain of the person owning, occupying, using or keeping such house, room, place, etc. In 39 C W N 1114 (2) slips of paper used for the purpose of facilitating betting operations, e. g., papers on which bets had been recorded, were held to be instruments of gaming. In the case before us the first element is satisfied by reason of Ex. 2 being found in that room.

To satisfy the second element, it is my view that the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him. The chance of profit of, or the actual profit made by the successful gambler, is not such gain as the section contemplates. To take instances an entrance fee charged by a person owning, occupying or using the place would be gain within the meaning of the section. A commission charged by such a person from persons winning wagers as a result of betting in that place is such gain. A person running a proprietary club where he allows gaming or betting would be the keeper of a common gaming house, whether he himself takes part in betting or not. Such a person makes profit or intends to make profit from his establishment which profit is not the direct result of betting in which he himself may have taken part. In my judgment the chance of winning wagers is not the gain which the section contemplates. In this case there is no evidence that Dr. Sen or anybody else intended to gain anything in that sense. The facts establish only this, that Dr. Sen and Jacob were betting on horse races in the consultation room. The conviction of both the appellants cannot stand on the evidence on the record unless the Crown can get and retain the benefit of S. 47 of the Act. In my judgment that section only raises a presumption of fact, and so a rebuttable presumption. If a search warrant is issued under S. 46 and if on a search made on the basis of the said warrant instruments of gaming are found at the place or on the person of men found there at the time of the search, the fact that such instrument of gaming are found would be evidence of the further fact that the place is a common gaming house. The effect of

such evidence may be nullified by other evidence on the record. That I understand is the effect of S. 47.

For taking the benefit of S. 47 the Crown, in my judgment, has only to show that the warrant in pursuance of which the place was searched was a legal warrant, that is, one which was issued in terms of S. 46. The Crown has to show, if at all, by evidence, that the warrant issued by the authority mentioned in that section was issued after that authority had received information on oath and after such enquiry which it deemed necessary. The warrant must state, as it usually does, that the authority on information on oath and on materials found on further enquiry (if any) had reason to believe that the place intended to be searched is a common gaming house. I cannot accept the contention of the learned advocate for the appellants that the Crown is to lead further evidence touching upon the nature of the information on oath received by the authority issuing the warrant or upon the nature of enquiry made by it. All that the Crown is required, if at all, is to prove that an information on oath was in fact made, and where the warrant recites an enquiry, that such an enquiry was in fact made. As the Court has no right to require proof by the Crown of any other fact, it follows *a fortiori* that it has no power to embark upon an enquiry as to whether the authority issuing the warrant could on the materials before it, e.g., the information on oath and the facts coming out of the enquiry, if any made, have reasonably come to believe that the place intended to be searched is a common gaming house.

This seems to be to me a fundamental principle. I am, however, inclined to the view that where such a warrant issued by a competent authority recites the fact that an information on oath had been received and that an enquiry had been made, and then states that that authority had reason to believe that the place sought to be searched is a common gaming house the presumption attaching to the regularity of official acts would be attracted and it would not be incumbent on the Crown to lead evidence on the point indicated above. I would not, however, decide the point definitely as it is not necessary in this case and as it would involve a careful consideration of the observations made by one of the learned

Judges in 53 Cal 718 (1). Whatever evidence the warrant (Ex. 1) affords on the point as to whether the Eastern Drug Stores was a common gaming house or not, the entire evidence on the record leads me to the conclusion that the prosecution has failed to establish that it was a common gaming house. Surendra Nath Banerjee, one of the proprietors of the said drug shop, was examined as a witness. He attends his shop regularly. He said that he did not know that betting goes on or was going on in his shop. He has been believed by the learned Magistrate. His evidence belies the case that his shop or any part of it was used for the purpose of "gain" by Dr. Sen or anybody else in the sense in which that word has to be understood in connection with the definition of common gaming house. I accordingly agree with my learned brother that the convictions on both the appellants cannot be sustained. I agree with the order which my learned brother has made.

B.D./D.S.

Convictions set aside.

A. I. R. 1936 Calcutta 793

CUNLIFFE AND HENDERSON, JJ.

Naimuddin Biswas and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 430 of 1936, Decided on 12th August 1936.

(a) Jury—Misdirection—Charge to jury that they must be satisfied as to place of occurrence—There is no misdirection.

Where a Judge tells a jury that, whatever view the jury might take of the defence version, they cannot convict the accused unless they are satisfied as to the truth of the prosecution version as to the place of occurrence, there is no misdirection causing any prejudice to the accused. [P 794 C 1, 2]

(b) Jury—Misdirection—Part of dying declaration found untrue—Rest of it corroborated by evidence—Judge while charging jury telling them to consider the value of declaration in view of misstatement—Held, there was no misdirection.

In a dying declaration the deceased made one exculpatory statement to the effect that he did not strike anyone from the accused's party. But there was evidence to show that this statement was false. The rest of the dying declaration was amply corroborated by a mass of evidence. While charging the jury the judge said: "You are to consider if in view of this single misstatement the entire version of the dying declaration should be disbelieved or not." It was contended for the accused that that amounted to misdirection:

Held: that no sensible jury would refuse to accept the remainder of the dying declaration corroborated by a mass of evidence merely because the deceased told one lie in his own interest. The Judge would have been guilty of misdirection if he had told the jury that if they thought this exculpatory statement to be untrue they could not believe the rest of the statement. No direction of this kind nor any provision of the law of this character would, in fact, ever prevent a jury from believing it, if they saw fit to do so; so there was no misdirection: 1925 Cal 876, *Disapproved*; 1933 Bom 479, *Approved*. [P 795 C 1, 2]

N. K. Basu and Binayak Nath Banerjee—for Appellants.

Khundkar and Bireswar Chatterjee—for the Crown.

Henderson, J.—The four appellants have been convicted of offences punishable under S. 326, I. P. C., and sentenced to various terms of imprisonment. The first two were convicted in connexion with an assault upon one Kalachand which eventually resulted in his death. The other two were convicted in connexion with an assault upon two persons named Meru and Palan. Various points have been taken by Mr. Basu on behalf of the appellants two of which deal with the general aspect of the case and the remainder of which relate to objections against specific portions of the charge delivered by the learned Assistant Sessions Judge. The first point taken is that the learned Judge ought to have proceeded with the case on the footing that the previous trial had finally delivered certain matters. What happened was that the appellants and various other persons were put on their trial not only on the present charges, but on charges under S. 148 and S. 304/149, I. P. C. The result was that the four appellants were convicted under S. 326, but the jury brought in a verdict of not guilty against the other persons and on the other charges. The appellants then appealed to the learned Sessions Judge who ordered a retrial.

The contention of Mr. Basu is that previous verdict really amounts to this: that the occurrence took place in accordance with the defence theory and the only thing which the learned Judge ought to have put before the jury was that they should consider whether the appellants had exceeded the right of private defence. There is of course no foundation for this argument. All that the previous trial amounts to is that the appellants have all been acquitted of rioting. For all we know

to the contrary, the jury may not have been satisfied that there were as many as five persons in the attacking party. The learned Judge was clearly right in putting the case before the jury in the way he did. Then it was said that the defence case with regard to the right of private defence was not properly put before the jury at all. We have reached the conclusion that it was really put in an unduly favourable light, because the learned Judge left it open to the jury to find that the occurrence took place in accordance with the defence version although there is no evidence in support of that conclusion. Briefly the two versions were as follows :

The complainant Irad Mandal held certain land under one Srimanta Kundu as a Bargadar. On the day of the occurrence he and some relations and labourers were clearing jungle from a portion of his land with a view to preparing it for sowing Kalai seed. They were then attacked by the appellants and others headed by the Naib of the Putia Raj and assaulted with a view to depriving the complainant of the possession of the land. The defence made a case that the occurrence did not take place on Irad's land at all, but at a place called Bangalpara where the accused party were attacked by the complainant's party and a scuffle took place resulting in injuries caused to persons on both sides. Now if this defence version be true there must have been evidence available to establish it. But the defence did not examine a single witness. Nothing was elicited in the cross-examination of any of the prosecution witnesses to prove that the occurrence took place in Bangalpara. There was, therefore, no evidence at all which would have justified the jury in accepting this view. Nor was there any evidence upon which any sort of claim to the right of private defence could be founded. The learned Judge should, therefore, have directed the jury that there was no evidence at all to support any right of private defence. It is perfectly true that some of the evidence given by certain police officers might support an inference that the occurrence did not take place on Irad's land. The learned Judge was very careful to tell the jury that, whatever view they might take of the defence version, they could not convict the accused unless they were satisfied as to the truth of the prosecu-

tion version as to the place of occurrence. There was clearly no misdirection causing any prejudice to the appellants in this aspect of the case.

A part of the evidence was a statement recorded by a Sub-Deputy Magistrate and made by the accused Naimuddin. Now this evidence has been attacked in two ways. In the first place it is said that the learned Judge did not make it sufficiently clear to the jury that this evidence was inconsistent with that of the eye-witnesses. Now, there was another witness, a doctor, who also deposed about a statement made by the deceased. So far as this statement goes, the jury would have had to consider what view they would take of this evidence with regard to the discrepancies between it and the rest of the evidence. But when we turn to the dying declaration recorded by the Sub-Deputy Magistrate we find that there is absolutely nothing in it which is inconsistent with the rest of the case. Then it is said that there was a very serious misdirection with regard to the use which the jury were at liberty to make of this evidence. What the learned Judge said was this:

There is, however, one misstatement in the said declaration that the deceased Kalachand who was struck did not strike anybody as it is in evidence from P. Ws. that Kali struck his assailant with the Fala with which he was struck after he was struck and you are to consider if in view of the said single misstatement the entire version of the dying declaration should be disbelieved or not.

Mr. Basu's contention is that the proper direction would be that if the jury were satisfied that the statement with regard to the alleged striking of one of the assailants by the deceased was untrue, they were by law forbidden to believe the rest of the dying declaration. In support of this argument, reliance was placed upon a single sentence in a judgment delivered by our learned brother Mukerji, J., in 52 Cal 987 (1). The passage is at p. 1003 and is in these terms:

As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of accuracy of the record and the truth of the entire statement before it can be acted upon.

In my opinion, the learned Judge did not intend to lay down any proposition of law at all. He was dealing with a refer-

1. Emperor v. Premananda Dutt, 1925 Cal 876
= 88 I C 1000 = 52 Cal 987 = 26 Cr L J 1256
= 29 O W N 738.

ence under S. 307, Criminal P. C., and he had to form his own opinion about the facts of the case. A part of the evidence upon which the prosecution relied was a dying declaration said to have been made by the deceased and a latter part of the judgment from which this extract has been made deals with the question whether the dying declaration was correctly recorded and whether in view of the surrounding circumstances of the case it was a reliable piece of evidence. Indeed, at the bottom of the page already referred to the learned Judge says this:

It becomes almost always a question of fact as to whether it should be relied upon or not.

In my opinion, that last sentence succinctly sets forth the true position. It seems to me that it is absolutely impossible to say that the tribunal responsible for coming to the decision upon the facts is not allowed to take into consideration what is admittedly part of the evidence and which it actually believes to be true. We have not been shown any authority for this proposition. Of course any sensible tribunal after reaching the conclusion that a part of the statement has been deliberately concocted, would decline to believe the rest of it without corroboration and, no doubt, in such cases the jury ought to be suitably cautioned. Again if certain statements are untrue owing to failure of memory or lack of powers of observation and so on, it would be ridiculous to say that because a man made a mistake with regard to one statement of fact the jury was debarred from accepting the rest. In the present case what happened was this. The deceased made an exculpatory statement with regard to an assault said to have been committed by him upon one of the accused party. Truthful witnesses sometime leave the path of truth in order to make exculpatory statements about themselves and I do not think any sensible jury would refuse to accept the remainder of the dying declaration in the present case corroborated as it is by a mass of evidence merely because the deceased told a lie in his own interest. In our opinion the learned Judge would have been guilty of misdirection if he had told the jury that, if they thought this exculpatory statement to be untrue they could not believe the rest of the statement. I need hardly say that no direc-

tion of this kind nor any provision of the law of this character would, in fact, ever prevent a jury from believing it, if they saw fit to do so.

The other points taken on behalf of the appellants are of minor importance: for example it was said that the learned Judge was wrong in directing the jury with regard to the evidence of some police officers. He was certainly entitled to give the jury his view of the matter and in addition to that he supported his view with very cogent reasons. A complaint, however, is made that his view is not supported by the record. The jury of course took their own view of the matter. We have ourselves been taken through these depositions by Mr. Basu and as recorded they are so unsatisfactory that it is really very difficult to know what these police officers meant. Finally, it was contended that the learned Judge led the jury to suppose that the first information report was actually substantive evidence with regard to the occurrence. The learned Judge never says so in plain terms; nor after perusing the whole of the charge do we think there is any legitimate reason to suppose that he intended the jury to believe so. All the points taken on behalf of the appellants fail and the appeal is, accordingly, dismissed. The appellants must surrender to their bail and serve out the remainder of the sentences imposed upon them.

Cunliffe, J.—I am of the same opinion and agree to the order proposed by my learned brother. An interesting contention during the course of the argument before us was put forward by Mr. N. K. Basu. As I understood his proposition it amounted to this: that because there was a mistake or untrue statement to be found in a declaration which was admitted in evidence under S. 32, sub-s. (1), Evidence Act, that whole declaration ought to have been withdrawn from the consideration of jury because any inaccuracy or untruth in a declaration of that character vitiated the whole of the contents contained therein. As my learned brother has pointed out, the authority for this proposition relied upon by the learned advocate for the appellants is the case in 52 Cal 987 (1). The argument rests upon a dictum of M. N. Mukerji, J., which is quite short and runs as follows. It is at p. 1003 of the report:

In my opinion a dying declaration stands upon a widely different footing from the testi-

mony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon.

The learned Judge then went on to point out that the rule in India under the Evidence Act with regard to statement concerning death made by persons before their death in trials which are concerned with an investigation into the responsibility of the death is much wider than the rule with regard to dying declarations according to the principles of the English Law of Evidence. Sub-s. (1), S. 32, Evidence Act, does not confine these statements to that class of statement which is made by a man who is apprehensive and is just about to die. Therefore of course the statements which are admitted according to the Indian Law of Evidence lose a great deal of the sanctity which is supposed to invest the dying declaration according to the English Law of Evidence.

In this particular statement which is a very short one there is nothing in the statement itself which indicates that the dead man thought that he was going to die. It seems to me therefore to be somewhat dangerous from the point of view of the appraisal of the value of the evidence to put the statement which we are considering here upon a different footing from any other piece of evidence not as my learned brother pointed out of very great value. In my opinion the true principle upon which this kind of evidence should be recorded ought to be firstly, does it strictly come within the provisions of S. 32, sub-s. (1)? If it does come within those provisions from the point of view of admissibility, in my view the statement should be looked upon from the point of view of its own value and nothing else. I see no reason to introduce an artificial rule such as is suggested by the learned Judge in the judgment to which I have referred. I think it is almost certain that declarations of this kind ought to be corroborated but this is about as far as we can go. There is a leading case which is often quoted in the English Law of Evidence,

the case in (1892) 17 Cox C C 503 (2), which is alluded to in Mukerji, J.'s judgment. In that case the learned Judge refused to admit a dying declaration for consideration because on examining it he found that instead of it being a straightforward account of what the dying man had said without any additions, it turned out to be a series of questions and answers and a good deal more question apparently than answer. In these circumstances the Judge said that he would not allow such a document to go to the jury because he apprehended that in the mental state which a dying man might be supposed to be in, it was very dangerous for anyone in authority to put leading questions to him and thereby possibly to direct his enfeebled mental powers towards uncertain questions in such a way that the authorities interested in the prosecution might possibly gain a benefit.

We were told by the learned Deputy Legal Remembrancer that as far as the case in 52 Cal 987 (1) is concerned this dictum has already been doubted by the Bombay High Court. I have had an opportunity of reading the judgment in the case to which he referred, namely, the case in 58 Bom 31 (3) and I am fortified in the view that I take that the value of the evidence amounting to a dying declaration cannot be whittled down in the manner in which Mukerji, J. suggests by the judgment of the Chief Justice of the Bombay High Court which, if I may say so, is characterised by an expression of good sense and good law. For these reasons and for the reasons given by my learned brother, I agree that this appeal must be dismissed.

B.D./R.K.

Appeal dismissed.

2. R. v. Mitchell, (1892) 17 Cox C C 503.

3. Emperor v. Akbarali Karimbhai, 1933 Bom 479=1933 Cr C 1533=146 I C 548=35 Cr L J 109=58 Bom 31=35 Bom L R 1021.

A. I. R. 1936 Calcutta 796

LORT-WILLIAMS AND JACK, JJ.

Istahar Khondkar and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 486 of 1934, Decided on 25th February 1935.

(a) Criminal P. C. (1898), Ss. 236, 237—Doubt contemplated by Ss 236 and 237 must arise at time of charge—To decide

whether such doubt exists Judge must know at that time what facts can be proved—"Can be proved" means facts about which there is evidence in hands of prosecution—Doubt within meaning of S. 236 exists where evidence is circumstantial and decision depends upon question whether Court will draw possible inference—Evidence direct, and such that if believed would establish but one offence—Question whether jury would believe evidence or not is irrelevant for deciding applicability of Ss. 236 and 237—Such doubt is not contemplated by Ss. 236 and 237.

The doubt contemplated by Ss. 236 and 237 must arise at the time of the charge. In order to decide whether such a doubt exists as will attract the provisions of Ss. 236 and 237 the Judge must know at that time what facts 'can be proved.' The expression 'can be proved' means facts about which there is evidence in the hands of the prosecution. What the evidence amounts to is disclosed in the depositions taken by the committing Magistrate, and in any additional evidence which may be in the hands of the prosecution, and of which notice has been given. This matter cannot be affected by considerations whether the prosecution will be able to produce this evidence at the trial, or whether the Court or jury will believe it if and when produced. [P 799 C 1]

But where the evidence is direct and not circumstantial and would if believed by the jury, establish but one offence, the question whether the jury would believe the evidence or not is irrelevant upon the point whether Ss. 236 and 237 are applicable or not. Such a doubt is not contemplated by Ss. 236 and 237: 1931 Cal 414, Ref., 1925 P C 130 and 1923 Cal 596, Doubled. [P 799 C 1]

(b) Criminal P. C. (1898), S. 237—Applicability—S. 237 is controlled by S. 236 and applies only to cases falling under S. 236—Case not falling under S. 236—Accused cannot be convicted under S. 237 of offence with which he was not charged.

Section 237 applies only to cases which fall within the provisions of S. 236 and is controlled by it. Where a case does not fall under S. 236, the accused cannot be convicted under S. 237 of an offence with which he was not charged. [P 799 C 2]

(c) Criminal P. C. (1898), Ss. 236 and 237—Doubt whether Court will make one and which of presumptions under S. 114, Illus. (a), Evidence Act, is not such doubt as is contemplated by S. 236—Such presumption is not one of fact which can be proved—It can only arise when some fact or facts cannot be proved.

A doubt whether the Court will make one and which of the presumptions under S. 114, Illus. (a), Evidence Act, is not such a doubt as is contemplated by S. 236. The question whether the Court will make presumption or which presumption, is irrelevant on the question of the applicability of Ss. 236 and 237. Such a presumption is not one of fact which can be proved. On the contrary it can arise only when some fact or facts cannot be proved. In appropriate circumstances, such facts, though they cannot be proved may be presumed. And in such a case there would be no doubt about which of-

fence the facts which could be proved would constitute. Alone they could not be enough to constitute any offence. But if the Court decided to presume the existence of other facts, then the proved facts and the presumed facts together would constitute an offence. The doubt, therefore, arises about whether Court will or will not presume a fact, and which fact, not about which offence the facts which can be proved will constitute, within the meaning of Ss. 236 and 237: 1931 Cal 414, Commented upon. [P 800 C 1]

(d) Criminal Trial—Trial by Jury—Charge to jury—Misdirection—Accused charged under S. 395, I. P. C.—Facts proved that dacoity was committed by accused and that they were in possession of stolen goods—No charge framed under S. 412, I. P. C.—Judge directing jury that if they thought that there was not sufficient evidence of dacoity and that there was evidence that accused were in possession of stolen property, knowing it to have been stolen, they might find accused guilty under S. 412 although not charged under it—Accused convicted under S. 412, I. P. C.—Conviction held bad—Direction to jury both upon S. 412, I. P. C. and S. 114, Illus. (a), Evidence Act, held contrary to law—Verdict held inferentially to be one of acquittal on charge of S. 395, I. P. C., and that there being no appeal under S. 417 accused could not be retried.

Where the accused are charged under S. 395, I. P. C., with the offence of dacoity and the facts that are proved are that a dacoity was committed by the accused and that some of the stolen goods were found later in possession of each of the accused, the proper direction to be given to the jury upon S. 114, Illus. (a), Evidence Act, should be, that they may, and not they must, in the absence of any reasonable explanation, find the accused guilty, and that, if an explanation is given, which may be true, it is for the jury to say on the whole evidence whether the accused are guilty or not; if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, accused are entitled to an acquittal. [P 800 C 2]

Where the Judge in such a case directed the jury that if they thought that there was not sufficient evidence of dacoity and that there was sufficient evidence that the accused dishonestly received or retained stolen property knowing it had been transferred by commission of dacoity, they might find the accused guilty under S. 412, I. P. C., although they were not charged under that section and the accused were ultimately convicted under S. 412:

Held: that the Judge's direction upon both S. 412, I. P. C., and S. 114, Evidence Act, was contrary to law and the verdict of jury was erroneous owing to those misdirections. That although the jury gave no verdict on the charge of dacoity, inferentially their verdict was one of acquittal upon that charge and that as there was no appeal under S. 417, Criminal P. C., against that verdict, the accused could not be tried again for that offence. [P 800 C 2]

(e) Evidence Act (1872), S. 114, Illus. (a)—Court cannot under S. 114, Illus. (a) presume knowledge of dacoity, required for conviction under S. 412, I. P. C.

The provisions of S. 114, Illus. (a) do not entitle the Court to presume the knowledge of dacoity or dacoits which is required for a conviction under S. 412, I. P. C. [P 800 C2]

(f) Criminal P. C. (1898), S. 236—Doubt must arise from nature of the act or series of acts—Doubt would arise because of inferences which might be drawn from the acts.

The facts which can be proved within the meaning of S. 236 are only ascertained after the completion of the trial and the charge cannot therefore be made to depend on them. In the terms of S. 236, the doubt must arise from the nature of the act or series of acts and the doubt would arise because of the inferences which might be drawn from those acts. [P 801 C 1]

(g) Criminal P. C. (1898), Ss. 236, 237—S. 237 only applies to cases referred to in S. 236 and does not refer to cases in which it is doubtful which offence will be proved—Accused charged for one offence—He cannot be convicted under S. 237 of different offence.

In interpreting the Illustration of S. 237, it must be remembered that it only applies to the class of cases referred to in S. 236 and therefore it does not refer to cases in which it is merely doubtful which offence will be proved and S. 237 is no authority for holding that in such cases on a charge of one offence a man can be convicted of a different offence. Under S. 236 the doubt must arise from the nature of the facts or inferences which can be drawn from those facts: 1925 P C 130, *Dissent*. [P 801 C 1]

Satindra Nath Mukherji and Priyanath Bhattacharjee—for Appellants.

Amiruddin Ahmed—for the Crown.

Lort-Williams, J.—In this case six men were charged with dacoity namely, Istahar Khondkar, Maijuddi, Azahar Ali, Adam Ali, Sonatan Patikar and Umacharan Patikar and one Jamini Kanta Nath, under S. 412, I. P. C. Two of them were acquitted, namely, Sonatan and Jamini, all the rest the jury found guilty of offences under S. 412. These five have appealed from jail. The learned Judge appears to have directed the Jury that if they thought that there was not sufficient evidence of dacoity, but that there was evidence that the accused dishonestly received or retained stolen property knowing it to have been transferred by the commission of dacoity or received from dacoits, they might find them guilty under S. 412, although no charge under this section had been made against any one of them, with the exception of Jamini. Of the five accused who have appealed from jail one, Umacharan Patikar, has been represented by Mr. Satindra Nath Mukerji. The rest are unrepresented. The point raised by the learned advocate

on behalf of Uma Charan is, that the jury were not entitled to convict him of an offence under S. 412, because no charge was made against him under that section: 26 Cr L J 1361 (1). This argument, of course, would apply to the rest of the appellants. Mr. Amiruddin Ahmed, who appears for the Crown, has argued that what the jury did was permissible under the provisions of Ss. 236 and 237, Criminal P. C. that is to say, he has argued that this was a case in which the facts which could be proved were not in dispute or doubt; what was in doubt was the kind of offence which those facts would constitute, within the meaning of those sections: 35 C W N 945 (2), and the cases therein discussed.

Now the facts were that a dacoity was committed, that none of the dacoits was recognised, but that some of the stolen goods were found about five to six weeks afterwards, in the possession of each of the accused. There was some evidence to show that each of the accused had taken steps to conceal the stolen goods. Two made confessions which implicated in the dacoity all of the accused except Jamini. The learned Advocate for the Crown has argued that this case comes within the ambit of S. 236, because there was no doubt about the facts which could be proved, and the only doubt which arose was what offence would be constituted by those facts, that is to say what inference would the jury draw from the facts. Would they consider that they were sufficient proof of an offence under S. 395, or of an offence under S. 412? He went further and suggested that though the facts were not in doubt, there was a doubt whether the jury would make one of the presumptions which they could make under S. 114, Illus. (a), Evidence Act, and which of those presumptions. Thus he argued that in cases to which that illustration applies, though the facts may not be in doubt, yet there will always be a doubt whether the Court will make such a presumption, and which presumption, the making of which is permissive and optional. and therefore Ss. 236 and 237 apply to all such cases. In my

1. *Achpal v. Emperor*, 1926 Lah 192=89 I C 449=26 Cr L J 1361.

2. *Mehr Sheikh v. Emperor*, 1931 Cal 414=1931 Or O 510=132 I C 254=32 Cr L J 892=59 Cal 8=35 C W N 945.

opinion, both these arguments are unsound. The facts which could be proved were that a dacoity had been committed by all the accused except Jamini, and that some of the stolen goods had been found, five to six weeks afterwards and partly concealed, in the possession of each of the accused. These facts could be proved by the confessions of Maijuddi and Azaharali and the evidence about the finding of the stolen goods. Whether the jury would believe the confessions and the rest of the evidence or not was and is irrelevant upon the point whether Ss. 236 and 237 were applicable or not. Such a doubt is not contemplated by the sections. There was no doubt about the admissibility of the confessions. They had been recorded in the prescribed way by a Magistrate, were declared therein to have been made voluntarily, and *prima facie* would be admissible in evidence. There was no doubt about what offence the facts to which I have referred would constitute. They would constitute, against all except Jamini, the offence of dacoity.

Thus the evidence of dacoity was direct and not circumstantial, and if this evidence were believed by the jury to be true, the only possible inference which could be drawn from the proved facts would be that the accused, other than Jamini, were guilty of dacoity. The learned Advocate for the Crown has failed to appreciate the distinction between the doubt whether the jury would believe the evidence and the inferences which it was possible for them to draw, assuming that they did believe it. The doubt contemplated by the sections must arise at the time of charge. In order to decide whether such a doubt exists as will attract the provisions therein contained, the Judge must know at that time what facts "can be proved." Therefore this expression must mean facts about which there is evidence in the hand of the prosecution. What this evidence amounts to is disclosed in the depositions taken by the committing Magistrate and in any additional evidence which may be in the hands of the prosecution and of which notice has been given. This matter cannot be affected by considerations whether the prosecution will be able to produce this evidence at the trial, or whether the Court or jury will believe it if and when produced. With great respect for the decision of their Lordships of the Judicial

Committee in 30 C W N 581 (3), I think that that decision will require to be reconsidered by them upon some future occasion. The facts which could be proved in that case against each of the accused clearly constitute both the offence of murder and an offence under S. 201, I. P. C., and, in my opinion, no doubt arose within the meaning of S. 236, Criminal P. C.

It is true that the illustration of S. 237, Criminal P. C., seems, at first sight, to support the different view which their Lordships adopted, but S. 237 applies only to cases which fall within the provisions of S. 236 and is controlled by it. And the illustration is not really inconsistent with the view which I have taken, because the decision in the case illustrated might depend upon which of several possible inferences would be drawn from the facts proved. Where the evidence is circumstantial, and the decision depends upon the question whether the Court will draw a possible inference, or which of several possible inferences, there exists a doubt within the meaning of S. 236 : 35 C W N 945 (2). The decision in 50 Cal 564 (4) was a case in point. In that case ornaments and money to the value of Rs. 18,000 were stolen from the room of the complainant. The accused occupied a room in the same flat. She was charged with theft under S. 380, I. P. C., and convicted of an offence under S. 54-A, Calcutta Police Act, with which she had not been charged. The evidence showed that she had obtained possession of the key and padlock of the door which separated her room from the room of the complainant. The rest of the evidence was matter of suspicion only, namely, that the accused made large payments to her creditors on the day of the theft and on the two following days, and later, pledged ornaments, and attempted to change notes for Rs. 1,000 and gave a goldsmith a large quantity of broken ornaments to be melted down. The identity of neither ornaments nor money was established. From the evidence about the key and padlock, a possible inference was that the accused stole the property. If this inference were not drawn by the

3. Begu v. Emperor, 1925 P O 130=88 I O 3=26 Cr L J 1059=52 I A 191=80 C W N 581=6 Lah 226 (P O).

4. Tulsi Tolini v. Emperor, 1923 Cal 596=72 I O 372=24 Cr L J 372=50 Cal 564.

Court, the whole of the evidence taken together, might afford reason to believe that they were stolen within the meaning of S. 54-A. And such was the decision, though I doubt whether such an inference was possible upon those facts, or could properly have been drawn.

The second argument of the learned advocate is still more unsound. The question whether the Court will make one and which of the presumptions under S. 114, Illus. (a), Evidence Act, is irrelevant upon a consideration of the provisions of Ss. 236 and 237, Criminal P. C. Such a presumption is not one of the facts which "can be proved." On the contrary it can arise only when some fact or facts cannot be proved. In appropriate circumstances, such facts, though they cannot be proved may be presumed. And in such a case there would be no doubt about which offence the facts which could be proved would constitute. Alone they would not be enough to constitute any offence. But if the Court decided to presume the existence of other facts, then the proved facts and the presumed facts together would constitute an offence. The doubt therefore arises about whether the Court will or will not presume a fact, and which fact, not about which offence the facts which can be proved will constitute within the meaning of Ss. 236 and 237. Upon this point there is a paragraph in the report of the judgment in 35 C W N 945 (2), *supra*, to which I was a party, which seems to be inaccurate and misleading. Therein it is stated at p. 947 that :

It may be that, even after evidence, the inference will be that the accused has committed one offence or another. For instance the Court may presume that a man, who is in possession of stolen goods soon after the theft and does not account for his possession, is either the thief or has received the goods knowing them to be stolen. In such a case the doubt may be taken up to the judgment stage and the Court shall pass judgment in the alternative under S. 367, Criminal P. C.

This must be a misprint for S. 237. The paragraph as reported seems to confuse inference with presumption, and to suggest that a doubt whether the Court will make presumption, or which presumption, may be such a doubt as is contemplated by S. 236. I did not intend to, and do not subscribe to any such proposition, as I have already stated. The direction of the learned Judge upon S. 114, Illus. (a), was neither correct nor

complete. The direction should have been in accordance with the statement made by Lord Reading, L. C. J. in 11 Cr App R 45 (5), with which Bray, Avory, Lush and Atkin, JJ. agreed. It was as follows :

Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not ; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution. That is the law ; the Court is not pronouncing new law, but is merely restating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases.

The result is that in my opinion the learned Judge's direction upon both S. 412, I. P. C. and S. 114, Evidence Act, was contrary to law, and the verdict of the jury was erroneous owing to these misdirections. Although the jury gave no specific verdict on the charge of dacoity, inferentially their verdict was one of acquittal upon that charge and as there is no appeal against that verdict under S. 417, Criminal P. C., the appellants cannot be tried again for that offence.

The provisions of S. 114, Illus. (a), Evidence Act, do not entitle the Court to presume the knowledge of dacoity or dacoits which is required for a conviction under S. 412, and the only evidence of such knowledge is contained in the retracted confessions, which were rejected by the jury. The evidence, however, relating to the concealment of the stolen goods is sufficient to prove guilty knowledge, and the circumstances were such as to justify us in making the presumption that the appellants, other than Umacharan, received those goods knowing them to be stolen. The evidence against Umacharan, apart from one of the retracted confessions, is very slight, and in his case we allow the appeal, and set aside the conviction and sentence and acquit him. Instead of sending the cases of the other

appellants back for re-trial, we alter the finding to one of conviction under S. 411, I. P. C., and in view of the fact that each of the appellants was in custody for seven months prior to his conviction, we reduce the sentence upon each of them to 1 year's rigorous imprisonment.

Jack, J.—I agree. The confusion which has arisen about the interpretation of S. 236, I. P. C., is due to the way in which it is worded. What is really meant seems to be:

If a single act or series of acts is of such a nature that it is doubtful which of several offences has been committed if the facts as alleged by the prosecution are established, the accused may be charged with the commission of all or any of such offences.

The facts which can be proved are only ascertained after the completion of the trial and therefore the charge cannot be made to depend on them; moreover in the terms of the section the doubt must arise from the nature of the act or series of acts, and the doubt would arise because of the inferences which might be drawn from those acts. In interpreting the illustration to S. 237, Criminal P. C., it must be remembered that it only applies to the class of cases referred to in S. 236, and therefore it does not refer to cases in which it is merely doubtful which offence will be proved, and S. 237, Criminal P. C., is no authority for holding that, in such cases, on a charge of one offence a man can be convicted of a different offence. With great respect to Lord Haldane it would appear difficult to reconcile S. 236, Criminal P. C., with his statement in the case referred to by my learned brother: 30 C W N 581 (3):

The illustration makes the meaning of the words plain. A man may be convicted of an offence though there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.

This interpretation would make the doubt depend merely on the nature of the evidence whereas under S. 236, Criminal P. C., the doubt must arise from the nature of the facts or the inferences which can be drawn from these facts. If the doubt only depended on the evidence S. 237 would apply to every case. In the present case if the facts as alleged by the prosecution are established the accused were clearly guilty of dacoity and not of dishonestly receiving property stolen in a dacoity; therefore they cannot be convicted of the latter offence on a charge of dacoity. The accused ought to have been

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charged with dishonestly receiving stolen property in the alternative, but since they have not been prejudiced by failure to frame this charge, and since the verdict of the jury clearly shows that they were guilty of this offence, there is no need to send back the case for retrial. The jury found them guilty under S. 412, I. P. C., instead of S. 411 because of the misdirection of the learned Judge where he said:

If the jury believe that there is not evidence to hold they committed dacoity but that they hold that they dishonestly received or retained stolen property knowing it to be such, they may find them guilty under S. 412, I. P. C.

The stolen property was not found with the accused until 6 weeks after the dacoity, and apart from the discarded confessions there is no evidence that they knew it was stolen in the dacoity, a factor which was necessary to bring the offence under S. 412, I. P. C.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Calcutta 801

CUNLIFFE AND HENDERSON, JJ.

Chhoteram Sarup Sha — Accused —
Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 680 of 1936, Decided on 17th August 1936.

Penal Code (1860), S. 199—Insolvency petition containing false statements—Such statements do not constitute evidence by themselves—No offence under S. 199.

The statements in a petition of insolvency are very analogous to statements made in ordinary civil pleadings—statements which are verified by law on the part of the person who places them on the record. But they certainly do not constitute evidence which is bound to be accepted by the Court. A petition in insolvency unbacked or uncorroborated by other evidence would not be accepted by the Court against the interests of any other person who was concerned in the question of the petitioner's insolvency.

In an insolvency petition, a petitioner made a false statement to the effect that he had never been an insolvent before. This was proved to be untrue and hence he was prosecuted under S. 199. The question to be decided was whether this statement contained in the insolvency petition came within the ambit of the expression that it was a statement 'bound or authorised by law to be received as evidence.'

Held: no offence under S. 199 was committed. [P 802 C 1]

S. K. Sen, Hiralal Ganguli and Sudhir Chandra Choudhuri—for Petitioner.

D. N. Bhattacharjee and Bireswar Chatterjee—for the Crown.

Cunliffe, J.—This Rule raises a short point of law on its *Advocate High Court*

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Srinagar.

tioner was convicted under S. 199, I. P. C., for making a false statement. S. 199 is a provision of the Code which deals with a very specialised form of perjury. This section which is not very often used is, in the following terms:

Whoever in any declaration made or subscribed by him, which declaration any Court of justice, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

The fact was that the petitioner put in a petition in insolvency and in his petition he made a false statement to the effect that he had never been an insolvent before. This was proved to be untrue and hence this prosecution. The question to be decided is whether this statement contained in the insolvency petition which was made in the district under the Provincial Insolvency Act comes within the ambit of the expression that it was a statement "bound or authorised by law to be received as evidence." In my opinion, it does not. The statements in a petition of insolvency are very analogous to statements made in ordinary civil pleadings—statements which are verified by law on the part of the person who places them on the record. But they certainly do not constitute evidence which is bound to be accepted by the Court. I doubt whether they are evidence in any sense of the word, except, possibly, in the form of admissions against the person who makes them. Certainly, a petition in insolvency unbacked or uncorroborated by other evidence would not be accepted by the Court against the interests of any other person who was concerned in the question of the petitioner's insolvency. There are decisions upon this question; but in my view, they turn on their own facts and it is not necessary to cite them. The rule, accordingly, is made absolute on the basis that I have indicated. The conviction and sentence passed upon the petitioner are set aside and we direct that the accused be set at liberty forthwith.

Henderson, J.—I agree. The decision of this Rule rests on the interpretation of the words "to receive as evidence of any fact" in S. 199, I. P. C. The prosecution was based on a statement made by the petitioner in a verified petition to an

Insolvency Court to the effect that he had never filed any other application in insolvency. It is abundantly clear that that petition could not be used as evidence to prove that in fact he had not filed such a petition. It might be used for the purpose of contradicting his own evidence on oath; but certainly it is not evidence per se of any fact with regard to the insolvency. On behalf of the Crown, Mr. Bhattacharjee sought to support the conviction not upon the ground that his petition could be received as evidence in the ordinary sense of the term but upon the ground that it might be described as evidence in a certain special sense. His argument was to the effect that, without this statement, the petitioner would have been unable to induce the learned District Judge presiding over the Insolvency Court to take any steps with regard to his petition. For this argument Mr. Bhattacharjee relied on the definition of "Evidence" in the Evidence Act. In my opinion, that definition is really against him.

B.D./R.K.

Rule made absolute.

A. I. R. 1936 Calcutta 802

GUHA AND NASIM ALI, JJ.

Sm. Matimala Debi and another—
Judgment-debtors—Appellants.

v.

Surendra Nath Mudi—Decree-holder—Respondent.

Appeal No. 215 of 1936, Decided on 21st August 1936, against order of Sub-Judge, 1st Court, Hooghly, D/- 16th March 1936.

Civil P. C. (1908), S. 60, Proviso 1, Cl. (m)—Testator granting estate to his widow for her lifetime and then to his daughter absolutely—Daughter dying during lifetime of widow leaving her husband as heir—Interest of husband in property is not mere expectancy of succession and is not exempt from attachment and sale.

Where a testator after making specific bequests grants the residual estate to his widow for her lifetime, and then to his daughter absolutely, and the daughter dies during the lifetime of the widow, leaving her husband as her sole heir, the interest of the husband in the property is not a mere expectancy of succession and is not exempt from attachment and sale under S. 60, Proviso 1, Cl. (m), in execution of a decree obtained against the widow and the husband. The right to the property vests absolutely in the daughter after the testator's death and though a life interest is bequeathed to the widow, the interest of the daughter is not mere possibility but a vested remainder. So long as the daughter is alive her heir, i. e., the husband,

has only an expectancy of succession to the vested remainder, but after the death it devolves on him by inheritance. The fact that the husband's right depends upon a contingency, namely the death of the widow, makes no difference, for a contingent interest is something different from a mere possibility of succession: *In re Parsons, Stockley v. Parsons*, (1890) 45 Ch D 51 and 1930 P C 17, Ref.

[P 803 C 2]

Atul Chandra Gupta and Phanindra Kumar Sanyal—for Appellants.

Radha Benod Pal and Narendra Nath Choudhury—for Respondent.

Nasim Ali, J.—This is an appeal by judgment-debtors against an order of the Subordinate Judge of Howrah, dated 16th March 1936, rejecting their objections to the attachment and sale of certain properties in an execution proceeding. One Jyotish Chandra Banerji was owner of these properties. He died having made his last will and testament, on 9th September 1917. By the said Will, after making specific bequests, the residual estate was granted to his wife for life, then to his daughter for life, then to her husband for life, and then to certain persons absolutely. By a codicil dated 5th May 1918, the residual estate was bequeathed by the testator to his daughter absolutely. The testator left surviving him his widow, Motimala Devi appellant 1, his daughter Anila Bala Devi and her husband Mrigendra Nath Mukerji, appellant 2. Probate of the Will was granted in due course. Thereafter, the daughter of the testator died intestate leaving her husband, appellant 2, as her sole heir. The respondent in this Court has attached these properties in execution of a decree obtained by him against the widow and the son-in-law of the testator. The latter objected to the attachment and sale of these properties on the ground that they were not liable to attachment. In view of the provisions contained in S. 60, proviso (1), Cl. (m), Civil P. C., the learned Subordinate Judge has overruled this objection. The judgment-debtors appeal to this Court. At the time of the hearing of this appeal, Mr. Gupta appearing for the appellants did not press the objection of appellant 1 to the sale of her life interest in the property in question. The whole argument of the learned advocate was confined to the question whether the interest of appellant 2 in the properties in question was liable to attachment and sale in exe-

cution of the decree against him. His contention is that although the right of the daughter was a vested right in terms of the Will, the right of her legal representative after her death, is only an expectancy of succession so long as the widow of the testator was alive and was consequently not liable to attachment. An expectancy of succession is a mere possibility and is not an interest or even a contingent title:

It is indisputable in law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person, to which he hopes to succeed, as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property: (1890) 45 Ch D 51 (1) at p. 55.

The right to the properties in question vested absolutely on the daughter on the testator's death, and though a life interest was bequeathed to the widow, her interest was not a mere possibility but a vested remainder, which was an interest granted out of the original estate. So long as the daughter was alive, her heir had only an expectancy of succession to this vested remainder. After her death, it devolved on Mrigendra, appellant 2, by inheritance. The interest of appellant 2 therefore is not a mere expectancy of succession. It is argued by Mr. Gupta that Mrigendra's right depends on a contingency, namely the death of the widow during his lifetime. But a contingent interest is

something quite different from a mere possibility of a like nature of an heir apparent succeeding to the estate or the chance of a relation obtaining a legacy and also something quite different from a mere right to sue. It is a well ascertained form of property . . . in respect of which it is quite possible to raise money and to dispose of it in any way that the beneficiary chooses: 57 I A 10 (2) at p. 18.

The learned Subordinate Judge was therefore right in rejecting the objection of appellant 2 to the attachment and sale of the properties in question. The appeal is therefore dismissed with costs. The hearing fee in this Court is assessed at two gold mohurs.

Guha, J.—I agree.

R.M./R.K.

Appeal dismissed.

1. *In re Parsons, Stockley v. Parsons*, (1890) 45 Ch D 51=59 L J Ch 666=62 L T 929=38 W R 712.
2. *Ma Yai v. Official Assignee*, 1930 P C 17=121 I O 225=57 I A 10=8 Rang 8 (P C).

A. I. R. 1936 Calcutta 804

NASIM ALI AND HENDERSON, JJ.

Sm. Charusila Dassi—Plaintiff—Applt.

v.

Abhilas Bauri and others—Respds.

Appeals Nos. 1069 to 1071 of 1932, Decided on 24th April 1936.

(a) Bengal Tenancy Act (1885 as amended in 1928), S. 115 (c) (3)—Special Judge rejecting memorandum of appeal for failure to supply requisite fee—Order rejecting memorandum of appeal is not decree and hence not appealable.

Section 107 (2), Civil P. C., invests an appellate Court with the same power as are conferred on a Court of original jurisdiction. But it does not purport to give the order passed by an appellate Court the same effect as an order passed by an original Court of like nature. S. 2 expressly says that 'decree' shall be deemed to include the rejection of a plaint. If it was the intention of the legislature to include within the definition of 'decree' an order rejecting a memorandum of appeal it would have expressly said so. [P 805 C 1]

Section 115 (c) (3), Ben. Ten. Act, makes applicable S. 107 and the provisions of O. 42, Civil P. C., to appeals to the High Court. An order passed by a special Judge rejecting memorandum of appeal for failure to supply requisite Court-fee is not a decree and hence is not appealable: 1932 Cal 482, *Foll.* [P 805 C 1]

(b) Bengal Tenancy Act (1885 as amended in 1928), S. 105-A—Decisions under—Appeal from — Court-fee — Decision on questions specified in S. 105-A is in effect decree—For appeal before special judge memorandum of appeal is required—Such memorandum comes under Art. 1, Sch. 1, of Court-fees Act.

The decision on questions specified in S. 105-A is for all practical purposes a decision under S. 106. For appeals from such decisions before the special Judge memoranda of appeals within the meaning of Art. 1, Sch. 1, Court-fees Act, are required and the Court-fees payable on such memoranda are ad valorem on the value of the subject-matter of dispute in appeal subject to a maximum of Rs. 20: 23 Cal 723 (P C), *not Foll.* [P 806 C 2; P 807 C 1]

(c) Bengal Tenancy Act (1885 as amended in 1928), S. 115—Decision under S. 105-A—Appeal to special Judge—Principle laid down for determining value of memorandum of appeals in suits under S. 7 (ii), Court-fees Act, should be followed.

Where an appeal is made to the special Judge from the decision on questions under S. 105-A, for valuing the subject matter of dispute the principle laid down for determining the value of memorandum of appeals in suits under S. 7 (ii), Court-fees Act, should be adopted: 1932 Cal 674, *Rel. on.* [P 807 C 1]

Atul Chandra Gupta and Bhola Nath Ray—for Appellant.

Panchanan Ghose, Muktipada Chatterjee, Nirod Bandhu Ray and Subodh Chandra Dutta—for Respondents.

Ramendra Chandra Ray—for Deputy Registrar (in Nos. 1070 and 1071).

Basak—for Secretary of State.

Nasim Ali, J.—The appellant in these three appeals filed three applications under S. 105, Ben. Ten. Act, before the Revenue Officer of Rampurhat in the district of Birbhum for settlement of fair and equitable rent of certain holdings. Before the Revenue Officer she raised the following issues under S. 105-A: (1) Are the holdings in dispute, though recorded as Mokrari in the record of rights, occupancy holdings? (2) Are the rents recorded in the record of rights the existing rent of the holdings? (3) Is she entitled to get additional rent for excess area? She paid Court-fee of 12 annas for each of the holdings mentioned in her application and Rs. 20 for each of the three applications. The Revenue Officer decided against her. She filed three appeals before the Special Judge of Birbhum and paid the same Court-fee on the memoranda of appeals as she did on her applications before the Revenue Officer. The learned Judge treated the appeals as appeals arising out of suits under S. 106, Ben. Ten. Act, and demanded additional Court-fees. The appellant having failed to comply with the order of the Judge her appeals have been dismissed. She appeals to this Court. In her Memorandum of appeals to this Court she has paid the same Court-fees as before the Special Judge.

During the pendency of the appeal to this Court respondent 9 in S. A. No. 1069, respondents 17, 18, 45, 48, 72 and 73 in S. A. No. 1070, respondents 10, 13, 24, 41, 44, 59, 62, 66 and 94 in S. A. No. 1071 died. Their heirs were not substituted within the time prescribed by law. The appellant's claim for fair rent in respect of the following Khatians is therefore dismissed.

Appeal No.	Khatian No.
S. A. No. 1069 of 1932	114
S. A. No. 1070 of 1932	15
	18
	66
	133
S. A. No. 1071 of 1932	23
	31
	35
	39
	71
	191
	202

A preliminary objection has been taken to the hearing of these appeals on behalf of the respondents on the ground that the order of the learned Special Judge though

in form an order of dismissal, is in substance an order of rejection of memorandum of appeals, and no appeal lies against such an order. In order to determine whether an order dismisses an appeal or simply rejects it, the substance and not the form of the order is to be considered. The order of the Special Judge is not accurately expressed because it states that the appeals are dismissed and not that the memorandum of appeals are rejected. It is however clear that the intention of the Judge was to reject the memorandum as they were not properly stamped. The learned advocate for the appellant however contends that an appeal lies against an order rejecting a memorandum. Now an appeal to this Court against the decision of the Special Judge lies under S. 109-A (now 115-C), Cl. (3), Ben. Ten. Act. That clause lays down that such an appeal is subject to the provisions of O. 42, Civil P. C. O. 42 of the Code lays down that the rules of O. 41 shall apply so far as may be to appeals from appellate decrees. The order appealed against does not come under R. 3, O. 41 which provides for rejection of memorandum of appeal. But by S. 107, Cl. (2) of the Code the appellate Court has the same powers as the Court of original jurisdiction in respect of suits instituted therein. By R. 11, O. 7 of the Code, the trial Court has been empowered to reject a plaint if the plaint is not properly stamped and the plaintiff being required to supply the requisite stamps fails to do so. The Special Judge therefore had power to reject the memorandum of appeal for failure of the appellant to supply the requisite stamps. The question then is whether the order is appealable. In 59 Cal 388 (1), Suhrawardy, J. observed :

Section 107 (2) invests an appellate Court with the same powers as are conferred on a Court of original jurisdiction. It does not purport to give the order passed by an appellate Court the same effect as an order passed by an original Court of like nature. S. 2 expressly says that "decree" shall be deemed to include the rejection of a plaint. If it was the intention of the Legislature to include within the definition of 'decree' an order rejecting a memorandum of appeal it would have expressly said so.

With these observations I respectfully agree. S. 109 (3), Ben. Ten. Act makes the provision of O. 42 applicable to the appeals to this Court. By implication the provisions of O. 41 are attracted. Even if the provisions of O. 43 also are attracted,

an order rejecting a memorandum of appeal is not appealable under its provisions. As at present advised I am inclined to think that an appeal arising out of a proceeding under S. 105 against the decision of the Special Judge lies to this Court when there has been an investigation and determination by him of any of the questions under S. 105-A.

I am therefore of opinion that no appeal lies to this Court against the order of the special Judge. But in view of the facts and circumstances of these cases we treat the memorandum of appeals to this Court so far as they relate to the tenancies in respect of which the appeals have not abated as petitions for revision under S. 115, Civil P. C. The point for determination in these cases is what was the court-fee payable on memorandum of appeals before the Special Judge in respect of the Khatians other than those in respect of which the claim for additional rent has been dismissed by us. It was not disputed at the bar that the amount of court-fee payable for the petitions before the revenue officer is governed by the notification under S. 105 (3), Ben. Ten. Act. It is however argued by the learned advocate for the appellant that the notification does not apply to appeals and that for determining the court-fee payable we must look to the Court-fees Act. It is also argued that the memorandum of appeal before the Special Judge do not come under Art. 1, Sch. 1, Court-fees Act and that they came under Art. 1, Cl. (b), Sch. 2 of the same Act. In support of this contention the learned Advocate relied upon a Full Bench decision of this Court: 23 Cal 723 (2). This ruling is of the year 1896. In that case it was held that no memorandum of appeal was required before the Special Judge in an appeal arising out of a proceeding for settlement of rent under S. 104 (2), Ch. 10, Ben. Ten. Act of 1885 as it stood then inasmuch as the proceeding under that section was not a suit. The reasons given for this decision are these:

(1) The proceeding was instituted by an application and not by a plaint. (2) The application was not subject to an ad valorem court-fee. (3) The provisions of S. 107, (old Act) did not prescribe that the decision of the revenue officer in such proceeding would be a decree. It has

1. Jnanada Sundari Shah v. Madhab Chandra, 1982 Cal 482=138 I O 648=59 Cal 388.

2. Upadhya Thakur v. Persidh Singh, (1896) 23 Cal 723 (F B).

the force of a decree which it might have without the proceeding necessarily becoming suit. (4) None of the rules framed by the Local Government under S. 189(1) of the Act laid down that such a proceeding would be a suit. (5) The rule framed by the Government to the effect that such a proceeding should be dealt with as a suit in respect of its procedure did not make them suits for purposes of court-fees as S. 189 of the Act did not authorize the Government to make rules about court-fees. Ch. 10, Ben. Ten. Act of 1885 has been greatly modified from time to time after the Full Bench decision by amending Acts. Government have now obtained power from the legislature to fix court-fees for proceedings for settlement to fair and equitable rent: see S. 105 (3). S. 105-A has been introduced. Mukherjee, J., while stating the history of the introduction of this section in 23 C L J 281 (3) decided by a Full Bench of this Court, observed as follows in the year 1916 :

Section 105 did not by itself in its original form contemplate an investigation into the question of the correctness of entries in the Record of Rights; yet a practice had grown up in proceedings under that section to decide questions which the legislature contemplated should be determined by a suit under S. 106. To put up the matter in another way the parties were placed in the same position as if a suit under S. 106 and a proceeding under S. 105 has been simultaneously instituted and consolidated and an amalgamated trial held for the investigation of the question of fair and equitable rent. This led to the introduction of S. 105-A which regularises the practice that gradually developed; and the revenue officers while seized of proceedings under S. 105 were expressly authorized to determine questions mentioned in S. 105-A which in ordinary course would form the subject of an enquiry under S. 106 * * * It follows accordingly that if in any proceeding under S. 105 questions under S. 105-A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent does in substance embody a decision of question within the scope of S. 105-A and consequently of S. 106 We cannot be invited to sacrifice substance to form, to look merely at the label and not the contents of the adjudication.

Before the introduction of S. 105-A by the amending Act of 1907, by a notification of the year 1899 a court-fee stamp of 8 annas was payable on application under S. 105 which replaced S. 104 (2) of the old Act in the year 1898. By the notifica-

tion of the year 1918 and 1922 under S. 105 (3), Ben. Ten. Act, court-fees payable were fixed thus : (a) A stamp of 12 annas for each tenancy which is the subject-matter of an application under S. 105. (b) An ad valorem fee chargeable under Art. 1, Sch. 1, Court Fees Act subject to a maximum of Rs. 20 in addition to the stamp of 12 annas for adjudication of issues mentioned in S. 105-A. By the notification under S. 35, Court Fees Act, the court-fee payable for a suit under S. 106 is exactly the same as for trial of issues specified in S. 105-A in a proceeding under S. 105. This has been made clear by the introduction of S. 105-B in Ch. 10, Ben. Ten. Act. S. 107 of the Act as it stood before its amendment in 1898 laid down that the decision in a proceeding for settlement of rent should have the force of a decree. The decision under Ss. 105 and 105-A have now the force and effect of a decree of a civil Court in a suit between the parties. By R. 60 (9) and (10) of Government rules framed under the Act the entry made in the decision of the Revenue Officer and schedule attached thereto with regard to the fair rent settled shall be held to be a decree and a proceeding under S. 105-A shall be considered as a part of the proceedings under S. 105.

Before 1898 there was no provision in Ch. 10 corresponding to S. 109 which was introduced by the Amending Act of 1898. After the introduction of S. 105-A proceedings under Ss. 105 and 105-A are now under the operation of S. 109. Under S. 108 (3) of the Act as it stood before 1898 though there was a second appeal to this Court from the decision of a special Judge in a suit under S. 106, there was no second appeal to this Court from the decision of the special Judge in a proceeding under S. 104 (2). S. 109-A (now S. 115-C after amendment in 1928) which has replaced the old S. 108 gives a right of second appeal if the decision of the special Judge is not a decision simply settling rent but a decision determining questions within the scope of S. 105-A and consequently of S. 106. By successive legislation and notification after the Full Bench decision in *Upadhaya Thakur's case* (2) the character of a proceeding under S. 105 in which questions mentioned in S. 105-A are investigated and determined has now been changed. The decision on questions specified in S. 105-A is for all practical

3. *Jnanda Sundari v. Abdul Rahman*, 1916 Cal 418=33 I C 148=43 Cal 603=20 O W N 428=23 C L J 281 (F B).

purposes a decision under S. 106. The ruling in *Upadhaya's case* (2) therefore cannot in my opinion apply to appeals before the special Judge against the decision of the Revenue Officer determining questions specified in S. 105-A. For such appeals memorandum of appeals within the meaning of Art. 1, Sch. 1, Court-fees Act, are required and the Court-fees payable on such memorandums are ad valorem on the value of the subject matter of dispute in appeal subject to a maximum of Rs. 20.

The next question is what is the value of the subject matter of dispute in the appeals before the special Judge. In determining the value under Art. 1, Sch. 1 we have got to look to the principles laid down in the sections of the Act. In view of the decision of the Court to which the appellant was a party i. e. 59 Cal 997 (4) the principle laid down for determining the value of memorandum of appeals in suits under S. 7 (ii), Court-fees Act should be adopted in valuing the appeals before the Special Judge in these cases. The appellant is therefore liable to pay a court-fee of 12 annas plus ad valorem fee on ten times the difference between fair rent claimed before the revenue officer and the rent recorded in the record of rights subject to a maximum of Rs. 20 for each of the khatiana.

We therefore direct the stamp reporter to report what would be the additional court-fee, which was payable in the Court of the revenue officer and the Special Judge in accordance with our decision in the cases for the khatians other than those in respect of which the claim has been dismissed by us. The stamp reporter is also directed to report what amount of additional court-fee would be payable on the memorandums of appeals treated as petitions for revisions under S. 115, Civil P. C. Further orders in these cases will be made as soon as the report of the stamp reporter is submitted.

Henderson, J.—I agree.

S. A. 1069 of 1932: The appellant is directed to deposit Rs. 3 that is, the deficit court-fee, within a week from this date. On such deposit being made, the judgment and decree of the Special Judge will be set aside and the case will be sent back to him for hearing on the merits according to law. Costs in

this Court will abide the result. Hearing fee one gold mohur. If however the deficit court-fee be not paid as directed above, the order of the Special Judge will be affirmed without costs. The petition of compromise filed in this Court will also be sent to the Special Judge for being disposed of according to law, if the deficit court-fee be paid as directed above.

S. A. 1070 of 1932: The learned advocate for the appellant states that his client does not want to proceed with this application for settlement of fair and equitable rent in respect of the Khatians other than Khatian Nos. 10, 19, 150, 171, 203, 206. The judgment and decree of the Special Judge in respect of those Khatians are therefore affirmed without costs. As regards the other Khatians, that is, Khatians Nos. 10, 19, 150, 171, 203 and 206, the landlord will get fair and equitable rent at the rate mentioned in the petitions of compromise.

S. A. 1071 of 1932: The learned advocate for the appellant states that his client does not want to press his application for settlement of fair and equitable rent so far as the Khatians other than Khatians Nos. 121 and 160 are concerned. The application for settlement of fair and equitable rent in respect of those Khatians is therefore dismissed. As regards the remaining Khatians that is, Khatians Nos. 121 and 160, the appellant will get fair and equitable rent at the rate mentioned in the petitions of compromise. There will be no order for costs in this case.

D.S./R.K.

Order accordingly.

A. I. R. 1936 Calcutta 807

GUHA AND NASIM ALI, JJ.

Nazar Khan Kabuli — Creditor—Appellant.

v.

J. J. S. Barrclough—Insolvent and others—Respondents.

Appeal No. 419 of 1934, Decided on 20th August 1936.

Insolvency—Proof of debts—Conditional discharge—Debt can be proved any time before final discharge.

An order rejecting the application of a creditor for inclusion of his name as a creditor on the ground of delay is not proper if his name was not included in the list of creditors and if no opportunity is given to him to explain the delay in making the application. The provisions contained in S. 33 (3) Provincial Insolvency Act, entitle a creditor at any time before discharge to tender proof of his debt and apply

4. Charusila Dasi v. Mazaffar Shaikh, 1932 Cal 674=149 I O 37=59 Cal 997=55 O L J 303.

to the Court for an order directing his name to be entered in the schedule. [P 808 C 1]

Sarat Chandra Janah and Hiran Kumar Roy—for Appellant.

Judgment.—This appeal has arisen out of an application made in an insolvency case by a person claiming to be a creditor and praying for inclusion of his name as such in the schedule of creditors. The application was made on 16th June 1934, before the learned District Judge, Midnapur, after a conditional discharge had been granted to the insolvent by the Court, on 26th May 1934. The application was rejected on 14th July 1934, on the ground that no sufficient and reasonable cause for the delay in making the application was made out. The order of 14th July 1934, mentioned above, was passed after hearing the objections raised by the creditors who had appeared in the proceeding before the Court. In our judgment, the order rejecting the application of the appellant for inclusion of his name as a creditor was not properly made, in view of the admitted position that his name was not included in the list of creditors, and seeing that no opportunity was given to the appellant to explain the delay in making the application out of which this appeal has arisen. The provisions contained in S. 33 (3), Provincial Insolvency Act, entitled a creditor at any time before discharge, to tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule. As at present advised, we are inclined to hold that the discharge mentioned in S. 33 (3), of the Act is the final discharge, and not a conditional order of discharge, as made in the case before us; a creditor being entitled under the law to prove his debt at any time so long as there were assets available for distribution, so as not to disturb the distribution of any dividend already declared. In the above view of the case before us, the appeal is allowed. The order of the Court below against which it is directed is set aside, and the case is remitted to the Court below for decision in accordance with law, after giving the appellant opportunity for proving his debt. There is no order as to costs in the appeal, as the respondents have not entered appearance.

B.D./R.K.

Case remanded.

A. I. R. 1936 Calcutta 808

R. C. MITTER, J.

Khagendra Nath Chatterjee—Defendant 2—Petitioner.

Kanti Bhushan Banerjee—Opposite Party.

Civil Rule No. 690 of 1935, Decided on 3rd February 1936.

Limitation Act (1908), Art. 7—Motor-car driver is artisan and suit for wages by him is governed by Art. 7.

A bus or motor-car driver must know something of the mechanism of a car, must know how to start it, to stop it and to start it. He is supposed to attend to car in emergent cases when mechanism goes out of order. In this view of the matter the motor driver is an artisan within the meaning of Art. 7 and the suit for wages by him is governed by Art. 7: 1927 Rang 279, Rel. on. [P 808 C 2; P 809 C 1]

Abinash Chandra Ghose—for Petitioner.

Phanindra Kumar Sanyal—for Opposite party.

Order.—This Rule has been obtained by defendant 2 in a suit instituted against him by the plaintiff opposite party for recovery of the balance of wages said to be due to him for the period of his service which he said, began on 14th May 1931 and terminated on 15th September 1931. The learned Small Cause Court Judge has found, overruling the defence, on the point, that the service terminated on 15th September 1931. The lower Court has also found that the plaintiff was employed under defendant 2 as a bus driver on daily wages. The suit was instituted on 12th September 1934 and a plea of limitation was taken but has been overruled. The question is whether the decision of the Court below on the point of limitation is a correct decision on point of law. Defendant 2 contends before me that Art. 7, Lim. Act applies to this case, and inasmuch as the suit has been instituted more than a year after the termination of service, it is barred by limitation. The whole question is whether a bus driver is an artisan within the meaning of that Article. I do not agree in the contention that a bus driver is a household servant. In my judgment, a bus or motor-car driver is an artisan. He must know something of the mechanism of a car, must know how to start it, to stop it and to start it. He is supposed to attend to the car in emergent cases when the mechanism goes a somewhat out of order during a journey. In this view of the mat-

ter I hold that he is an artisan within the meaning of Art. 7. This point was considered by the Burma High Court in 5 Rang 477 (1) and I agree with that portion of the judgment of Maung Ba, J., where Art. 7 has been applied on the footing that a motor-car driver is an artisan.

In this view of the matter I do hold that the point of limitation has been erroneously decided by the lower appellate Court and the plaintiff's suit ought to have been dismissed on the ground of limitation. The Rule is accordingly made absolute and the decree passed by the Court below is discharged. The petitioner must have the costs of the Court below from the opposite party. There will be no order for costs of this Court.

P.R./R.K. *Order accordingly.*

1. Sewaram v. Lachminarayan, 1927 Rang 279 = 104 I C 520 = 5 Rang 477.

A. I. R. 1936 Calcutta 809

CUNLIFFE AND HENDERSON, JJ.

Babu Lal Chaukhani — Accused —
Petitioner.

v.

Emperor—Opposite Party.

Misc. Case No. 95 of 1936, Decided on 3rd August 1936.

(a) Criminal P. C. (1898), S. 498—Appeal finally decided by High Court—Accused applying to Privy Council for leave to appeal—High Court has no power to grant bail during intervening period.

Between the time of the High Court dealing finally with a criminal matter and the time when a successful approach for leave to appeal has been made to the Privy Council, the High Court in matter of bail, is *functus officio* and has no power to grant bail to the accused : 1924 Cal 64, *Foll.* ; 1927 All 97 and 24 Mad 161, *Dissent.* [P 810 C 2]

Per *Cunliffe, J.—Obiter*—On the acceptance on the part of the Judicial Committee of the appeal, the power of the High Court with regard to bail would be revived and fresh seisin of the case with regard to the question of bail could be considered. [P 810 C 2]

Per *Henderson, J.*—It is only when leave to appeal has actually been granted that any question of granting bail either directly or indirectly arises. [P 812 C 1]

(b) Criminal P. C. (1898), S. 561-A—S. 561-A should not be interpreted as having reference to bail—Per *Henderson, J.*

Per *Henderson, J.*—It is incorrect to interpret S. 561-A as having any reference to bail, a matter which is specifically provided for by the Code itself. [P 811 C 2]

(c) Criminal P. C. (1898), S. 561-A—Appeal finally decided by High Court—Accused

applying for leave to Privy Council—High Court has jurisdiction under S. 561-A to extend time for accused to surrender—Per *Henderson, J.—Obiter.*

Per *Henderson, J.—Obiter*—The High Court has jurisdiction, under the power preserved to it by S. 561-A, to extend the time for an accused to surrender, between the time the case has been finally decided by it, and the time when leave to appeal to the Privy Council has been made, but it would not do so when no case has been made out for its interference on merits and when such direction would not give effect to any order passed under the Code, nor would it prevent the abuse of the process of the Court or secure ends of justice. [P 811 C 2 ; P 812 C 1]

C. Noad and Satindra Nath Mukerji—
for Petitioner.

W. W. K. Page—for the Crown.

Cunliffe, J.—We now propose to give our reasons for rejecting the petition made to us last Monday on behalf of one Babulal Chaukhani. The petitioner, it appears, together with a number of other persons was put on his trial before a Magistrate for offences under the Electricity Act and also for conspiracy. A number of convictions resulted, including the petitioner's. Then a visit was made to the Court of appeal with the result that, so far as the petitioner was concerned, his conviction for conspiracy was set aside, but the Court preserved his conviction for theft under the Electricity Act. On that conviction he was sentenced to undergo one year's rigorous imprisonment.

As I understand it, the Court of appeal dealt with the cases of his co-accused and I believe these persons are now undergoing their punishment in jail. The petitioner approached us for the purpose of obtaining an extension of the time within which he would surrender to his bail before the Chief Presidency Magistrate. He had approached the Magistrate already who allowed him the concession of not surrendering until, I think I am right in saying, the 29th of the last month but beyond that the Magistrate was not prepared to go. The reason that the petitioner asked us to exercise the discretion of the Court in his favour was that he had instructed his solicitors in England to place a petition before the Judicial Committee of the Privy Council with regard to an appeal before their Lordships. He mainly relied upon a case decided comparatively recently by a Bench of the High Court of Allahabad. That was the decision of Sulaiman and Bannerji, JJ., in, 49 All

247 (1). The learned Judges there decided that they had inherent jurisdiction to stay the execution of their own order when the ends of justice so required it and they could admit to bail a person whose appeal had been admitted by the Privy Council. The judgments of the Court showed that they relied upon the provisions of a new section in the Criminal Procedure Code, S. 561-A, which deals with the preservation of the inherent power of the High Court to make orders which might prevent the abuse of the process of the Court and so on. It is to be noted that the facts in that case were not analogous to the facts before us now, because in the course of their judgment the learned Judges made this observation:

Before surrendering and before any appeal to their Lordships of the Privy Council was actually filed, the accused applied to this Court for bail on the ground that they have sent instructions to a Solicitor in England for lodging a petition for special leave.

Then follow the important words:

The High Court naturally refused to entertain the application so long as the accused had not surrendered. After information had been received that they had surrendered, the Bench i. e., the earlier Bench of the Allahabad High Court which dealt with the matter dismissed the application, but without prejudice to the right to bring another application in the event of special leave being granted by the Privy Council.

It was presumably on the second attempt of the petitioner there that the learned Judges considered the exercise of their inherent power. Reliance was also placed upon a short decision by a Bench of the Madras High Court in 24 Mad 161 (2). That was a case, again, in which leave had already been granted by the Judicial Committee and the Madras High Court allowed bail in a substantial form with two sureties in two substantial amounts. So it will be seen that the facts there were not analogous with the facts before us at the present time. There is however a decision of a Bench of this High Court which dealt with a petition based on facts very similar to the petition before us now. That was the case in 50 Cal 585 (3), decided by the late Chief Justice of this Court, Sir Lancelot Sanderson sitting with Richard-

son, J. There, as I understand their judgment, the Court held that between the time of an appellate Court dealing finally, as far as this province is concerned with a criminal matter, and the time when a successful approach has been made to the Privy Council, the Court in matters of bail is *functus officio*. Reference was made to *Subrahmaniam Ayyar's case* (2). It was distinguished and in his judgment Richardson, J., said:

So far as the present case is concerned, this Court is *functus officio*; it has no seisin of the case in any way; the case cannot again be brought before this Court for the purpose of leave being given to appeal.

It was also held that in the circumstances such as this and in circumstances such as the Court was considering there, it was no question of the powers under Cl. 41, Letters Patent being successfully invoked. To my mind, the decision of this Court is binding on us. Nor do I think it is irreconcilable with either of the cases on which reliance was placed by the petitioner. In both the Madras and Allahabad cases, a further stage of a definite nature had been reached in the proceedings by the successful petitioner to the Privy Council to hear the petitioner's appeal, and as I apprehend what might well have been decided in this Court in the circumstances, that the further stage had been reached by the acceptance on the part of the Judicial Committee of the appeal, the powers of this Court in regard to bail would be revived and fresh seisin of the case with regard to the question of bail could be considered. After we had the benefit of Mr. Carden Noad's argument, we asked whether the Crown was represented and interested in this question of bail; whereupon we were told by Mr. Page, that he represented the Crown and we proceeded to hear him shortly both on merits and on the law. He argued with emphasis that there were not merits in the appeal and having regard to the leading decision in *Dillett's case* (4), the chance of a successful approach in such circumstances to the Privy Council was a very remote one. It may be of interest to say that shortly after we had given our decision in regard to the rejection of this application, the Registrar of this Court was informed formally that a suspension order had

1. *Emperor v. Ram Sarup*, 1927 All 97=98 I C 593=27 Cr L J 1377=49 All 247.

2. *Queen Empress v. Subramaniam Ayyar*, (1901) 24 Mad 161=2 Weir 657.

3. *Tulsi Telini v. Emperor*, 1924 Cal 64=72 I C 862=24 Cr L J 862=50 Cal 585.

4. (1888) 12 A C 459=56 L T 615=36 W R 81=16 Cox C C 241.

been issued by the Local Government in reference to this matter. I believe it was a temporary suspension order lasting until such time as the actual petition for an order of permanent protection pendente lite could be considered.

It is sometimes said in certain quarters that this Court has become hostile to the directions and orders of the Local Government. I desire to say that nothing is further from the truth. This Court is always anxious to co-operate with the Local Government, if it can do so according to the ordinary rules of law and procedure and bearing in mind its constitutional duty to protect the subject when requiring its protection. It is, in my opinion, only when Government speaks with two voices that any trouble arises. I think, I have already noted that the counsel for the Crown, a counsel of great experience, publicly urged in this Court that there were no merits in this application whatever, and that the petitioner's chance of a successful approach to the Judicial Committee was very problematical. It is difficult to understand having regard to the fact that it is the same official of Government who instructed the learned Counsel for the Crown in this Court to argue in this way who shortly afterwards issued this executive protection order in favour of the petitioner. The two attitudes cannot be properly reconciled. It is obviously much in favour of a petitioning convicted criminal that he should have the benefit of a protection order such as this to carry him right through until the time the Privy Council decided to admit this appeal. There is, of course, attached to such an order no unpleasant requirements, such as the signing of a bail bond or the calling upon sureties in substantial amounts to be responsible for his necessary appearance in Court. I should imagine that such an order also leaves open a much larger door to the question which sometimes arises of the personal evasion by a convicted criminal of the sentence imposed on him. I only make these observations in what I regard as the public interest.

Henderson, J.—In rejecting this application we indicated that we would give our reasons in writing later. The petitioner was convicted of certain offences by the learned Chief Presidency Magistrate. He appealed to this Court. The appeal, which was heard by my Lord the Chief Justice and Costello, J., was only

partially successful and he was eventually directed to surrender to his bail and serve out a certain term of imprisonment. The petition before us was really under two heads. In the first place we were asked to interfere in revision with an order of the Chief Presidency Magistrate refusing to extend the time for the petitioner to surrender, in order that he might be able to apply for leave to appeal to the Judicial Committee of the Privy Council. It was conceded by Mr. Noad that there is no specific provision of the Code of Criminal Procedure which empowers a Magistrate to make such an order and we attach no importance to the fact that similar orders appear to have been made in the past. It is clearly the duty of the Magistrate to see that the orders of this Court are carried out and not to assist convicted persons in the evasion of them. It is impossible for us, sitting here in revision, to direct the Magistrate to pass what would be a most improper order. Then in the second place we were asked to make an order for bail ourselves or to allow the petitioner an extension of time to surrender. Now the case in 50 Cal 585 (3) is a direct authority of this Court for the proposition that we have no jurisdiction to grant bail in a case of this kind. I need only say that I respectfully agree with that decision.

It was, however, contended by Mr. Noad that the law has been altered by the enactment of S. 561-A, Criminal P. C., and in support of his argument he relied on a decision of the High Court of Allahabad, 49 All 247 (1). As the application for bail was rejected the decision is not a direct authority. The opinion of the learned Judges was based not upon the precise terms of the new section, but on the inherent jurisdiction of the Court which that section purports to preserve. In my opinion, it would be incorrect to interpret S. 561-A, Criminal P. C., as having any reference to bail, a matter which is specifically provided for by the Code itself.

Finally we were asked to extend the time for the petitioner to surrender under the power preserved to us by S. 561-A, Criminal P. C. As at present advised I should not be prepared to say that we have no jurisdiction to do so, inasmuch as it is a matter outside the specific provisions of the Code, but I am strongly of opinion that no case has been made out

for our interference on the merits. Such a direction would clearly not give effect to any order passed under the Code; on the other hand it would merely stultify an order of this Court. Nor would it prevent the abuse of the process of any Court. The only point which remains is to consider whether it would secure the ends of justice. In my opinion it would not. It is only when leave to appeal has actually been granted that any question of granting bail, either directly or indirectly, arises. It was for that very reason that the learned Judges of the Allahabad High Court rejected the petition which had been made to them.

R.M./R.K. *Application rejected.*

A. I. R. 1936 Calcutta 812

LODGE, J.

Debendra Nath Sadhu Khan—Defendant—Petitioner.

v.

Rai Ramprotap Chamaria—Plaintiff—Opposite Party.

Civil Rule No. 355 of 1936, Decided on 25th August 1936, from order of Munsiff, 2nd Court, Howrah, D/- 5-2-1936.

Civil P. C. (1908), Ss. 2 (2), 115, 144—Order rejecting application for restitution under S. 144 on ground of limitation amounts to decree and is appealable—High Court cannot interfere under S. 115.

A rejection of a prayer for restitution under S. 144 on the ground of limitation amounts to determination of a question under S. 144 and the order dismissing the application is a decree and is therefore appealable and as such the High Court has no jurisdiction to interfere under S. 115. [P 812 C 2]

Apurba Charan Mukherjee—for Petitioner.

Panchanan Ghose and Bhola Nath Ray—for Opposite Party.

Order.—This rule was issued on the opposite party to show cause why an order passed by the Munsif, 2nd Court, Howrah on an application under S. 144, Civil P. C., should not be set aside. The material facts are as follows: The petitioner was defendant in Title Suit No. 57 of 1927 in the Court of the 2nd Munsif at Howrah. The suit was decreed in favour of the plaintiff on 8th September 1928 and on 30th September 1928 the plaintiff in that suit obtained delivery of possession in execution of the decree. An appeal against that decree was filed and the appeal was decreed on 12th August 1932, the plaintiff's suit being dismissed.

A Second Appeal being second appeal No. 1943 of 1932 was filed which was dismissed on 6th March 1935. In the meantime on 26th April 1933 the petitioner applied under S. 144 for recovery of possession of the property from which he had been dispossessed. He made no application at that time for mesne profits and no order for mesne profits was passed but an order for possession was passed and symbolical possession was delivered on 30th April 1933. On 24th August 1935 the petitioner applied for assessment of mesne profits. Objection was taken on the ground that the application was barred by limitation. The learned Munsif came to the conclusion that the application was barred by limitation and dismissed the same with costs. Against that order the present rule has been issued. A preliminary objection has been taken that as the order is an appealable order this Court has no justification for interference under S. 115, Civil P. C. Under S. 2, Cl. 2, Civil P. C., a decree shall be deemed to include a determination of any question within S. 144, Civil P. C.

It is argued that by the order of the learned Munsif a question under S. 144 has been determined and therefore the order is a decree and therefore appealable. My attention has been drawn to a note at p. 421 of Sir Dinshaw Mulla's Commentary on the Code of Civil Procedure, Edn. 10, 1934 in which it is stated that a decision that an application under this section is time-barred is a decision on a question collateral to the question of restitution and hence it is not a decree and not appealable as such. Relying on that the learned advocate for the petitioner has argued that the order is not appealable, and consequently the application for revision would be entertainable. In my opinion the preliminary objection must be upheld. I am unable to understand how it can be argued that a rejection of a prayer for restitution under S. 144 on the ground of limitation does not determine the question under S. 144, Civil P. C. In my opinion by rejection on the ground of limitation such a question was determined and the order was therefore a decree which is appealable. In this view of the case the Court has no jurisdiction to interfere under S. 115, Civil P. C. Under the circumstances I order that the rule be discharged.

but I make no order as to costs. Let the certified copies of the orders of the Courts below filed in this Court be returned to the learned Advocate for the petitioner.

R.M./R.K.

Rule discharged.

A. I. R. 1936 Calcutta 813

GUHA AND BARTLEY, JJ.

Jitendra Nath Roy—Plaintiff—Appellant.

v.

Madan Mohan Das Mohanta Maharaja and another—Defendants—Respondents.

Letters Patent Appeal No. 5 of 1936, Decided on 3rd August 1936, against judgment of Edgley, J., D/- 24th January 1936.

(a) Interpretation of Statutes — Taxation statute.

A taxation statute like the Cess Act must be strictly interpreted. [P 813 C 2]

(b) Bengal Cess Act (9 of 1880), Ss. 54, 56 and 58—Notices under S. 54 must be properly published with all details—Omission or mistake in them disentitles zamindar for recovery of cesses under S. 58—Such mistakes are not mere irregularities but illegalities.

In view of the mandatory nature of the provisions contained in Ss. 54 and 56, Cess Act, unless notices required by S. 54 of the Act have been properly published with all details specified in S. 54, the zamindar is not entitled under the law to sue for recovery of cesses under S. 58. Omissions and mistakes in the notices issued under S. 54 are not mere irregularities but illegalities which vitiate the notices.

[P 813 C 2]

Hemendra Chandra Sen and Satyendra Ch. Sen—for Appellant.

Bijon Kumar Mukerji and Narendra Krishna Bose—for Respondent.

Judgment.—This is an appeal under S. 15, Letters Patent, and is directed against the decision of our learned brother Edgley, J. reversing the decision of Additional District Judge of Jessore Khulna; it has arisen out of a suit for recovery of cess payable in respect of some rent-free lands appertaining to the zamindari of the plaintiff-appellant. It appears that the trial Court dismissed the plaintiff's suit. On appeal to the learned District Judge, the decision of the trial Court was reversed, and a decree was passed in favour of the plaintiff entitling him to recover the amount claimed in the suit as cesses payable by the defendants. There was then a second appeal to this Court by the defendants, and in that appeal, the decision of the primary Court dismissing the suit was restored.

In this appeal the only question for consideration is whether the plaintiff appellant is entitled to recover cess at double the amount with interest from the defendants-respondents, payable in respect of the years 1333 to 1336 B. S. under S. 58, Cess Act. On the findings arrived at by the lower appellate Court the notices required by S. 54, Cess Act had been duly served, and the question is whether those notices were such as strictly complied with the provisions contained in that section. There can be no doubt about the position, in view of the language of the statute, that the plaintiff was not entitled to recover cesses as claimed in the suit, unless there is compliance with all the items mentioned in S. 54.

There had been non-compliance, so far as the mention of 12th January, the date fixed by the Board of Revenue for payment of cess, the amount of which was less than Rs. 10 and most of the amounts involved in the case before us were less than Rs. 10; there was also no mention of the amounts payable in each instalment, where payments in more than one instalment were permitted. Regard being had to the position indicated above we have no hesitation in agreeing with Edgley, J. that the suit was bound to be dismissed on the ground that there was non-compliance on the part of the plaintiff, so far as the mandatory provisions of the Cess Act were concerned. As the learned Judge has observed, a taxation statute like the Cess Act must be strictly interpreted, and in view of the mandatory nature of the provisions contained in Ss. 54 and 56, Cess Act, unless notices required by S. 54 of the Act have been properly published with all the details specified in S. 54, the zamindar in the position of the plaintiff was not entitled under the law to sue for recovery of cesses under S. 58. In our judgment, the omission to specify the exact amounts payable by the defendants, and the further omission or mistake in the matter of mentioning the dates fixed by the Board of Revenue, in the notices purported to have been issued under S. 54, were not mere irregularities but were illegalities which vitiated the notices. The liability in respect of payment of cesses by persons in the position of the defendants was based upon the service of notice prescribed by law, and the provisions con-

tained in S. 54, Cess Act, had to be strictly complied with in all particulars, before any statutory liability could arise, as claimed by the plaintiff in the suit.

The service of notice in the manner prescribed by law is the foundation of the party's claim to recover cesses by a suit like the one before us; and non-compliance of the provisions of the law as contained in S. 54 in any way whatsoever, cannot be treated as a mere irregularity which does not invalidate the notice, as it appears to have been held by the District Judge in the Court of appeal below. The equitable considerations that might arise in favour of the appellant before us, cannot be allowed to override the definite provisions of the law, creating rights and liabilities of the parties, so far as the present claim for recovery of cesses was concerned by a suit. The decision of our learned brother Edgley, J., against which this appeal is directed is in our judgment right and must be upheld. The appeal is dismissed. There is no order as to costs in the appeal.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Calcutta 814

GUHA AND BARTLEY, JJ.

Radha Gobinda Sen and another—
Plaintiffs—Petitioners.

v.

Ram Brahma Mondal and another—
Opposite Parties.

Civil Revn. Nos. 451 and 459 of 1936, Decided on 31st July 1936, from order of Second Court of Munsif., Krishnagar (Nadia), D/- 19th March 1936 and from order of Dist. Judge, Nadia, D/- 16th March 1936.

(a) Stamp Act (1899), S. 5—"Distinct Matters"—Test of—Vakalatnama—Two stipulations—One by which pleader to receive certain fees for work to be done—Second by which pleader if not paid not bound to appear—These two held not distinct matters.

Two matters however are considered to be distinct, if one of them is subsidiary to another contained in the same document, the test being whether one is incidental and accessory to the other. A vakalatnama contained two stipulations to the following effect: (1) The pleader is to receive certain fees for work to be done for his client in Court in a case before the Court in which the vakalatnama is filed. (2) The pleader is not bound to appear and act if fees are not paid in advance:

Held: that the stipulation to remunerate the pleader in advance was a necessary part of the vakalatnama and was not a separate agreement

or a separate matter as contemplated by S. 5, Stamp Act. The vakalatnamas in question contained one indivisible contract and were chargeable under Art. 10, Sch. 2, Court Fees Act; and there were no such distinct matters contained in them to which the provisions of the Stamp Act relating to agreements were applicable.

[P 814 C 2 ; P 815 C 1]

(b) Interpretation of Statutes—Fiscal statute—It should be construed strictly and in favour of and beneficial to subject.

In case of doubt, the construction of a fiscal statute should be construed strictly in favour of and beneficial to the subject. There cannot be any equitable construction of a fiscal statute; and the Crown seeking to recover a tax must bring it within the letters of the law; otherwise, the subject is free. The intention to tax a particular instrument in different ways must appear in clear and positive words. [P 815 C 1]

*Ramaprosad Mukhopadhyaya, Mahit Kumar Mukerji and Umaprosad Mukopadhyaya—*for Petitioners.

*Bijan Kumar Mukerji—*for Opposite Parties.

Order.—The question for consideration in these cases is whether vakalatnamas containing stipulations to the following effect are required to be stamped as agreement under the Stamp Act, as also as vakalatnamas under the Court Fees Act: (1) The pleader is to receive certain fees for work to be done for his client in Court in a case before the Court in which the vakalatnama is filed. (2) The pleader is not bound to appear and act, if fees are not paid in advance. In view of the provisions contained in the Stamp Act, an instrument comprising or relating to several distinct matters is chargeable with aggregate amount of duties with which separate instrument each comprising or relating to one of such matters would be chargeable (S. 5). In applying this provision of law, there can be no doubt that what has to be taken into account is what the parties concerned purported to provide for, by an instrument, and not whether any particular provision was necessary or might have been dispensed with the question being whether a deed contained two distinct matters, as specifically mentioned in S. 5, Stamp Act. Two matters however are considered to be distinct, if one of them is subsidiary to another contained in the same document the test being whether one is incidental and accessory to the other. The position has to be kept in view and what has to be considered is whether any instrument contains distinct

matters and not whether it contains two distinct contracts.

In applying the rules deducible from the provision contained in S. 5, Stamp Act, to which reference has been made above the canons of construction applicable to fiscal statutes must be kept in view and in case of doubt, the construction of a fiscal statute should be construed strictly in favour of and beneficial to the subject. There cannot be any equitable construction of a fiscal statute; and the Crown seeking to recover a tax must bring it within the letters of the law; otherwise the subject is free: See 32 C L J 421 (1) at p. 425. The intention to tax a particular instrument in different ways must appear in clear and positive words. In the case before us the stipulation to remunerate the pleader in advance is a necessary part of the vakalatnama and was not a separate agreement or a separate matter, as contemplated by S. 5, Stamp Act. The vakalatnamas in question containing one indivisible contract were chargeable under Art. 10, Sch. 2, Court-fees Act; and there were no such distinct matters contained in them to which the provisions of the Stamp Act relating to agreements were applicable.

On proper construction of the vakalatnamas before us, there was no doubt that the instruments do not comprise or relate to several distinct matters and there can be no question of charging them with the aggregate amount of duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under the law. As indicated sufficiently clearly, there is no room for any doubt as to the proper construction either of the terms of the vakalatnamas or of the provisions of the law applicable to the same; and even if there was any room for doubt, in the absence of any definite provision of the law, the vakalatnamas are not chargeable both under the Court-fees Act and the Indian Stamp Act, as held by the learned Judges in the Court below. The rules are made absolute. The orders against which the rules were directed are set aside. There is no order as to costs in the rules.

R.W./R.K.

Rules made absolute.

1. Killing Valley Tea Co., Ltd. v. Secy. of State, 1921 Cal 40=61 I O 107=48 Cal 161=32 C L J 421.

A. I. R. 1936 Calcutta 815

MUKERJI AND S. K. GHOSE, JJ.

Bhabataran Chakravarty and others—
Plaintiffs—Appellants.

v.

*Ramlal Das Mohunt—*Defendant—Respondent.

Appeal No. 49 of 1933, Decided on 6th January 1936, from Original decree of Dist. Judge, Bankura, D/- 25th January 1933.

Public Suits Validation Act (11 of 1932), Ss. 2, 3—Suit under S. 92, Civil P. C., dismissed as consent of collector not being in order—Subsequent passing of Act 11 of 1932—Restoration of suit on petition under S. 3 of Act—Court has to proceed with suit and cannot enquire into validity or otherwise of consent and dismiss suit on that ground.

A suit under S. 92 was dismissed on the ground that the consent of the Collector under S. 93, Civil P. C., with which the suit had been filed was not in order. Subsequent to this the Public Suits Validation Act (11 of 1932), received the assent of the Governor-General and came into force and the plaintiffs put in a petition under the provisions of S. 3 of that Act for restoration of the suit and the suit was restored. But the objection which the defendant had taken to the restoration of the suit was thereafter repeated before the Judge and as the result of that the Judge again dismissed the suit on the view that the consent of the Collector with which the suit had been originally instituted not having been in order and there having been no fresh consent given by the Collector with the previous sanction of the Local Government, the suit was not maintainable:

Held: that once the order of restoration was made, the suit will have to be proceeded with in accordance with law. S. 2 of the Act was already a part of the law of the land and if by its terms the sanction was applicable to the suit as it then was, the suit could again be dismissed but should be proceeded with if S. 2 warrants such a procedure. In the present case, at the time when the Act was passed, an appeal from the decree of the trial Court dismissing the suit was competent and open to the plaintiffs, and there could be no question that the validity or otherwise of the consent with which the suit was originally instituted could no longer be enquired into and would consequently form no ground for dismissal of the suit once again.

[P 816 C 2]

Narendra Krishna Bose—for Appellants.

Sitaram Banerjee and Sudhansu Kumar Sen—for Respondent.

Judgment.—This is an appeal preferred by the plaintiffs from a decree dismissing their suit under S. 92, Civil P. C. The suit was instituted with the consent of the Collector under S. 93 of the Code on 22nd June 1928. It remained pending for several years when on 30th November

1931 the decision of the Judicial Committee in 36 C W N 257 (1) was delivered. On 15th February 1932, in view of the said decision, the suit was dismissed, it being held that the consent of the Collector under S. 93 of the Code with which the suit had been filed was not in order. This decree was signed by the Court on 17th February 1932. On 8th April 1932, the Public Suits Validation Act (Act No. 11 of 1932) received the assent of the Governor-General and came into force. On 4th May 1932, the plaintiffs put in a petition under the provisions of S. 3 of the Act for restoration of the suit. This petition was objected to on behalf of the defendant but eventually on 20th June 1932 the learned District Judge set aside the decree of dismissal that he had made on 15th February 1932 and ordered the suit to be restored. The objection which the defendant had taken to the restoration of the suit was thereafter repeated before the learned Judge and as the result of that the learned Judge on 25th January 1933 again dismissed the suit on the view that the consent of the Collector with which the suit had been originally instituted not having been in order and there having been no fresh consent given by the Collector with the previous sanction of the Local Government, the suit was not maintainable in view of the decision of the Judicial Committee in 36 C W N 257 (1) referred to above. The learned Judge has taken the view that although in view of S. 3 of the Act the plaintiffs were entitled to have the decree of dismissal originally made set aside and their suit restored still the moment the suit came to be restored it would have to be proceeded with and proceeded with in accordance with the

law from that point of time, S. 2 of the Act not applying to the suit at all.

This is a view which, in our opinion, is clearly not maintainable. S. 3 is concerned only with the question of restoration by the trial Court of a suit which had been dismissed merely on the ground of defect in the sanction required by S. 93 of the Code. Once the order of restoration is made, the suit will have to be proceeded with and proceeded with in accordance with law. S. 2 of the Act is already a part of the law of the land and if by its terms the section is applicable to the suit as it then was, there can be no question that the suit cannot again be dismissed but should be proceeded with if S. 2 warrants such a procedure. In the present case, at the time when the Act was passed, an appeal from the decree of the trial Court dismissing the suit was competent and open to the plaintiff's. That being the position, the suit was a pending suit within the meaning of S. 2 and once it is established that the suit was pending at that point of time, the provisions contained in S. 2 at once came into play. S. 2 being applicable to the suit as it then was, there can be no question that the validity or otherwise of the consent with which the suit was originally instituted could no longer be enquired into and would consequently form no ground for dismissal of the suit once again. We are of opinion that the learned District Judge was in error in the view that he took of this matter. The result is that the appeal succeeds. We accordingly order that the decree from which it has been preferred being set aside the suit be now tried on the merits in accordance with law. Costs of this appeal will abide the result; hearing fee being assessed at three gold mohurs.

R.W./R.K.

Appeal allowed.

1. Prem Narain v. Ram Charan, 1932 P O 51=136 I C 461=59 I A 121=53 All 990=36 C W N 257 (P C).

E N D



